Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
COMMITTEE REPORT
1350 Pennsylvania Avenue, N.W., Washington, DC 20004

To: Members of the Council of the District of Columbia

From: Councilmember Charles Allen CA
Chairperson, Committee on the Judiciary and Public Safety

Date: November 30, 2022

Subject: Report on Bill 24-0320, the "Comprehensive Policing and Justice Reform Amendment Act of 2022"

The Committee on the Judiciary and Public Safety, to which Bill 24-0320, the "Comprehensive Policing and Justice Reform Amendment Act of 2022", was referred, reports favorably thereon and recommends approval by the Council of the District of Columbia.

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STATEMENT OF PURPOSE AND EFFECT

I. Purpose and Effect

Bill 24-0320, the "Comprehensive Policing and Justice Reform Amendment Act of 2022", was introduced on June 15, 2021, by Committee Chairperson Charles Allen, Councilmembers Bonds, Cheh, Gray, Henderson, Lewis George, McDuffie, Nadeau, Pinto, Silverman, Robert White, Trayon White, and Chairman Mendelson. The bill was referred to the Committee on the Judiciary and Public Safety on June 29, 2021. The Committee held a public hearing on B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020", on October 15, 2020. B23-0882 is substantially similar to B24-0320, and, therefore, pursuant to Council Rule 501(a)(2), the hearing record for B23-0882 is incorporated into this report by reference.

The impetus for, and legislative history of, B24-0320 dates back to the summer of 2020. On March 13, 2020, Breonna Taylor, a 26-year-old Black woman, was fatally shot by members of the Louisville Metro Police Department while she was sleeping in her home. On May 25, 2020, George Floyd, a 46-year-old Black man, was killed when Derek Chauvin of the Minneapolis Police Department pressed his knee into Mr. Floyd's neck while Mr. Floyd was handcuffed and lying face down in the street. Their deaths ignited a national movement against systemic injustice, racism, and police brutality against Black Americans. Demonstrations were held across the country – including here in the District – demanding greater police accountability and transparency and urging lawmakers to reimagine a system of public safety that decenters policing.

In response to these events, on July 7, 2020, the Council passed B23-0825, the "Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020" (D.C. Act 23-0336; 67 DCR 9148).[1] D.C. Act 23-336 was composed of eighteen subtitles related to policing and criminal justice reform in the District, including – for law enforcement officers in the District – a ban on the use of neck restraints, restrictions on the use of consent searches, and a codified standard for the use of deadly force. Importantly, Subtitle Q of Act 23-0336 established a Police Reform Commission ("PRC"), composed of twenty representatives from District agencies, advocacy groups, businesses, and faith-based organizations. The PRC was tasked with examining "policing practices in the District and provid[ing] evidence-based recommendations for reforming and revisioning policing in the District." The PRC's report was required to include recommendations on Act 23-0336 itself. Originally, the PRC's report was due on December 31, 2020, and the PRC would "sunset upon the delivery of its report or on December 31, 2020, whichever is later." The Council, at the request of the PRC's co-chairs, extended the deadline for submitting its report from December 31, 2020 to April 30, 2021.[2]

B24-0320, as introduced, largely mirrors the provisions of both the original emergency act and B23-0882, but departs from its predecessor bills in three important respects. First, it does not

[1] This bill was titled the "second" emergency act because an earlier draft – B23-0774, the "Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020" – was postponed indefinitely. *See* B23-0774, the "Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020" (introduced June 8, 2020), https://lims.dccouncil.us/Legislation/B23-0774.

[2] *See* Police Reform Commission Extension Emergency Amendment Act of 2020 (D.C. Act 23-556; 68 DCR 226), https://lims.dccouncil.us/Legislation/B23-1014.

include provisions which established the Police Reform Commission ("PRC"). The PRC published its report on April 1, 2021 and has, therefore, completed its original statutory mandate.[3] Additionally, B24-0320 does not provisions that dealt with oversight and accountability of the Metro Transit Police Department, and which have since been made permanent in the Washington Metropolitan Area Transit Authority Police Accountability Amendment Act of 2020 (D.C. Law 23-249; 68 DCR 3671). Finally, B24-0320 removed provisions which have since made permanent in the Restore the Vote Amendment Act of 2020 (D.C. Law 23-277; 68 DCR 4795). The next section contains a description of each of the remaining subtitles in B24-0320, as introduced.

B24-0320 also incorporates provisions from several other permanent bills largely centered on police reform. The first, B24-0094, the "Bias in Threat Assessments Evaluation Amendment Act of 2021", was introduced by Councilmembers Robert White, Cheh, Lewis George, Nadeau, Pinto, and Silverman. The bill was referred to the Committee on the Judiciary and Public Safety on March 2, 2021.

B24-0320 additionally includes provisions from B24-0213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021". B24-0213 was introduced by Councilmembers Lewis George, Bonds, Cheh, Nadeau, Robert White, and Trayon White on April 19, 2021 and referred to the Committee on the Judiciary and Public Safety the following day.

Provisions of B24-0112, the "White Supremacy in Policing Prevention Act of 2021", introduced by Councilmembers Lewis George, Allen, Bonds, Henderson, McDuffie, Nadeau, Pinto, and Trayon White on February 25, 2021, have also been incorporated into B24-0320. The Committee held a public hearing on B24-0094, B24-0112, and B24-0213 on May 20, 2021.

Furthermore, B24-0320 includes provisions from B24-0254 and B24-0356. B24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021", was introduced by Councilmembers Henderson, Lewis George, McDuffie, Pinto, and Robert White on May 20, 2021. The bill was referred sequentially to the Committee on the Judiciary and Public Safety and the Committee of the Whole on June 1, 2021. B24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021", was introduced by Chairman Mendelson on July 12, 2021 and sequentially referred to the Committee on the Judiciary and Public Safety and the Committee of the Whole the following day. The Committee held a public hearing on B24-0254 and B24-0356 on October 21, 2021.

The final permanent bill integrated into B24-0320 is B24-0515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021", which was introduced by Chairman Mendelson at the request of the Mayor on November 17, 2021. The bill was referred to the Committee on the Judiciary and Public Safety on December 7, 2021, and the Committee held a public hearing on March 14, 2022.

B24-0320 also incorporates provisions from two emergency bills (and subsequent emergency, temporary and congressional review emergency bills): B23-1002, the "Metropolitan Police Department Overtime Spending Accountability Emergency Act of 2020", which was

[3] D.C. Police Reform Commission, *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission* (April 1, 2021), https://dcpolicereform.com/ [hereinafter *PRC Recommendations*].

introduced by Councilmembers Nadeau, Allen, Gray, and Robert White on November 16, 2020 and B24-0809, the "Opioid Overdose Prevention Emergency Amendment Act of 2022", which was introduced by Chairman Mendelson at the request of the Mayor on May 10, 2022. Immediately below are descriptions of each permanent bill as introduced. Part II provides a description of where the Committee Print makes changes to the bills as introduced and its reasons for doing so.

1. <u>B24-0320, as Introduced</u>

a. *Prohibiting the Use of Neck Restraints*

Current District law completely prohibits a law enforcement officer's use of trachea holds "under any circumstances."[4] The use of carotid artery holds is limited to "circumstances and conditions under which the use of lethal force is necessary to protect the life of a civilian or a law enforcement officer, and has been effected to control or subdue an individual."[5] Additionally, the Metropolitan Police Department ("MPD"), prior to the use of carotid artery holds by its members, must issue certain policies and procedures.[6]

Subtitle A of the bill repeals the definitions of "trachea holds" and "carotid artery holds" and instead more broadly prohibits the use of neck restraints, defined as "the use of any body part or object to attempt to control or disable a person by applying pressure against the person's neck, including the trachea or carotid artery, with the purpose, intent, or effect of controlling or restricting the person's movement or restricting their blood flow or breathing." The bill makes it unlawful – without exception – for an officer to apply a neck restraint. The bill requires that "any officer who applies a neck restraint" or "any officer who is able to observe another officer's application of a neck restraint" to render first aid or request emergency services for the person on whom the neck restraint was applied. The unlawful use of a neck restraint, or the failure to subsequently render aid or request emergency medical services, is punishable by a fine of no more than $25,000, incarceration for no more than 10 years, or both. The bill also makes a conforming amendment to D.C. Official Code § 5–302 (replacing references to "trachea and carotid artery holds" with "neck restraints") to make the prohibition on neck restraints applicable to federal law enforcement officers acting in the District.

b. Improving Access to Body-Worn Camera Footage

Subtitle B includes several provisions expanding access to MPD officers' body-worn camera ("BWC") footage. Current District law requires that the Mayor "collect, and make available in a publicly accessible format, data on MPD's Body-Worn Camera Program, including

[4] D.C. Official Code § 5–125.03(a). Trachea holds, arm bar holds, or bar-arm holds are defined as "any weaponless technique or any technique using the officer's arm, a long or short police baton, or a flashlight or other firm object that attempts to control or disable a person by applying force or pressure against the trachea, windpipe, or the frontal area of the neck with the purpose or intent of controlling a person's movement or rendering a person unconscious by blocking the passage of air through the windpipe." D.C. Official Code § 5–125.02(1).
[5] *Id.* Carotid artery holds, sleeper holds, or v holds are defined as "any weaponless technique which is applied in an effort to control or disable a person by applying pressure or force to the carotid artery or the jugular vein or the sides of the neck with the intent or purpose of controlling a person's movement or rendering a person unconscious by constricting the flow of blood to and from the brain." D.C. Official Code § 5–125.02(2).
[6] D.C. Official Code § 5–125.03(a).

"[h]ow many times internal investigations were opened for a failure to turn on body-worn cameras during interactions."[7] The bill broadens this requirement to include data on "the results of those internal investigations, including any discipline imposed" on officers resulting from those internal investigations.

The bill also requires that MPD provide the "Chairperson of the Council Committee with jurisdiction over [MPD]" with "unredacted copies of the requested body-worn camera recordings" within 5 days after such a request by the Chairperson. The bill prohibits the entire Council, including the Chairperson, from publicly disclosing such body-worn camera recordings. The bill also requires that the Mayor "publicly release the names and body-worn camera recordings of all officers who committed [an] officer-involved death or serious use of force" within five business days after such a death or serious use of force. For serious uses of force or officer-involved deaths that occurred prior to the bill's enactment, but after the launch of the District's Body-Worn Camera Program, the bill as introduced requires the release of the associated BWC recordings and officers' names by August 15, 2020. Prior to this, the District's regulations stated only that the Mayor could release BWC footage not available through FOIA "on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General," with matters of significant public interest including "officer-involved shootings, serious use of force by an officer, and assaults on an officer requiring hospitalization."[8] And while there are examples of its use,[9] the American Civil Liberties Union of the District of Columbia ("ACLU-DC") found "this discretion has been exercised infrequently and unevenly."[10]

The bill creates certain exemptions from the general duty to release officers' names and BWC recordings after a death or serious use of force. Specifically, the bill prohibits release of that information in cases where specific individuals "do not consent to its release." For BWC recordings of an officer-involved death, the decedent's next of kin may object to, and prevent the release of, BWC recordings. For BWC recordings of a serious use of force, "the individual against whom the serious use of force was used," or "if the individual is a minor or unable to consent, the individual's next of kin," may object to its release. In cases "of a disagreement between the persons who must consent to the release of a body-worn camera recording", the bill requires that the Mayor "seek a resolution in the Superior Court of the District of Columbia" ("Superior Court"). The bill requires that the Superior Court order release of the footage "if it finds that the release is in the interests of justice."

To minimize the traumatic impact of viewing BWC recordings of a loved one's death, the bill requires that MPD "[c]onsult with an organization with expertise in trauma and grief on best practices for creating an opportunity for the decedent's next of kin to view the body-worn camera

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[7] D.C. Official Code § 5–116.33(A)(3).
[8] 24 DCMR 3900.10.
[9] Executive Office of the Mayor, *Bowser to Discuss the Release of MPD Body Camera Footage in Case of Significant Public Interest* (December 15, 2015), https://mayor.dc.gov/release/mayor-bowser-discuss-release-mpd-body-camera-footage-case-significant-public-interest .
[10] American Civil Liberties Union, *Statement at Committee on Judiciary and Public Safety Public Oversight Roundtable on "Five Years of the Metropolitan Police Department's Body-Worn Camera Program: Reflections and Next Steps"* (October 21, 2019) https://www.acludc.org/en/legislation/aclu-dc-statement-public-oversight-roundtable-five-years-metropolitan-police-departments.

recording in advance of its release." MPD must also notify the decedent's next of kin of the BWC recording's impending release and offer the next of kin an "opportunity to view the body-worn camera recording privately in a non-law enforcement setting in advance of its release, and if the next of kin wish to so view the body-worn camera recording, facilitate its viewing." The bill defines "serious use of force" and "next of kin" by reference to MPD General Order 901.307 and 401.08, respectively.

Finally, the bill amends District of Columbia Municipal Regulation 24-3900.9 to prohibit MPD officers from "review[ing] their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing." Current law allows for MPD officers to "review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing, except in cases involving a police shooting."

c. Office of Police Complaints

Subtitle C makes several changes to the Office of Police Complaints ("OPC") and its supervising body, the Police Complaints Board ("PCB"). Under current law, the PCB is "composed of 5 members, one of whom shall be a member of the MPD, and 4 of whom shall have no current affiliation with any law enforcement agency."[11] The bill expands the PCB to "9 members, which shall include one member from each Ward and one at-large member, none of whom, after the expiration of the term of the currently serving member of the MPD, shall be affiliated with any law enforcement agency."

The bill also modifies the powers of OPC's Executive Director. Specifically, it allows the Executive Director to initiate their own complaint against a police officer if they find "evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint." The Executive Director may, in turn, take any of the actions specified in D.C. Official Code § 5–1107(g). The bill specifies two situations that would constitute a discovery of abuse or misuse of police powers: (1) if an officer fails to intervene or report an excessive use of force or another form of misconduct or (2) if an officer fails to "report to their supervisor any violations of the rules and regulations of the MPD committed by any other MPD officer, and each instance of their use of force or a use of force committed by another MPD officer." "Misconduct" and "use of force" are defined by reference to MPD General Order 901.07 and 201.26, respectively.

d. Use of Force Review Board Membership Expansion

Subtitle D codifies the establishment of a Use of Force Review Board ("UFRB"), tasked with "review[ing] uses of force as set forth by the Metropolitan Police Department in its written directives." The UFRB is currently established through MPD General Order 901.09.[12] The bill

[11] D.C. Official Code § 5–1104(a).

[12] Metropolitan Police Department, *General Order 901.09* (March 30, 2016), https://go.mpdconline.com/GO/GO_901_09.pdf. According to that order, the UFRB is composed of: one Assistant Chief selected by the Chief of Police, who shall serve as the Chairperson of the Board; the Commanding Official for the Special Operations Division of the Homeland Security Bureau; the Commanding Official for the Criminal Investigations Division of the Investigative Services Bureau; the Commanding Official for the Metropolitan Police Academy; a Commander or Inspector assigned to the Patrol Services Bureau; the Commanding Official for the Recruiting Division; and the Commanding Official for Court Liaison Division.

expands the UFRB's membership to include three civilian members appointed by the Mayor: one who has personally experienced a use of force by a law enforcement officer, one who is a member of the D.C. Bar in good standing, and a District resident. The bill would also add two civilian members appointed by the Council – "[o]ne member with subject matter expertise in criminal justice policy," and "[o]ne member with subject matter expertise in law enforcement oversight and the use of force"— and OPC's Executive Director.

e. Anti-Mask Law Repeal

Subtitle E repeals section 4 of the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code § 22-3312.03). This statute prohibited individuals who are using public rights of way, entering onto public property, or holding a meeting or demonstration from "wearing any mask, hood, or device whereby any portion of the face is hidden, concealed, or covered as to conceal the identity of the wearer."[13] The law also prohibits the wearing of masks, hoods, or other devices when done with the intent to deprive anyone from equal protection under the law, interfere with the exercise of another person's rights, or to intimidate or threaten another person.[14] At the time of introduction, the District was in the early stages of the COVID-19 pandemic and the Centers for Disease Control and Prevention suggested wearing masks to control the spread of the virus.[15] Criminalizing the use of masks during this time makes little sense. More importantly, the vagueness and breadth of the offense can lead to unnecessary police interactions – even outside the context of a global health emergency.

f. Limitations on Consent Searches

Perhaps one of the most significant changes of the bill is Subtitle F, which prescribes a new standard for consent searches conducted by District law enforcement agencies. The subtitle establishes an informed, affirmative consent standard for conducting consent searches by requiring an officer to issue *Miranda*-like warnings before conducting a consent search. Specifically, the bill requires that officers first "[e]xplain, using plain and simple language delivered in a calm demeanor, that the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to a search." The bill next requires that the officer advise the subject of the legal contours of consent searches, including that "[a] search will not be conducted if the subject refuses to provide consent to the search" and that "[t]he subject has a legal right to decline to consent to the search." Under the bill, officers must "[o]btain consent to search without threats or promises of any kind being made to the subject." It also requires that officers "[c]onfirm that the subject understands the information communicated by the officer" and, if appropriate, "[u]se interpretation services when seeking consent to conduct a search of a person."

To discourage noncompliance with the new procedures, the bill establishes an exclusionary rule. Specifically, the bill specifies that during a defendant's motion to suppress evidence recovered through a purported consent search, "the court shall consider an officer's failure to

[13] D.C. Official Code § 22-3312.03.
[14] *Id.*
[15] Centers for Disease Control, CDC calls on Americans to wear masks to prevent COVID-19 spread (July 14, 2020), https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html.

comply with the requirements of this section as a factor in determining the voluntariness of the consent." The bill also creates strong incentives for officers to capture the warnings required by the bill on their body-worn camera or through a written document. Otherwise, "[t]here shall be a presumption that a search was nonconsensual."

g. Mandatory Continuing Education Expansion; Reconstituting the Police Officers Standards and Training Board

Subtitle G requires several additional topics be included in the continuing education program administered by MPD. Under current law, the program consists of 32 hours of training covering community policing, bias-related policing, the use of force, prohibitions on the use of chokeholds and neck restraints, "mental and behavioral health awareness, and linguistic and cultural competency.[16] The bill expands the training on preventing bias-based policing to include education on racism and white supremacy. The bill modifies the training on use of force to specifically cover "[l]imiting the use of force and employing de-escalation tactics." The bill also substitutes training on limiting the use of chokeholds and neck restraints to specifically focus on "the prohibition on the use of neck restraints" provided for in Subtitle A of the bill. Finally, the subtitle requires training on: (1) "[o]btaining voluntary, knowing, and intelligent consent from the subject of a search, when that search is based solely on the subject's consent; and (2) the "duty of a sworn officer to report, and the method for reporting, suspected misconduct or excessive use of force by a law enforcement official that a sworn member observes or that comes to the sworn member's attention, as well as any governing District laws and regulations and Department written directives."

The subtitle reconstitutes the Police Officer Standards and Trainings Board ("POST Board"). The POST Board was established by Section 4 of the Omnibus Police Reform Amendment Act of 2020 (D.C. Law 13-160; D.C. Official Code § 5–107.03), effective October 4, 2000. The Board is charged with "establish[ing] minimum application and appointment criteria for the Metropolitan Police Department."[17] In addition to the 11 members described at D.C. Official Code § 5–107.04(b), the bill would add as voting members of the POST Board the Executive Director of OPC and the Attorney General. Subtitle G also adds three additional community representatives, bringing the total number of members to 15. Additionally, the subtitle specifies that the community members on the POST Board should have expertise in oversight of law enforcement, juvenile justice reform, criminal defense, gender-based violence or LGBTQ social services, policy, or advocacy, and violence prevention or intervention.

The subtitle also requires that the POST Board develop application and appointment criteria addressing an applicant's prior service with a law enforcement agency, allegations of misconduct, or discipline imposed by that law enforcement or public safety agency.

h. Identification of MPD Officers During First Amendment Assemblies as Local Law Enforcement

[16] D.C. Official Code § 5–107.02.
[17] D.C. Official Code § 5–107.04(a).

Current law requires that MPD "implement a method for enhancing the visibility to the public of the name or badge number of officers policing a First Amendment assembly by modifying the manner in which those officers' names or badge numbers are affixed to the officers' uniforms or helmets."[18] Furthermore, MPD must "ensure that all uniformed officers assigned to police First Amendment assemblies are equipped with the enhanced identification and may be identified even if wearing riot gear."[19] To strengthen and clarify this rule, the bill requires that "[d]uring a First Amendment assembly, the uniforms and helmets of officers policing the assembly . . . prominently identify the officers' affiliation with local law enforcement." During the summer 2020 protests, there were several incidents where it was unclear whether officers were members of District law enforcement agencies or one of the numerous federal law enforcement agencies operating in the District.[20]

i. Preserving the Right to a Jury Trial

Under current District law, "[i]n a criminal case tried in the Superior Court in which, according to the Constitution of the United States, the defendant is entitled to a jury trial, the trial shall be by jury."[21] A defendant may waive that right and request, instead, a bench trial by judge.[22] However, the D.C. Code enumerates certain circumstances under which a defendant is still entitled to a jury trial. First, if the "defendant is charged with an offense which is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 180 days," the defendant is still entitled to a jury trial. Additionally, if the "defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 2 years," they remain entitled to a jury trial. Subtitle I would make three additional criminal offenses jury demandable: assault as defined in D.C. Official Code § 22-404(a)(1), resisting arrest as defined in D.C. Official Code § 22–405.01, and threats to do bodily harm as defined in D.C. Official Code § 22-407 – if the victim-complainant is a law enforcement officer. Determining the facts of these cases often rests on determinations of who is more credible: the defendant or the officer. In these cases, defendants may fear that a judge that routinely listens to testimony from officers will be more inclined to side with the officer. On the other hand, a jury of their peers – some of whom may have also experienced police violence or misconduct – may render a more impartial determination.

j. Repeal of Failure to Arrest Crime

The bill as introduced repeals the outdated and rarely charged offense of "neglect to make arrest for offense committed in presence," sometimes referred to as the District's failure to arrest statute. A "member of the police force" commits the offense if they "neglect making any arrest for an offense against the laws of the United States committed in [their] presence."[23] The offense is

[18] D.C. Official Code § 5–331.09.
[19] *Id.*
[20] Martin Austermuhle, *Report Finds D.C. Police Responsible For Use Of Tear Gas During Clearing Of Lafayette Park*, (June 9, 2021), https://dcist.com/story/21/06/09/report-finds-d-c-police-responsible-for-use-of-tear-gas-during-clearing-of-lafayette-park/.
[21] D.C. Official Code § 16–705(a).
[22] *Id.*
[23] D.C. Official Code § 5–115.03.

punishable by imprisonment for no more than 2 years or a fine not exceeding $500.[24] Richard Schmechel, Executive Director of the Criminal Code Reform Commission, explained in his testimony before the Committee that this statute defies the general idea that criminal law should be a tool of last resorts since it makes "an officer criminally liable for not making an arrest even when doing so does not advance justice." He also argued that the statute "effectively binds District law enforcement officers to follow federal crime policy on drug and other offenses even when . . . the District has a different policy."

k. Amending Minimum Standards for Police Officers

D.C. Official Code § 5–107.07.01 currently provides three "minimum standards," any one of which an individual must meet to be eligible as a sworn officer of MPD. The first option is for an applicant to have completed "60 hours of post-secondary education at an accredited college or university."[25] Alternatively, an applicant could have "[s]erved in the Armed Forces of the United States, including the Organized Reserves and National Guard, for at least 2 years on active duty and if separated from the military, have received an honorable discharge."[26] Finally, an applicant qualifies for appointment by having "[s]erved at least 3 years in a full-duty status with a full-service police department in a municipality or state within the United States and have resigned or retired in good standing."[27]

Subtitle K adds three conditions for which an applicant would become ineligible for appointment as a sworn officer of MPD: if they were previously (1) determined by a law enforcement agency to have committed serious misconduct, as defined in MPD's general orders; (2) terminated or forced to resign for disciplinary reasons from any commissioned, recruit, or probationary position with a law enforcement agency; or (3) resigned from a law enforcement agency to avoid potential, proposed, or pending adverse disciplinary action or termination.

l. Police Accountability and Collective Bargaining Agreements

The bill also makes several changes to the management authority and bargaining rights between MPD and its members. Under current law, "[a]ll matters shall be deemed negotiable" between management and labor except those specifically enumerated. The bill eliminates discipline as a negotiable subject, stating instead that "[a]ll matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable." Additionally, to avoid any interference with collective bargaining agreements already in effect, the bill clarifies that this provision only applies "to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020."

[24] *Id.*
[25] D.C. Official Code § 5–115.03(e)(1).
[26] D.C. Official Code § 5–115.03(e)(2).
[27] D.C. Official Code § 5–115.03(e)(3).

m. Officer Discipline Reforms

Current law establishes a strict timetable for initiating discipline against an MPD officer. Specifically:

> "[N]o corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause."[28]

MPD is considered to have "notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence."[29] However, the timeline for commencing action is tolled during certain investigations into the same act or occurrence that serves as the basis of the corrective or adverse action. Specifically:

> "If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action . . . shall be tolled until the conclusion of the investigation."[30]

In recognition of the ambiguities surrounding the timeline for commencing corrective action, Subtitle M extends the permissible timeline for the MPD commencing corrective or adverse action against a sworn member from 90 to 180 days "[i]f the act or occurrence allegedly constituting cause involves the serious use of force or indicates potential criminal conduct by a sworn member or civilian employee of the Metropolitan Police Department." Currently, the DCMR states that after receiving a trial board's findings, the "Chief of Police may either confirm the finding and impose the penalty recommended, reduce the penalty, or may declare the board's proceedings void and refer the case to another regularly appointed trial board." Subtitle M grants the Chief the ability to increase the penalty, if appropriate.

[28] D.C. Official Code § 5–1031(a-1)(1).
[29] D.C. Official Code § 5–1031(a-1)(2).
[30] D.C. Official Code § 5–1031(b).

n. Use of Force Reforms

The D.C. Code is silent on the circumstances in which an officer may use deadly force. Instead, the standard for the use deadly force has been outlined in MPD's General Order 901.07.[31] The order defines deadly force as "any use of force likely to cause death or serious physical injury."[32] The order states that the "primary purpose of deadly force is to neutralize a subject who poses an immediate threat of death or serious injury to the member or others," but cautions that this "does not include a subject who poses a threat solely to himself or herself."[33] The order specifically cites "the use of a firearm or a strike to the head with a hard object" as examples of deadly force.[34]

The order describes two situations in which deadly force is authorized: in the defense of life and to apprehend a fleeing felon. An officer "may use" deadly force under the defense of life standard: (1) "[w]hen it is necessary and objectively reasonable"; (2) "[t]o defend themselves or another from an actual or threatened attack that is imminent and could result in death or serious bodily injury; and (3) "[w]hen all other options have been exhausted or do not reasonably lend themselves to the circumstances."[35]

The general order lays out two-factor and five-factor tests for the use of deadly force to apprehend a fleeing felon. Under the two-factor test, an officer may use deadly force "[t]o apprehend a fleeing felon only when every other reasonable means of affecting the arrest or preventing the escape has been exhausted" and "[t]he suspect fleeing poses an immediate threat of death or serious bodily harm to the member or others." The five-factor test also requires that an officer must have exhausted "other reasonable means of affecting the arrest or preventing the escape" before resorting to deadly force. In addition to exhausting other means, an officer must find that:

1. There is probable cause to believe the crime committed or attempted was a felony that involved an actual or threatened attack that could result in death or serious bodily harm;
2. There is probable cause to believe the person fleeing committed or attempted to commit the crime;
3. Failure to immediately apprehend the person places a member or the public in immediate danger of death or serious bodily injury; and
4. The lives of innocent persons will not be endangered if deadly force is used.

Subtitle N establishes a statutory standard for the use of deadly force by law enforcement officers.

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[31] Metropolitan Police Department, General Order 901.07 (November 3, 2017), https://go.mpdconline.com/GO/GO_901_07.pdf.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Metropolitan Police Department, General Order 901.07 (November 3, 2017), https://go.mpdconline.com/GO/GO_901_07.pdf.

1. The law enforcement officer reasonably believes that deadly force is immediately necessary to protect the law enforcement officer or another person, other than the subject of the use of deadly force, from the threat of serious bodily injury or death;
2. The law enforcement officer's actions are reasonable, given the totality of the circumstances; and
3. All other options have been exhausted or do not reasonably lend themselves to the circumstances.

In addition to providing a standard for the use of force, the subtitle also includes a standard for a factfinder – either a judge or a jury – to use when examining an officer's use of force. The bill first requires that a factfinder consider "[t]he reasonableness of the law enforcement officer's belief and actions from the perspective of a reasonable law enforcement officer." Second, a factfinder must consider "[t]he totality of the circumstances." Under the bill, the totality of the circumstances includes whether the subject of the use of force appeared to possess or actually possessed a deadly weapon and whether that subject "[r]efused to comply with the law enforcement officer's lawful order to surrender an object believed to be a deadly weapon." The bill also requires that the factfinder consider"[w]hether the law enforcement officer engaged in de-escalation measures prior to the use of deadly force, including taking cover, waiting for back-up, trying to calm the subject of the use of force, or using non-deadly force prior to the use of deadly force," as well as "[w]hether any conduct by the law enforcement officer prior to the use of deadly force increased the risk of a confrontation resulting in deadly force being used."

o. Restrictions on the Purchase and Use of Military Weapons

Subtitle O prohibits District law enforcement agencies from purchasing or using several kinds of military-style equipment, including: (1) "[a]mmunition of .50 caliber or higher"; (2) "[a]rmed or armored aircraft or vehicles; (3) "[b]ayonets; (4) "[e]xplosives or pyrotechnics, including grenades"; (5) "firearm mufflers or silencers"; (6) "[f]irearms of .50 caliber or higher"; (7) "[f]irearms, firearm accessories, or other objects, designed or capable of launching explosives or pyrotechnics, including grenade launchers; and (8) "[r]emotely piloted, powered aircraft without a crew aboard, including drones." The bill also requires that District law enforcement agencies publish notice of any request for "property through a program operated by the federal government" on a publicly accessible website within 14 days after such a request. Similarly, District law enforcement agencies must publish notice of any acquisition of "property through a program operated by the federal government" on a publicly accessible website within 14 days after such acquisition.

p. Limitations on the Use of Internationally Banned Chemical Weapons, Riot Gear, and Less-Lethal Projectiles

Under current law, the deployment of officers in riot gear must be "consistent with the District policy on First Amendment assemblies" and done "only where there is a danger of violence."[36] In cases where officers are deployed in riot gear, the commander at the scene must "make a written report to the Chief of Police within 48 hours and that report shall be available to

[36] D.C. Official Code § 5–331.16(a).

the public on request."[37] A commanding officer at the scene must approve the use of "[l]arge scale canisters of chemical irritant" at First Amendment assemblies,[38] which can be approved only if they determine that "the chemical irritant is reasonable and necessary to protect officers or others from physical harm or to arrest actively resisting subjects." Similar to the reporting requirement for the deployment of riot gear, the commanding officer who makes that determination "shall file with the Chief of Police a written report explaining his or her action within 48 hours after the event."[39] The D.C. Code also specifies that chemical irritants cannot "be used by officers to disperse a First Amendment assembly unless the assembly participants or others are committing acts of public disobedience endangering public safety and security."[40]

2. B24-0094, as Introduced

B24-0094, the "Bias in Threat Assessments Evaluation Amendment Act of 2021", requires that the Attorney General conduct a study to determine whether MPD engaged in biased policing when it conducted threat assessments of assemblies within the District. The study would examine MPD's use of threat assessments, and whether MPD engaged in biased policing when conducting those threat assessments, from January 2017 through January 2021. The study must examine several factors, including the number of arrests made, the number and type of injuries to both civilians and officers, the number of officers deployed, and the type of gear or weaponry used by police. If biased policing occurred, the study must determine whether the bias was on the basis of race, color, national origin, sex, gender, religion, or some other trait or characteristic. If biased policing occurred, the bill requires that the Attorney General issue recommendations on how to prevent bias from affecting threat assessments in the future and how to ensure there is not a disparity in MPD's response to assemblies of a similar size and characteristic. If the study is inconclusive on the present of bias, the Attorney General must instead provide recommendations on "what additional steps must be taken to reach a conclusion."

The bill additionally provides criteria governing with which outside entities the Attorney General may partner in conducting the study, including that the outside entity be nonpartisan or have some history and experience examining law enforcement practices. Finally, the bill provides the Attorney General, or their designee, with subpoena power to carry out the study.

3. B24-0112, as Introduced

B24-0112, the "White Supremacy in Policing Prevention Act of 2021", requires the Office of the District of Columbia Auditor ("ODCA") to conduct a comprehensive assessment into whether members of MPD have any ties to white supremacist organizations or other hate groups "that may affect identified officers in carrying out their duties properly and fairly." To conduct the study, ODCA may examine several sources, including officers' organizational affiliations and memberships, as well as any speech, photographs, video footage, or social media engagement. ODCA may also look to complaints and interviews with officers, witnesses, or relevant stakeholders. ODCA would also be required to recommend reforms to MPD's "policy, practice,

[37] *Id.*
[38] D.C. Official Code § 5–331.16(b)(1).
[39] *Id.*
[40] D.C. Official Code § 5–331.16(b)(2).

and personnel to better detect and prevent white supremacist or other hate group ties among Department officers and staff that suggest they are not able to enforce the law fairly, and to better investigate and discipline officers for such behavior." Similar to B24-0094, the bill specifies criteria any outside entity must meet for ODCA to collaborate with them in conducting the study.

4. B24-0213, as Introduced

B24-0213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021", prohibits District law enforcement officers from engaging in vehicular pursuits of an individual operating a motor vehicle, unless the officer reasonably believes that: (1) the fleeing suspect has committed or has attempted to commit an "immediate" crime of violence; (2) the vehicular pursuit is immediately necessary to avoid death or serious bodily injury to a person other than the operator of the suspect motor vehicle; and (3) the pursuit is not likely to put others in danger of death or serious bodily injury.

The bill provides over one dozen factors to consider when determining whether a law enforcement officer's belief in the necessity of a vehicular pursuit was reasonable, including whether the suspect's identity is known and the suspect can be apprehended later, the likelihood of the public being endangered by the pursuit, the availability of other resources such as helicopters, whether the operator of the motor vehicle appeared to possess a dangerous weapon, and whether the law enforcement officer engaged in de-escalation measures or, conversely, their conduct increased the risk of harm.

The bill also prohibits officers from engaging in certain enumerated vehicle pursuit tactics, such as boxing in, paralleling, ramming into, or discharging a firearm at, a suspect's motor vehicle. It would be unlawful for District law enforcement officers to engage in any of these tactics, which are defined in the bill, but the criminal penalty was not provided.

5. B24-0254, as Introduced

B24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021", requires that local education agencies maintain additional data with respect to school-based disciplinary actions involving law enforcement, and requires that MPD maintain records for school-involved arrests by race, gender, age, and disability. The bill also requires that MPD biannually publicly report certain data from school-involved incidents

6. B24-0356, as Introduced

B24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021", creates a new position of Deputy Auditor for Public Safety ("Deputy Auditor") within the Office of the District of Columbia Auditor. The bill establishes minimum qualifications for the Deputy Auditor, including that they must "be an attorney with substantial experience" in certain areas of law or "an individual with at least 5 years of experience in law enforcement and/or corrections oversight." The Deputy Auditor would be appointed by the Auditor and can only be removed by the Auditor "for cause."

The bill renames the PCB the Police Accountability Commission ("PAC"), and renames OPC the Office of Police Accountability ("OPA"). The bill expands the membership of the PAC from five to ten members (nine voting and one ex-officio member). The bill describes the backgrounds, experiences, or subpopulations the nine members need to represent, including "neighborhoods with higher-than-average levels of police stops and arrests," LGBTQIA communities, immigrant communities, and individuals with, or from organizations who serve people with, disabilities. In addition to maintaining several of the functions assigned to the PCB under current law, the PAC would also be responsible for providing "comments and input on the job description and qualifications" of MPD's Chief of Police, as well as sharing information and collaborating with the Deputy Auditor. Additionally, the bill requires that the Chief of Police submit MPD policies, procedures, and updates to training to the PAC, after which the PAC would have 45 days to provide comments. The bill grants members of the PAC a stipend of $5,000, and the Chair of the PAC a stipend of $7,000, per year. The bill empowers OPA's Executive Director to receive and investigate complaints against special police officers, to receive anonymous complaints, and to continue administrative investigations of officers while the U.S. Attorney's Office determines whether to pursue prosecution against an officer.

Finally, the bill amends the Freedom of Information Act of 1976 so disciplinary records of officers with MPD and the D.C. Housing Authority Police Department can no longer be withheld from the public, and requires that MPD create a publicly accessible database for disciplinary records of officers.

7. B24-0515, as Introduced

Current law requires that MPD's Chief of Police "establish a police officer cadet program, which shall include senior year high school students and young adults under 25 years of age residing in the District of Columbia who are graduates of a high school in the District."[41] The purpose of the program is to instruct, train, and expose individuals serving in MPD with the "duties, tasks, and responsibilities of serving as a police officer with the Metropolitan Police Department."[42] B24-0515 would remove the requirement that cadets graduate from District high schools to qualify for MPD's cadet program.

II. Background and Committee Reasoning

a. Prohibiting the Use of Neck Restraints

The bill's prohibition on the use of neck restraints is the provision most responsive to the circumstances of George Floyd's death. In its report, the PRC argued that "the use of neck restraints by police officers is dangerous, potentially fatal, and unnecessary," noting that "other non-lethal means of restraint exist."[43] The PRC recommended that the Council expand the prohibited uses of force beyond neck restraints to include other applications of force causing positional asphyxia, such as "prone restraints" or "hogtying."[44] The PRC also recommended that

[41] D.C. Official Code § 5–109.01(a).
[42] *Id.*
[43] *PRC Recommendations* at 120.
[44] *Id.*

that the bill not make violations of the prohibition a distinct felony or misdemeanor offense.[45] Instead, the PRC suggested that the bill clarify that violations on the prohibition of certain restraints "may be prosecuted under existing assault or homicide statutes and that execution of public duty is not a defense."[46] The PRC argued that "[w]ith a variety of assault and homicide statutes on the books, the code already makes it a crime for a police officer to use illegitimate, asphyxiating restraints when applying force."

The Committee agrees with the PRC's first recommendation. The bill as introduced was too narrow in its original prohibition against neck restraints. The underlying rationale of the ban – to prevent the asphyxiation of individuals taken into custody – extends to restraints beyond those that that specifically target an individual's neck. In fact, years prior to George Floyd's murder, special police officers in the District kneeled on an arrestee's back, killing him. Specifically, on November 1, 2015, Alonzo Smith "was stopped by the guards after he was spotted running through [an apartment] complex, shirtless and shoeless, yelling for help."[47] Residents had "called 911 to report a man racing through the halls, shouting and banging on doors."[48] At some point, a special police officer grabbed Smith in a 'bear hug-type move, pivoted, and put Mr. Smith onto the floor.'"[49] When MPD officers arrived on the scene, they "found Smith lying on his stomach on a staircase landing, conscious and breathing."[50] One special police officer knelt on Smith's back while another held his head down.[51] Smith's later died, and an autopsy revealed "'blunt force injuries' — described as abrasions, contusions and hemorrhages — on Smith's head, neck and torso." His death was ruled a homicide.[52]

Because of the dangers presented by restraints that do not target the neck, the better approach is to create a broader prohibition against any restraint that creates the risk of asphyxiation. The Committee Print accomplishes this by expanding the prohibition to "prohibited techniques," a term defined to include both neck restraints and asphyxiating restraints.

The Committee is persuaded argument that the criminal offense for using a prohibited technique is duplicative and unnecessary. Existing homicide and assault statutes can, and should be used to, address this conduct in cases where use of the technique injures or kills another person. The Committee Print therefore strikes the separate of offense regarding the unlawful use of prohibited techniques.

b. Improving Access to Body-Worn Camera Footage

The Committee Print's provisions related to body-worn camera footage ("BWC") fall into three categories: (1) expanding the public's access to BWC footage, (2) increasing Council access

[45] *Id.*
[46] *Id.*
[47] Ann E. Marimow, Keith L. Alexander, & Perry Stein, *Security guards will not be charged in death of D.C. man*, WASH. POST (October 13, 2016), https://www.washingtonpost.com/local/public-safety/security-guards-will-not-be-charged-in-death-of-dc-man-family/2016/10/13/e3492e24-90ad-11e6-a6a3-d50061aa9fae_story.html.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*

to BWC footage, and (3) restricting the ability of law enforcement officers to view that footage prior to writing an initial report.

Beginning with the first issues, the PRC recommended that the Council "modify and make permanent provisions . . . [relating to the] release of body-worn camera footage."[53] The PRC agreed that the law should require the public disclosure of the "the names of all subject officers (the officers who committed the acts at issue)."[54] Further, the PRC recommended language that would clarify that the release should include the "BWC recordings of all officers (not just subject officers) that capture any part of the events leading up to the incident, during the officer-involved death or serious use of force, and after the incident."[55] The PRC urged the Council to "make explicit in the law that, prior to the Mayor releasing a BWC recording of a serious use of force, MPD shall make reasonable efforts to notify the individual against whom the officer(s) used force, or if the individual is a minor or unable to do so, the individual's next of kin."[56] The PRC emphasized that MPD should be required to "consult with an organization that possesses expertise in trauma and grief, adopt these best practices, and rely on a specialized unit, e.g., Victim Services Branch, Major Case Victims Unit, to liaise with the decedent's next of kin."[57] The PRC specifically recounted Kenithia Alston's struggle to view the BWC footage capturing her son's death.[58] Ms. Alston also testified at the Committee's public hearing on B23-0882. She explained that when first contacting her, MPD minimized both the extent of her son's injuries as well as their role in his death. She stated that despite the requirement that MPD provide next of kin with adequate notice before releasing the body-worn camera footage of police-involved deaths, she received only a voicemail 90 minutes before the release of the footage.

The Committee was horrified to learn of Ms. Alston's experience when being notified about Marqueese's death. Learning that a family member or loved one has been killed by police is a devastatingly traumatic experience. Notice and opportunity to view the circumstances of their death is a process that should be guided by dignity and candor. To better prevent MPD from compounding a family's trauma in the wake of an officer-involved killing, the Print incorporates the PRC's recommendation by requiring that MPD "[c]onsult with an organization with expertise in trauma and grief on best practices for providing the decedent's next of kin with a reasonable opportunity view the body-worn camera recording privately in a non-law enforcement setting prior to its release." The bill also requires that the notice and opportunity to view the footage be provided to the next of kin "[i]n a manner that is informed by the consultation."

The Print further promotes transparency specifying that when "releasing body-worn camera recordings, the likenesses of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, shall not be redacted or otherwise obscured." When testifying on B23-0882, Thomas Sussman, President of the D.C. Open Government Coalition, argued that:

[53] *PRC Recommendations* at 180.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 182.

> "Police officers are public servants who wield governmental power and are paid by taxpayer dollars. The idea that their identities should be shrouded when in public performing their duties is absurd, as litigation established years ago when courts told police they could not stop citizens from videotaping them at work in public. . . And, while the privacy of certain individuals and in certain venues should be safeguarded, people and cars and house numbers that are videoed in public spaces are, by definition, already in the public domain and should not be subject to redaction."

Director Niquelle M. Allen of the District's Office of Open Government similarly argued that:

> "There should be no expectation of personal privacy for individual officers acting on behalf of the District of Columbia and in uniform. Further, there should be no redactions when in the public space. It is reasonable to have an expectation of privacy in spaces closed to the public, medical facilities, and the like. If the incident recorded occurs in the public space, then the signs and other indicators of locations should not be redacted."

The Committee agrees that officers' faces should not be redacted from BWC footage. Police officers have tremendous power over members of the public, and even other government employees do not. They can stop and search people, make arrests, and are authorized to carry firearms and, when justified, use deadly force. The unique powers and functions of police officers – ranging from the ability to conduct momentary detentions to discharging their firearms – require a robust system of oversight to ensure they are not abused or misused. FOIA can be a valuable tool in that oversight system, providing the public a window into police operations and interactions – the bulk of which occurs without incident. But in cases where potential misconduct has occurred, it makes little sense to allow the officer's face to be redacted, particularly as the likenesses of most members of the public are not redacted. Incidentally, stopping the practice of redacting officers' faces may also help lower the prohibitive costs of redactions that Mr. Sussman spoke about in his testimony:

> "According to the MPD, the D.C. FOIA requires redaction of many private details before releasing BWC video, and MPD employs contractors to blur faces and other identifying information. Requesters are charged $23 for each minute of the contractors' work, and charges estimated in response to past requests run from thousands to millions of dollars."

The Print, therefore, expands MPD's biannual reporting requirements regarding FOIA requests to include "any costs invoiced to the requestor" and "the length of time between the initial request and the Department's final response." This change will help track the costs being placed on the public for acquiring BWC footage.

Turning to the second issue, the PRC recommended that the Council "make permanent the . . . requirement that MPD provide, within five days, unredacted . . . copies of all body-worn camera recordings that the chairperson of the Council committee, with jurisdiction over MPD,

requests, and which the chairperson shall not publicly disclose."[59] Given the Council's role in conducting oversight of MPD, the PRC found that "[i]t therefore makes sense that MPD provide the chairperson of the committee with jurisdiction over MPD unredacted copies of BWC recordings, within five days, upon request."[60] The Committee has used this authority multiple times this Council Period and continues to find that the Chairperson's access to unredacted BWC is a critical tool in its ability to conduct meaningful oversight. The Print, therefore, requires that within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over MPD, MPD provide those recordings to the Chairperson. The Print clarifies that these "body-worn camera recordings shall not be publicly disclosed by the Chairperson or the Council." However, to further promote transparency and the ability to conduct legislative oversight over MPD's operations, the Print allows the Councilmember representing the Ward in which the incident occurred to jointly view the recordings with the Chairperson.

The PRC recommended that the Council make permanent changes to the DCMR that prohibit officers from reviewing their BWC recordings or the BWC recordings that have been shared with them to assist in initial report writing.[61] The PRC argued that the "law should prohibit officers from viewing their body-worn camera footage, or the body-worn camera footage of other officers (except for the publicly available body-worn camera footage the Mayor releases) in all cases involving serious uses of force and in-custody deaths."[62] In cases not involving in-custody deaths or serious uses of force, the PRC recommended that "the law should not allow officers to freely view other officers' body-worn camera footage, except as prosecutors, OPC, and MPD internal investigators permit."[63] Finally, the PRC recommended when an officer writes an addendum report, the "officers indicate whether they viewed body-worn camera footage prior to writing the addendum report, and specify what body-worn camera footage the officer viewed, including the officer's own."[64]

In defense of these recommendations, the PRC summarized the issues presented by allowing or prohibiting officers from reviewing their BWC footage:

> "The scientific literature does show that the accuracy of officer reports (as compared to known details about the incident and video footage documentation) improves after officers have the opportunity to view video recordings and can facilitate recall. But research also shows that video recordings do not necessarily reflect what the officer saw, heard, or perceived, and can bias the officer's memory, suppress what the officer originally recalled ('retrieval-induced forgetting'), and cause overreliance on video footage for recollection ('cognitive off-loading'). Viewing another officer's BWC footage, often recorded from a completely different perspective, presumably exacerbates these issues."[65]

[59] *Id.*
[60] *Id.*
[61] *Id.* at 169.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 170.

In his testimony before the Committee on B23-0882, Professor Stoughton, Associate Professor at the University of South Carolina School of Law, argued that the bill should permit officers to review BWC footage in some contexts and not others. He noted that the balance is between "ensuring that officers do not engage in gamesmanship by using video to manufacture *ex post* justifications for their actions or unconsciously contaminate their contemporaneous perceptions of events" against the "interest in ensuring that officers' reports are complete and accurate." He explained that "[i]n the context of incident or arrest reports, which turn on objective facts rather than the officers' perception, a pre-report review may be relatively unproblematic." Put simply, what matters for most report writing is "what actually happened." But "[t]he propriety of a use of force doesn't turn on the objective facts of the situation, but on the reasonableness of an officer's perceptions and actions." Therefore, an officer's report on the use of force "is supposed to reflect what the officer *perceived*."

The Committee acknowledges the difficulty in crafting a procedure that reduces the risk of biased reporting without sacrificing the accuracy of that report. However, given the broad range of stakeholders with which the PRC consulted when developing its report, the Committee is persuaded by its recommendation to make the ban on an officer's ability to consult their BWC footage prior to their initial report writing permanent. The Committee Print therefore maintains the prohibition on reviewing BWC footage prior to writing an initial report. The Print forbids MPD officers from reviewing "their body-worn camera recordings or body-worn camera recordings that have been shared with them to assist in initial report writing." The bill also requires officers to "indicate, when writing any subsequent reports, whether the officer viewed body-worn camera footage prior to writing the subsequent report and specify what body-worn camera footage the officer viewed." The Committee notes that, although MPD and the United States Attorney's Office oppose this provision, neither agency has provided specific examples of the way in which it might be problematic in individual cases.

c. Office of Police Complaints

The PRC recommended that the Council "make permanent the . . . exclusion from the Police Complaints Board of individuals employed by law enforcement agencies,"[66] and the Committee Print, accordingly, maintains that provision. However, where the PRC argued that "[t]he new law should make clear that individuals formerly employed by law enforcement agencies are not excluded from serving on the PCB,"[67] the Print takes a different approach. In her testimony before the Committee on B24-0356, Ahoefa Ananouko, Policy Associate from the ACLU-DC, stated that "[r]egardless of whether this person would be a voting or non-voting member, the ACLU-DC does not support including a member of the MPD on the [PCB], and we encourage the Council to adopt the changes made in the Comprehensive Police Reform bill." The Committee agrees that removing individuals with law enforcement affiliations (including police unions) from the PCB gives it greater independence, both real and perceived, from the law enforcement agencies it oversees and helps transition the District to system of complete civilian oversight. The Print, therefore, states that no PCB member "shall have a current or prior affiliation with law enforcement, including being employed by a law enforcement agency or law enforcement union."

[66] *Id.* at 162.
[67] *Id.*

In short, the police should not police themselves, regardless of the substantive experience they may bring to the role.

The PRC further urged that the Council "reconsider . . . expansion of the Police Complaints Board from five to nine members, based solely on appointment of one member from each of the eight DC wards and one at-large member."[68] The PRC noted that "[w]hile increasing the PCB membership from five to nine makes it more likely that the board reflects the diversity of the District, geographic diversity alone will not necessarily result in a board that reflects the District's diversity."[69] As noted by Ms. Ananouko:

> "Additionally, we support the intent of B24-356 to ensure meaningful representation on the PAC from community members most directly impacted by policing and incarceration. The Comprehensive Police Reform bill included language to expand the Board to have a representative from each Ward. Bill 24-356 specifies what that representation should look like, including that young people aged 15-24 from neighborhoods impacted by policing, immigrants, LGBTQIA communities, and those with disabilities must have representation on the board. We strongly support the bill's intention with this language to ensure that those most impacted by policing serve on the Commission, and also recognize that the proscriptive nature of the bill language may pose a challenge in identifying members who want to or are able to serve on the Commission."

The Committee continues to believe that expanding the PCB's membership allows it to better represent the District. The Committee finds that adding four additional members will allow for a broader range of experiences to be reflected within the PCB. However, rather than specifying particular backgrounds or traits a specific number of PCB members must meet, the Print instead requires that the members "be District residents and represent the District's geographic, demographic, and cultural diversity." The Committee notes that the Executive has failed to comply with the new membership language since the passage of the emergency and temporary legislation by not appointing any new PRC members.

The PRC also recommended that the Council make permanent the "extension of OPC's jurisdiction to include 'evidence of abuse' or 'misuse of police powers,' including those that the complainant did not allege in the complaint but that the OPC discovers during its investigation."[70] The PRC further recommended that the "law should not limit, through the use of examples, the allegations of 'evidence of abuse' or 'misuse of police powers' that OPC discovers during its investigation and upon which it can make a finding."[71] The Print, therefore, maintains these expansions to the authority of OPC's Executive Director. Without this discretion, there are concerns OPC cannot consider clear misconduct it observed but that the complainant did not specifically identify in its complaint. A explained by ACLU-DC Executive Director Monica Hopkins:

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[68] *Id.*
[69] *Id.*
[70] *Id.* at 164.
[71] *Id.*

> "Currently, OPC can only investigate misconduct expressly raised by complainants. That means, if someone complains about an act of excessive force but doesn't mention that the officer performed an illegal search as well, OPC is powerless to act."

The goal here is not that OPC mine BWC footage for potential violations unalleged by a complainant, but to allow OPC to consider the entire tenor of a police-civilian interaction in reaching an informed finding and to, where appropriate, initiate its own complaint against officer.

However, contrary to the PRC's recommendations, the Print still provides examples of evidence of abuse or misuse of police powers. The Committee notes that that these are meant to be illustrative examples and do not restrict OPC's ability to initiate complaints or take any other actions available to it under D.C. Code § 5-1107 when confronted with other conduct that constitutes abuse or misuse of police powers.

The PRC recommended that OPC "have statutory authority to recommend discipline for officers who are proven to have engaged in misconduct, and the ability to obtain relevant personnel records to make informed disciplinary recommendations."[72] Accordingly, Subtitle C of the bill incorporates provisions of B24-0356 and now requires that, upon a sustained allegation of misconduct, OPC's Executive Director must provide the designated agency principal with the recommendation for the discipline to be imposed on the subject police officer." To allow the Executive Director to make an informed recommendation on the discipline to be imposed, the bill specifies that the Executive Director will have access to "most current Table of Offenses and Penalties Guide in General Order 120.21 (Disciplinary Procedures and Processes), or any successor document," as well as "[t]he subject police officer's complete personnel file, including any record of prior misconduct and adverse or corrective action."

The Committee does not yet go so far as to grant OPC the authority to determine the punishment for officers. As discussed in more detail below, several police chiefs have complained that protections negotiated through collective bargaining agreements have served as a barrier to an adequate disciplinary system for police misconduct. For the time being, the Committee wishes to see how MPD uses its new authority to implement a more robust system of discipline.

The bill also makes permanent provisions that allow for OPC to receive complaints anonymously. As Monica Hopkins, Executive Director for the ACLU-DC, argued in her testimony before the Committee, allowing the submission of anonymous complaints "would address the concerns raised by community members before the Council that fear of retaliation by MPD officers keeps them from filing complaints." At the same hearing, Katerina Semyonova, Special Counsel to the Director for Policy and Legislation at the Public Defender Service for the District of Columbia ("PDS"), testified that "[n[ationwide, bystander video has been sufficient time and again to expose abuse by police and to raise the need for investigation and action" and that "police should not be shielded from accountability simply because an individual wants or needs to remain anonymous."

[72] *Id*. at 168.

Finally, the bill incorporates provisions from B24-0356 that require the Police Chief to submit new or revised written directives to the PCB for approval or disapproval prior to issuing them. The PRC had similarly argued for the PCB "to have authority to review and approve MPD policies prior to issuance that are not purely administrative in nature."[73]

In addition to following the PRC's recommendations, the Print expands OPC's jurisdiction in a number of other important ways. First, the Print allows OPC to receive complaints related to an officer "[r]ecklessly making false statements in applications for search warrants, arrest warrants, or in sworn testimony before a court of competent jurisdiction." The Committee finds it appropriate to expand OPC's jurisdiction in response to Chief Contee's announcement that several officers were recently discovered to have misrepresented the truth in their police reports related to gun seizures:

> "D.C. Police Chief Robert Contee announced in late September that the department was internally investigating seven officers within a crime suppression unit for allegedly seizing individuals' guns without making arrest or filing a warrant. A review of months of body-worn camera footage found instances in which officers' reports did not match the events recorded on their body-worn cameras."[74]

In response, the United States Attorney's Office for the District of Columbia ("USAO-DC") plans "to dismiss dozens of felony gun and drug cases" involving these officers. And while those dismissals may help provide redress to the individuals who have a criminal case resulting from this misconduct or related to these officers, it does not provide accountability for the officers. More fundamentally, in cases where an officer made false statements in key moments, such as when seeking a warrant or testifying in court, individuals negatively harmed by those statements should have an independent forum to receive and investigate their complaint. Expanding OPC's jurisdiction to capture this form of misconduct creates that forum.

Second, the Committee expands OPC's jurisdiction to cover Office of Inspector General ("OIG") officers if they are authorized to conduct felony investigations. This subset of OIG employees is granted the authority to carry a firearm, make warrantless arrests, and serve as affiants for search warrants.[75] These officers, therefore, enjoy similar powers to both MPD and DC Housing Authority Police Department officers and should be governed by similar systems of oversight.

d. Use of Force Review Board Membership Expansion

The PRC recommended that the Council make permanent the bill's expansion of the Use of Force Review Board ("UFRB").[76] The PRC's recommendations were, in part, based on conversations with "Michael Bromwich, a consultant to the district auditor, who had been leading

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[73] *Id*. at 26.
[74] Colleen Grablick, *Federal Prosecutors To Dismiss Dozens Of Cases Tied To D.C. Police Unit Accused Of Misconduct*, DCIST (November 1, 2022), https://dcist.com/story/22/11/01/prosecutors-dismiss-cases-mpd-investiation/.
[75] D.C. Official Code § 1–301.115a.
[76] *PRC Recommendations* at 122.

a team that was conducting a comprehensive independent assessment of MPD officer-involved shootings in 2018-19."[77] Mr. Bromwich found that the UFRB "has focused on whether officers were justified in using deadly force at the moment they decided to shoot, rather than examining more broadly all precipitating and subsequent events."[78] The PRC noted that until "passage in 2020 of Section 107 of Act 23-336, the board did not include any voting civilian members."[79] The PRC argued that:

> "[T]he addition of voting civilian members should help ensure that, consistent with its mission, the board's reviews of police shootings (1) examine the entire series of events surrounding such shootings—not simply the moment deadly force was deployed; and (2) include consideration of recommendations regarding policy, training, supervision, tactics, commendations, and discipline."[80]

The Committee Print maintains the addition of five civilian members – three appointed by the Mayor and two appointed by the Council – to the Use of Force Review Board. Additionally, the Committee Print clarifies that the three civilian members appointed by the Mayor and the two civilian members appointed by the Council must have "no current or prior affiliation with law enforcement, including being employed by a law enforcement agency or law enforcement union." The Committee notes that while then-Deputy Mayor Mitchell testified on behalf of the Executive in support of the expanded membership of the UFRB, the Executive has again failed to follow the law by appointing any civilian members to the Board.

e. Anti-Mask Law Repeal

The PRC recommended that the Council "make permanent Section 108 of Act 23-336 repealing DC Code § 22-3312.03, which prohibits wearing hoods or masks with intent to discriminate, intimidate, or break the law."[81] The PRC noted that the law, "enacted in 1983, was intended to prevent hate groups like the Ku Klux Klan from intimidating people while wearing hoods and masks."[82] However, "because it is written so broadly and can be applied so subjectively . . . the law has been used to stop, pat down and even charge District residents, often minors who are 17 or 18 years old, for wearing hoodies."[83] In his testimony before the Committee, Nicholas Robinson, Legal Advisor for the International Center for Not-for-Profit Law, argued that "[a]n anti-mask law clearly does not make sense during a pandemic and, more generally, it just gives too much discretion to law enforcement." He also noted research finding that "most states do not have anti-mask laws and do not seem to suffer any negative consequences." The Committee agrees with the PRC in its determination that the anti-mask law is no longer necessary. The Committee Print, therefore, maintains the full repeal of this statute.

[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at 119.
[82] *Id.*
[83] *Id.*

f. Limitations on Consent Searches

In practice, consent searches are used to circumvent the legal justifications normally required to conduct a search a person or property:

> "Police officers ask for consent to search because when they obtain consent, it is the quickest and easiest way to search a person or property suspected of possessing or containing evidence of a crime. Officers do not need a warrant, nor do they need probable cause to arrest, reasonable suspicion of possession of a dangerous weapon, or any other legal justification for a warrantless search. Among many variants, consent searches include the practice among some MPD officers of telling individuals to lift their shirts and show their waistbands."[84]

Consent searches are constitutional when the "consent is given voluntarily and not coerced."[85] Unfortunately, given the power imbalance between officers and the subject of their search, many "feel like they have no choice and want to appear compliant."[86] To help overcome the power dynamics between law enforcement officers and community members, Act 23-336 "requires officers to provide Miranda-style warnings and obtain consent without threats or promises."[87]

The PRC found these protections insufficient and recommended that the Council "modify Section 110 of Act 23-336 . . . by prohibiting all consent searches—warrantless searches permitted based solely on the consent of the individual whose person or property is searched—and, in criminal cases, should require the exclusion of any evidence obtained from a consent search."[88] Prohibiting consent searches altogether "will properly require officers who wish to conduct searches to properly focus on safety, rather than on targeting individuals who are likely to consent."[89]

The Committee continues to recognize the inherent power imbalance between officers and the potential subjects of a search or arrest. Given the power dynamics surrounding consent searches, the Committee Print maintains provisions in the bill as introduced that require the issuance of *Miranda*-like warnings prior to seeking consent for a search. However, the Committee would like to better understand what effect the prophylactic rules provided in the bill as introduced have had in curtailing improper consent searches before banning the practice altogether. The Committee is troubled by the testimony from witnesses that MPD has failed to provide adequate interpretation services when delivering the warnings required under the emergency and temporary legislation that has been in effect since 2020. The Committee underscores that failure to use interpretation services as required under the bill is a fact a court must consider when determining the voluntariness of the consent. Finally, the Committee is supportive of the Director of Legal and Strategic Advocacy at the Network for Victim Recovery of D.C. Kristin Eliason's suggestion that

[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 104.
[89] *Id.* at 105.

MPD provide subjects of a consent search a rights card modeled after the Sexual Assault Victims' Rights Act. While the Committee stop shorts of legislatively mandating the provision of such a card, it could help ensure subjects better understand their rights. The Committee suggests that either OPC or ODCA examine compliance with the warning requirements established in this subtitle, especially on the issue of providing interpretation services when needed.

g. Mandatory Continuing Education Expansion; Reconstituting the Police Officers Standards and Training Board

The PRC recommended that the Council "make permanent Section 111(a) of Act 23-336, which refines the requirements for mandatory continuing education of MPD officers in [D.C. Official Code §] 5-107.02."[90] The PRC emphasized that "fostering a culture of guardian policing requires educating and training officers on guardian policing in a holistic way."[91] This philosophy "must run through and permeate all aspects of officer education and training—starting with recruit training and continuing with post-Academy field training, annual in-service training, and supervisor training."[92] The PRC underscored that "[a]ll the training recommendations in this report . . . are interconnected in their effort to incorporate guardian policing concepts."[93] The PRC argued, however, that trainings related to "'linguistic and cultural competency' and the prevention of 'biased-based policing, racism, and white supremacy,' required by D.C. Code 5-107.02(b)(2) & (6), . . . should be open to the community and include employees of other District agencies."[94]

The Committee Print makes permanent the revised requirements for mandatory continuing education. Additionally, the Committee Print requires that mandatory continuing education include training on the prohibited techniques (i.e., neck restraints and asphyxiating restraints) and the ban on the use of consent searches.

The Committee again notes that, since the passage of these requirements in the emergency and temporary legislation, MPD and the Executive have failed to follow the law and reconstitute the POST Board.

h. Identification of MPD Officers During First Amendment Assemblies as Local Law Enforcement

The PRC recommended that the Council "make permanent Section 112 of Act 23-336, which amends the First Amendment Assemblies Act of 2004 to require the uniforms and helmets of MPD officers policing First Amendment assemblies to identify their affiliation with local law enforcement."[95] The PRC explained how the unique presence of both local and federal law enforcement agencies makes such a reform necessary:

[90] *Id.* at 147.
[91] *Id.* at 148
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 123.

> "Because MPD officers often police protest activity with officers from other agencies, this requirement helpfully serves to distinguish officers who are local, with direct community ties, from those who are not. The requirement enables District residents to hold MPD and its officers accountable for their actions during protests. At the same time, it protects MPD officers who are carrying out their duties properly when officers from other agencies are not. At root, this requirement appropriately seeks to foster community trust in MPD."[96]

The Committee finds that a basic component of transparency in policing is ensuring that members of the public can identify law enforcement officers and the law enforcement agency that employs them. This is especially important in the District, where myriad federal law enforcement agencies have jurisdiction. For example, it took nearly a year to confirm which law enforcement agencies were responsible for clearing Lafayette Park on June 1, 2020.[97] Clearer identification for local law enforcement officials could help avoid this confusion moving forward. Therefore, the Committee Print makes these provisions permanent.

i. Preserving the Right to a Jury Trial

The PRC recommended that the Council "make permanent Section 113 of Act 23-336, which provides a right to a jury trial when a person is accused of assault on a police officer, and restore the right to a jury trial in all criminal cases."[98] As the PRC notes in its report, a goal of the NEAR Act was "to make prosecutors examine [assault on a police officer] cases more closely, as well as take the court out of the uncomfortable position of having to make specific credibility findings that would affect an officer's career."[99] In practice, however, "the Office of the U.S. Attorney began charging people accused of this offense with simple assault instead, preventing them from having a jury."[100] The Criminal Code Reform Commission ("CCRC") has expressed similar concerns in its testimony before the Committee:

> "In 2016, the D.C. Council passed the Neighborhood Engagement Achieves Results (NEAR) Act, which split the existing 180 day, non-jury demandable APO offense into a new APO offense and a resisting arrest offense and increased the penalty for both to six months. The apparent legislative purpose of this shift was to make sure that these offenses were decided by juries rather than judges. But charging data suggests that this has not been the effect of the law. The number of charges for violations of D.C. Code § 22-405(b) remained relatively consistent within the range of 1,592 and 1,712 for every two-year period between 2009 and 2016. However, after the NEAR Act, for the period of 2017 to 2018, the combined number of charges for APO and resisting arrest dropped by about a thousand charges to a mere 529. This represents a more than 66% decrease in charging from the previous years. However, the number of charges brought for violations of D.C.

[96] *Id.*
[97] Martin Austermuhle, *Report Finds D.C. Police Responsible For Use Of Tear Gas During Clearing Of Lafayette Park*, (June 9, 2021), https://dcist.com/story/21/06/09/report-finds-d-c-police-responsible-for-use-of-tear-gas-during-clearing-of-lafayette-park/.
[98] *Id.* at 184.
[99] *Id.*
[100] *Id.*

> Code § 22-404(a)—simple assault—saw a corresponding uptick with the passage of the NEAR Act. For two-year periods between 2009 and 2016 simple assault charges were in the range of 3,221 to 3,865, but rose about a thousand charges to 5,282 for the period of 2017 to 2018. The elements of the simple assault offense are identical to the prior APO offense, except that the complainant's status as a law enforcement officer need not be proven. And the NEAR Act did not explicitly preclude prosecutors from using their discretion to charge what previously had been an APO case as a simple assault. As there is no practical difference in the authorized imprisonment penalty between the revised offenses (revised APO and resisting arrest) and simple assault (the difference between 6 months and 180 days), the shift in charges [to] simple assault suggests these charging decisions may be based on jury demandability rather than how the facts fit the law."

In his concurring opinion in the case of *Bado v. United States*, Senior Judge Washington forcefully argued for the expansion of jury trial rights in the District:

> "Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state. Those perceptions are fueled not only by reports that police officers are not being held responsible in the courts for police involved shootings of unarmed suspects but is likely also promoted by unwise decisions, like the one that authorized the placement of two large monuments to law enforcement on the plaza adjacent to the entrance to the highest court of the District of Columbia."[101]

The Committee is persuaded by the arguments of the PRC, CCRC, and Judge Washington on the importance jury trials have in protecting individual liberty and restoring public confidence in the criminal justice system – particularly in cases where the alleged crime involves a law enforcement officer. In a system where police officers regularly testify before judges and collaborate with prosecutors, juries provide an independent check on these system actors. At this time, however, the Committee declines to expand the right to a jury trial beyond what was originally contemplated in the bill. The Committee notes in addition to B24-0320, the Revised Criminal Code Act of 2022, passed on 2nd reading on November 15, 2022 (Enrolled version of Bill 24-416), contains an even more dramatic expansion of jury trial rights for all misdemeanors that will phase in between 2025 and 2030.

j. Repeal of Failure to Arrest Crime

The PRC recommended that the Council "make permanent Section 114 of Act 23-336 repealing DC Code § 5-115.03, which makes it a two-year misdemeanor for an officer not to make

[101] *Bado v. United States*, 186 A.3d 1243, 1264 (DCCA 2018).

an arrest for an offense committed in their presence."[102] In support of its recommendation, the PRC spoke about the deleterious effect arrests have on individuals and their families:

> "Arrests result in a loss of liberty, induce stress, and can have adverse consequences on family responsibilities, employment, and income. Arrests also have a serious impact on public resources. They consume officer and court time and fill up detention facilities. And arrests for low-level offenses harm police-community relations. Community members question the fairness and wisdom of locking people up for minor infractions.
>
> Equally important, arrests for low-level offenses are an ineffectual way to reduce serious crime. There is a raft of research on the ineffectiveness of 'zero-tolerance' policing—policing that hinges on widespread, aggressive use of stops, searches, and arrests, usually for minor offenses, as a crime-fighting strategy. That research shows that zero-tolerance policing poisons police-community relations and fails to drive down the rate of serious crime. Arresting people for low-level offenses is not 'smart' law enforcement."[103]

Given that "[t]here is little or nothing to commend arrests for low-level offenses," the PRC reasoned that "it makes no sense to require officers to always make an arrest for a crime committed in their presence."[104] The CCRC, in its testimony before the Committee, expressed similar concerns:

> "A fundamental tenet of any criminal justice system must be that the criminal justice system is a last resort when other efforts to ensure public safety fail. This statute enshrines the opposite, making an officer criminally liable for not making an arrest even when doing so does not advance justice. Moreover, as the statute refers to both federal and District law, it effectively binds District law enforcement officers to follow federal crime policy on drug and other offenses even when such the District has a different policy. The statute is routinely ignored in current practice and continuing to include the law in the D.C. Code undermines the legitimacy of all criminal laws.
>
> When an officer's failure to arrest an individual is because of the officer's collusion in a protection scheme or because of some other illicit motive, other criminal statutes and doctrines of accomplice and conspiracy liability adequately sufficiently criminalize and punish such conduct."

The Committee agrees with both the PRC and the CCRC in their determination that the failure to arrest statute is no longer necessary. The Committee Print, therefore, maintains the full repeal of this statute.

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[102] *Id.* at 119.
[103] *Id.* at 117–18.
[104] *Id.* at 119.

k. Amending Minimum Standards for Police Officers

The PRC recommended that the Council "make permanent Section 115 of Act 23-336, which prevents MPD from hiring officers who engaged in serious misconduct in another police department."[105] The PRC argued that it is "difficult to promote a guardian culture if MPD were to hire officers with troubling disciplinary histories at other agencies.[106] The PRC also explained how the hiring of such officers exposes the District to financial liability. Specifically, "[i]f MPD hired an officer with a known history of serious misconduct, and that officer proceeded to violate a community member's rights during a law enforcement encounter, the District's potential liability would significantly increase."[107]The Committee continues to believe that hiring officers with a history of misconduct undermines public confidence in our police force. The Committee Print, therefore, maintains this prohibition.

l. Police Accountability and Collective Bargaining Agreements

The PRC recommended that the Council make permanent the change to D.C. Code § 1-617.08, which states that "[a]ll matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable."[108] The PRC found that "[c]urrent negotiated disciplinary policies have resulted in arbitration decisions that MPD has criticized as lenient, and have limited the MPD's ability to update disciplinary policies."[109] Specifically, prior bargaining agreements reached between MPD and the Fraternal Order of Police ("FOP") allow "non-probationary officers to challenge adverse actions involving any 'fine, suspension, removal from service, or any reduction of rank or pay' through arbitration."[110] The PRC explained how incentives within the arbitration process thwart robust police accountability:

> "Unless both the union and District agree, the arbitration is not open to the public. Both parties must agree on the selection of the arbitrator, and the arbitrator possesses the power to re-review the issue(s) submitted. When both parties must agree on the arbitrator, it can 'incentivize arbitrators to consistently compromise on punishment to increase their probability of being selected in future cases.' Giving the arbitrator authority to re-review issues tends to divorce discipline from publicly accountable actors, insulating officers from democratic oversight."[111]

In its review of arbitration decisions, the PRC found that "arbitrators in DC ruled that MPD had to reinstate 39 of 86 officers it fired, including an officer convicted of a misdemeanor for sexually abusing a teenager in his car."[112] Interestingly, even former Chiefs of Police for MPD have criticized arbitration decisions:

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[105] *Id.* at 152.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 172.
[109] *Id.* at 173.
[110] *Id.*
[111] *Id.* at 173.
[112] *Id.*

> "Like other chiefs around the country, former MPD Chief Peter Newsham complained that arbitration decisions allowed 'very bad police officers back onto our department.' As former MPD Chief Charles Ramsey put it, 'It's demoralizing, but not just to the Chief…. It's demoralizing to the rank and file who really don't want to have those kinds of people in their ranks[.] It causes a tremendous amount of anxiety in the public. Our credibility is shot whenever these things happen.'"[113]

Given the evidence that the current collective bargaining agreement governing the disciplinary process for MPD officers has not resulted in a meaningful system of accountability, the Committee Print follows the PRC's recommendation. Section 116 of the Print makes the discipline of sworn law enforcement personnel a sole management right by precluding both substantive and impacts-and-effects bargaining over any matter pertaining to the discipline of sworn law enforcement personnel. The Print also establishes the effective date of this amendment by making it applicable to any collective bargaining agreement entered into after the September 30, 2020 expiration of the existing agreement and to any provision automatically renewed under the terms of that agreement after the effective date of this legislation. The Print clarifies this amendment's applicability to pending disciplinary actions by allowing employees to challenge disciplinary actions under the negotiated grievance process of any existing collective bargaining agreement only if, on or before the effective date of this subsection, MPD has issued a final agency decision. The Committee notes that the changes in Section 116 of the Print do not diminish an employee's right to challenge disciplinary action under the statutory provisions of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; 25 DCR 5740) or regulations issued pursuant to those provisions. The Print also amends D.C. Code § 1-608.01(d) to eliminate any obstacle to the issuance of separate personnel regulations governing sworn members of MPD.

m. Officer Discipline Reforms

The PRC recommended that the Council amend D.C. Code § 5-1031 to "extend the time frame for MPD's commencement of a corrective or adverse action from 90 business days to one year, from notice of the act or occurrence, for all cases." The PRC noted that Act 23-336 "essentially established two deadlines by extending the time frame from 90 business days to 180 business days for cases involving serious uses of force and potential criminal conduct."[114] This, however, could have the unintended effect of inviting "legal challenges based on case categorization and cases with allegations involving both serious uses of force and potential criminal conduct and other misconduct allegations."[115] Furthermore, use of business days could "lead to computational errors."[116] "The better practice," argued the PRC, "is to establish a single deadline for all disciplinary cases of one year, or 365 days."[117]

The Committee agrees that the 90- and 180-day rules have created needless confusion about the timeline for initiating discipline. Moreover, it makes little sense to impose a technical

[113] *Id.* at 173–74.
[114] *PRC Recommendations* at 172.
[115] *Id.*
[116] *Id.*
[117] *Id.*

obstacle to disciplining police officers, as opposed to other public employees, given the critical positions of public trust they hold. However, rather than establish a single, 365-day timeline for commencing disciplinary action, the Committee believes there is good reason to dispense with a time limitation for disciplinary actions against MPD officers altogether. This repeal is intended to apply retroactively to any disciplinary matter pending the effective date of this act, thereby precluding any arbitrator, adjudicator, administrative body, or court from modifying or reversing any disciplinary action—or affirming such a modification or reversal on appeal—on the basis of an agency's failure to comply with the deadlines set forth in D.C. Code § 5-1031.

n. Use of Force Reforms

The PRC recommended that the Council "make permanent Section 119 of Act 23-336, which restricts the use of deadly force in [D.C. Code §] 5-337.01.[118] The PRC noted that "certain deadly police encounters, particularly police shootings, are 'lawful but awful,' because while they might not violate the Constitution, they are nevertheless precipitated by unnecessarily aggressive, improper tactics."[119] The PRC characterized the bill as incorporating "best practices for use of force" that "have been part of MPD policy and training for several years."[120] In effect, the law "properly requires officers not only to act reasonably at the precise moment they decide to use deadly force, as the Constitution demands, but also to act prudently to avoid ever reaching that moment in the first place."[121] The PRC found that the provision "promotes the sanctity of human life by requiring officers not simply to act reasonably at the moment they decide to shoot, but to do what they can to avoid putting themselves in that situation."[122]

The Committee Print makes permanent the provisions restricting the use of deadly force. The Print also incorporates several recommendations made by Professor Cynthia Lee, the law professor that drafted the model use of deadly force law on which the bill is based. Professor Lee recommended that the bill require that an officer "honestly and reasonably" believe that deadly force is immediately necessary prior to its use because it "ensures that an officer who does not actually believe he needs to immediately use deadly force . . . is not allowed to escape criminal liability. The Print incorporates this recommendation, though it substitutes the word "honestly" for "actually." She also recommended that the language around an officer's use of de-escalation measures be clarified so that the jury considers whether they were "feasible" at the time. Furthermore, she recommended that the bill include "calling for mental health service workers to assist if the officer knows or has reason to believe the subject is mentally impaired" as an example of the de-escalation measures an officer may have taken. The Committee finds that these recommendations strengthen the bill's framework for determining if the use of deadly force was justified and, therefore, incorporates those amendments in the Committee Print. Rather than limiting the example of a de-escalation to "mental health service workers," however, the Committee Print expands the example to include "mental health, behavioral health, or social workers."

[118] *Id.* at 120.
[119] *Id.* 120–21.
[120] *Id.* at 121.
[121] *Id.*
[122] *Id*.

o. Restrictions on the Purchase and Use of Military Weapons

The PRC recommended that the Council "make permanent Section 120 of Act 23-336, which restricts purchase of various military weaponry."[123] It noted that "local law enforcement has become increasingly militarized, in part because of an influx of money and military-style supplies from the federal government."[124] This militarization has, in turn, "not only caused more civilian deaths and failed at preventing more officer deaths, but also has failed to reduce rates of violent crime while simultaneously eroding public trust and confidence in law enforcement."[125] To help move MPD away from the "warrior model of policing," restrictions on "the purchase and use of specific types of military weaponry" and the requirements "to notify the community whenever it requests or acquires equipment through a federal government program" should be made permanent.[126] The Committee notes that MPD does not possess much of the listed weaponry, though it has acquired some equipment through the federal Law Enforcement Support Office before.[127] Ms. Hopkins of ACLU-DC similarly also praised provisions in B23-0882 that would help demilitarize local law enforcement:

> "The military-industrial complex has been brought to the doorsteps of U.S. households through federal funding and military weapons transfers—empowering police to terrorize civilians, particularly Black, Brown, and immigrant communities. The militarization of policing, with heavy artillery and surveillance technologies, encourages officers to adopt a "warrior" mentality and think of the people they are supposed to serve as enemies and continues the deterioration of trust in law enforcement. The ACLU-DC supports Bill 23-882's provisions restricting District's law enforcement agencies from acquiring and using military weaponry as listed in the legislation, including requiring agencies to publish notices of requests or acquisition of any property from the federal government within 14 days of the request or acquisition and to return any such equipment that they've already acquired within 180 days of the enactment of the law."

The Committee, therefore, maintains restrictions on District law enforcement agencies' ability to acquire and use military-style equipment. In addition to maintaining the provisions of the bill as introduced, the adds grenade launchers and similar accessories to the list of weaponry that is required to be reported. An article written by the International Center for Not-for-Profit Law Found that "Flash bangs, blast balls, and stun grenades . . . have severely injured protesters and can trigger cardiac arrest."[128] It makes little sense to not also include devices that aid in the deployment of grenades, which were already included in the restrictions on military-style equipment.

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Megan Cloherty, Military equipment D.C. acquired from federal program, WTOP (August 18, 2014), https://wtop.com/news/2014/08/military-equipment-dc-acquired-from-federal-program/.
[128] International Center for Not-for-Profit Law, *Legislative Options to Restrict the Use of Less Lethal Weapons in Crowd Control* at 3 (August 2020), https://www.icnl.org/wp-content/uploads/LLWs-Briefer-final-formatted.pdf.

p. Limitations on the Use of Internationally Banned Chemical Weapons, Riot Gear, and Less-Lethal Projectiles

The PRC recommended that the Council "make permanent Section 121 of Act 23-336, which amends the First Amendment Assemblies Act of 2004 to restrict the use of chemical weapons, less-than-lethal projectiles, and riot gear during First Amendment assemblies."[129] As the PRC notes in its discussion of this recommendation, "protests for racial justice in the summer of 2020 exposed certain law enforcement practices that are inimical to the First Amendment rights of free speech and assembly."[130] On June 1, 2020, "certain agents aggressively and needlessly deployed tear gas and rubber bullets to disperse protestors" gathered at Lafayette Square to protest the killing of George Floyd."[131] While many initially believed that the U.S. Park Police were responsible for the use of tear gas, and that MPD played no role in the use of chemical irritants, MPD confirmed that some of its officers use used tear gas in response to "assaultive actions" from protestors. That same day, MPD officers kettled nearly 200 protestors on Swann Street NW, using flash bang grenades and pepper spray in the process.[132] This event – and others involving the use of chemical irritants at lawful demonstrations – prompted the Council to ban the use of chemical irritants for the purposes of dispersing First Amendment assemblies. Just a few weeks later:

> "On June 22, D.C. police officers used pepper spray on protesters near Black Lives Matter Plaza in the afternoon, and again that evening in Lafayette Square to stop a 'large group that was attempting to deface and destroy' a statue of Andrew Jackson, the Metropolitan Police Department said over email. The next day, MPD deployed sting balls and OC spray against protesters in Black Lives Matter Plaza, which the department said was a response to 'instances of individuals igniting of fireworks, intentionally setting fires, throwing projectiles, Molotov cocktails, and smoke grenades at officers in the area.'"[133]

The Committee Print, therefore, includes a more comprehensive reform to how MPD responds to First Amendment assemblies. Specifically, the Committee Print maintains definitions of "chemical irritants" and "less-lethal projectiles" under the bill and groups them under a combined class of tools called "less-lethal weapons." It clarifies that the District's policy that MPD not engage in mass arrests of groups that include First Amendment assemblies or that began as a First Amendment assembly unless MPD determines that the assembly has transformed, in substantial part or in whole, into an activity subject to dispersal or arrest and has issued the dispersal orders required by law. That Print clarifies that, in the context of First Amendment assemblies, before arresting anyone engaged in unlawful disorderly conduct or violence directed at persons or property, MPD must have individualized probable cause to arrest that person.

The Print also establishes more nuanced guidelines for dispersing crowds at a First

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[129] *Id.* at 123.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] Rachel Kurzius, *Would D.C.'s Police Reform Bill Have Stopped MPD From Pepper Spraying Protesters?*, NPR (June 25, 2020), https://www.npr.org/local/305/2020/06/25/883283633/would-d-c-s-police-reform-bill-have-stopped-m-p-d-from-pepper-spraying-protesters.

Amendment assembly or riot, depending on the threat presented by the crowd in question. If there is not an imminent danger of bodily injury of significant damage to property, MPD must "issue at least three clearly audible and understandable orders to disperse using an amplification system or device, waiting at least 2 minutes between the issuance of each warning." If a crowd presents a more imminent threat, MPD must issue only one dispersal order. In either case, MPD must provide members of the crowd a reasonable and adequate time to disperse, as well as a clear and safe route for dispersal. Importantly, these limitations apply to dispersals of both First Amendment assemblies and riots. The Committee is concerned that if these protections are limited to First Amendment assemblies and not riots, it will invite law enforcement officials to designate gatherings as riots to avoid the requirements of the law altogether.

The Print also requires that the dispersal order itself meet certain requirements, such as being issued by the incident commander and informing the crowd "of the law, regulation, or policy that they have violated that serves as the basis for the order to disperse," that failure to obey the dispersal order could result in their arrest, and identify for participants reasonable exit paths they may take.

The Print also places clearer limitations on the use of riot gear and the deployment of less-lethal weapons by modeled after the use of deadly force framework from the bill as introduced to this context. The Print describes several factors a trier of fact must consider when determining whether the use of riot gear or less-lethal weapons was reasonable, such as whether the "use of less-lethal weapons was limited to the people for whom MPD had individualized probable cause for arrest." The Print also establishes more detailed reporting requirements following the deployment of riot gear or less-lethal weapons.

The Print also ensures that individuals have some recourse in cases where these new restrictions on policing large gatherings are violated. Specifically, for cases where MPD may have violated these policies when conducting arrests for rioting, the Print provides an affirmative defense to crime of rioting as described in D.C. Code § 22-1322.

q. Evaluating Bias in Threat Assessment

Besides the use of riot gear, less-lethal weapons, and kettling tactics, the police response to protests for racial justice during the summer of 2020, compared to the insurrection at the U.S. Capitol on January 6, 2021, presented a different issue: whether law enforcement's threat assessments of, and response to, public assemblies are affected by bias. Multiple news outlets, District officials, and members of the public called attention to the discrepancy in how law enforcement reacted to each demonstration:

> "The response to the conservative, mostly white mob was a sharp contrast to the police reaction to protests after the killing of George Floyd in late May and early June—and to other protests organized for progressive causes in the Capitol itself in recent years—where peaceful protesters were arrested in large groups and met by officers armed with military-style vehicles, equipment and weaponry. On Thursday morning, Capitol Police reported that they had made 14 arrests in connection with

> the insurrection, far fewer than the arrest totals during the heaviest days of racial justice protests in the District this summer."[134]

In fact, more people were arrested for curfew violations while participating in the June protests for racial justice than were arrested for participating in the tumultuous mob that stormed the halls of Congress:

> "D.C. officials reported 69 arrests [related to the insurrection], the majority related to curfew violations or unlawful entry. In early June, during the height of protests against police violence, 289 people were arrested. A significant portion of those arrests were made by MPD after protesters who were out past the city-imposed curfew say they were trapped by police on a residential street in Dupont Circle (Some sheltered overnight in the home of a neighbor who opened his doors to them)."

Concerns of bias within MPD were reinforced in February 2022, when Chief Contee announced an officer was placed on leave due to allegations of "improper contacts with a prominent member of the extremist group Proud Boys."[135] The member of the Proud Boys in question, Enrique Tarrio, stated that the MPD officer "would tell him the location of counterdemonstrators."[136] Even prior to the insurrection at the Capitol, MPD's response to white nationalists hosting demonstrations in the District had raised concerns that MPD treats conservative demonstrations more favorably than progressive ones. In February 2020, "[p]olice escorted masked members of a white nationalist group on a march through Washington's National Mall on Saturday that Metropolitan Police said occurred without incident or arrests."[137] More fundamentally, MPD's own arrest data has revealed that it disproportionately stops and arrests Black people. ACLU-DC's analysis of the data found that:

> "In 2020, Black people made up roughly 46% of the D.C. population, but 74.6% of the people stopped. This is a slight increase from our original report, which found that between July 22, 2019 and December 31, 2019, Black people composed 46.5% of the D.C. population but 72% of the people stopped. Meanwhile, in 2020, non-Hispanic white people made up only 12.5% of stops despite composing roughly 36.6% of D.C.'s population. . .
>
> The data further suggest that the link between stops and race is more than correlational. 86.5% of the stops, and 90.7% of the searches, that resulted in no warning, ticket, or arrest, were of Black people. These figures are virtually identical to the 2019 figures—86.1% and 91.1%, respectively. These stops and searches are

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[134] Martin Austermuhle and Jenny Gathright, *After Mob Took Congress, Many Ask: How Did The Police Allow It To Happen?*, DCIST (January 7, 2021), https://dcist.com/story/21/01/07/congress-insurrection-capitol-police-security/.
[135] Peter Hermann and Devlin Barrett, *D.C. police lieutenant suspended over alleged ties to right-wing group*, WASH. POST (February 16, 2022), https://www.washingtonpost.com/dc-md-va/2022/02/16/dc-police-tarrio-proud-boys-lamond/.
[136] *Id*.
[137] Reuters, *Masked white nationalists march in Washington with police escort* (February 8, 2020), https://www.reuters.com/article/us-usa-protests/masked-white-nationalists-march-in-washington-with-police-escort-idUSKBN20301H.

> the ones mostly likely to arise from innocent conduct, and it is therefore deeply disturbing that Black people, once again, almost certainly make up the vast majority of individuals subjected to stops or searches despite not violating the law.[138]

Taken together, these incidents and MPD's arrest data raise concerns about how bias affects the manner in which MPD polices First Amendment Assemblies. To better understand whether bias is affecting MPD's threat assessments, the Committee Print incorporates provisions from B24-0094. The Print largely maintains provisions describing the scope of the study and the eligible entities with whom the implementing agency may partner. However, instead of requiring OAG to conduct the study, the Print makes OPC the implementing agency for the change. The Committee finds that OPC, the agency specifically tasked with providing oversight of MPD (and not representing MPD in litigation), is better situated to conduct this study.

The Committee notes that in its Fiscal Year 2022 Budget Report, the Committee allocated $150,000 to OPC to conduct a study on bias in threat assessments. In October 2022, OPC published the report summarizing the results of the study, which "did not find indications of bias in the data provided by the MPD, nor in the processes used to assess threat in preparation for First Amendment demonstrations in the District."[139] The Committee finds that the October 2022 report submitted by OPC fulfills the requirements of the legislation, and no further action from OPC is needed.

r. Preventing White Supremacy in Policing

MPD's policing of demonstrations related to racial justice, some of its members' links to far-right organizations, and the disproportionate arrests of Black people in the District, have also raised alarms regarding the presence of white supremacy within the Department. The Committee Print therefore incorporates provisions from B24-0112, which require ODCA to conduct a comprehensive assessment of whether MPD officers have ties to white supremacist or other hate groups that may affect the officers' ability to carry out their duties properly and fairly or may undermine public trust in MPD. To ensure ODCA has adequate time to conduct its comprehensive assessment, the Print extends the timeline for submitting the report to a total of 18 months from the applicability date of the bill. The Committee Print also removes language from the bill as introduced that clarifies that the assessment "shall not violate Department officer and staff members' legal rights or protections as employees, including those addressing privacy and free speech." The Committee finds this language to prescriptive, nor does it wish to create the impression that absence of this language in other provisions is meant to lessen employees' legal rights or protections in other contexts. The Committee notes here, however, that the assessment should be conducted in a way that accords MPD officers and other government employees with their full rights under the law.

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[138] ACLU Analytics & ACLU of the District of Columbia, *Racial Disparities in Stops by the Metropolitan Police Department: 2020 Data Update* (last visited November 28, 2022), https://www.acludc.org/en/racial-disparities-stops-metropolitan-police-department-2020-data-update.

[139] National Policing Institute, *A Study of Bias in the Washington D.C. Metropolitan Police Department's Threat Assessment Process* (October 2022), https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/NPI_BiasReport_Oct2022-2.pdf.

s. Limitations on the Use of Vehicular Pursuits by Law Enforcement Officers

In October 2020, officers initiated a chase of a young Black man, Karon Hylton-Brown, "because he was riding on the sidewalk and without a helmet."[140] In the BWC footage released by police, Hylton-Brown can be seen operating "a rented blue Revel scooter, darting across the street in front of a cruiser," which activates its lights and begins to follow Hylton-Brown.[141] The officers then continued "to follow, driving up streets and down alleys in the Kennedy Street area for 1 minute and 50 seconds," and one officer "appears to point out Hylton as he turns and crosses streets."[142] Just before the collision, the police cruiser followed Hylton-Brown "down a tight alley filled with garages." Ultimately, when Hylton-Brown "steered out of an alley onto Kennedy Street, a busy strip in Brightwood Park, a passing van plowed into the scooter," killing him. The incident "ignited a new round of volatile protests in the nation's capital." Notably, the incident has resulted in criminal charges for two officers involved, with the trial currently underway:

> "Sutton has been charged with second degree murder, obstruction of justice, and conspiracy charges. And his supervisor, Lt. Andrew Zabavsky, has been charged with obstruction of justice and conspiracy, because prosecutors say he helped Sutton delay investigations of the crash and mislead D.C. police officials about what happened."[143]

The circumstances of Hylton-Brown's death appear to have violated MPD's policy on vehicular chases, and the Committee, which had requested the BWC footage shortly after the chase, cannot overemphasize how disturbing it was. MPD's General Order on vehicular pursuits cautions that "[v]ehicle pursuits may present a danger to the public, [MPD] members, and involved suspects.[144] The General Order generally restricts the use of vehicular pursuits except in cases where there is an immediate danger of death or serious bodily injury to the officer or to the public.[145] The General Order also specifically states that officers "shall not pursue a vehicle for the sole purpose of affecting a stop for a traffic violation."

In light of the danger presented by vehicular pursuits, the Committee Print incorporates provisions from B24-0213. However, after careful consideration, the Committee declines to ban outright the use of vehicular pursuit tactics exactly as proposed under the introduced bill. The Committee was troubled by the thought of creating a system in which the use of deadly force is permitted in certain circumstances, but vehicular pursuits are not. And while the Committee recognizes the dangerous, sometimes deadly, results of vehicular chases, it seems odd that those

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[140] Justin Jouvenal, Peter Hermann & Emily Davies, *After a Black man's death, a D.C. street agonizes over the future of policing*, WASH. POST (April 23, 2021), https://www.washingtonpost.com/dc-md-va/2021/04/23/karon-hylton-dc-police-protests/?itid=lk_interstitial_manual_10.
[141] *Id*.
[142] *Id*.
[143] Jenny Gathright, *'He Was Pursuing That Moped': MPD Captain Testifies Against Officers In Murder, Obstruction Trial*, DCIST (November 18, 2022), https://dcist.com/story/22/11/18/karon-hylton-brown-death-police-trial-terence-sutton/.
[144] Metropolitan Police Department, *General Order 3012.03* (December 30, 2021), https://go.mpdconline.com/GO/GO_301_03.pdf.
[145] *Id*.

tactics would be completely unavailable to law enforcement officers when those same officers may discharge their firearm at someone. Therefore, the Print instead designates boxing in, caravanning, deploying a roadblock or tire deflation device, and paralleling as serious uses of force. The Print designates ramming – the pursuit tactic mostly likely to cause injury – as a deadly use of force. By specifying the level of force associated with each tactic, the Committee intends for the decision to employ one of these tactics – and whether it was justified – to be reviewed under the use of force framework provided in MPD General Order 901.07. The Print also provides a standard for factfinders to use when reviewing the use of a vehicle pursuit tactic. This standard is modeled after similar provisions in the Print governing determinations regarding the use of deadly force, riot gear, and less-lethal weapons.

t. School Police Incident Oversight and Accountability

The Committee believes that access to timely information regarding law enforcement activity on school grounds is critical. Ahoefa Ananouko, Policy Associate at the ACLU-DC, testified about the importance of data collection for accountability:

> "The ACLU-DC supports the goals of B24-254 to increase the reliability and transparency of data gathered about school-based police incidents as a necessary step to increasing oversight and accountability of police and dismantling the school-to-prison pipeline."

The Committee understands that police presence in schools may negatively impact Black and Brown students and students with disabilities. Danielle Robinette, Policy Attorney at the Children's Law Center, testified to how this bill can support Black and Brown students and students with disabilities:

> "[T]he presence of police in schools has a disproportionate negative impact on Black and Brown students and students with disabilities. The cumulative effect of these interactions contributes to school pushout for these groups of students. We therefore support the bills presently before the Committee and consider them to be a good initial step towards minimizing the harmful impacts of policing on Black, Brown, and/or disabled young people in DC."

Indeed, removing police from schools was one of the most common requests the Committee received in its public hearing on the bill, as well as during MPD's budget oversight hearings for the last several years. In 2020, the Council took its first major step to transition police out of schools. The Fiscal Year 2021 Budget Support Act of 2020, effective December 3, 2020 (D.C. Law 23-149; 67 DCR 10493), transferred management of school security contracts from MPD to DCPS. The following year, in the Fiscal Year 2022 Budget Support Act of 2021, effective November 13, 2021 (D.C. Law 24-45; 68 DCR 10163), the Council required that MPD slowly phase out MPD's School Safety Division ("SSD"). Specifically, the SSD would be reduced to a maximum of 60 personnel by July 2022, a maximum of 40 personnel by July 2023, and a maximum of 20 personnel by July 2024. By July 2025, SSD would be dissolved and MPD would no longer "staff DCPS and public charter schools with school resource officers." However, the Committee still recognizes the importance of collecting discipline data that accurately illustrates what is

happening in local school communities. The Committee Print, therefore, incorporates provisions in the bill as introduced. To ensure that the data collected under this subtitle does not become too burdensome, the Print eliminates the requirement that schools track the recovery of general contraband (which may include cell phones, toys, or other objects) and focuses on collecting data related to the recovery of weapons or drugs, which present more direct public safety threats. The Committee also notes that the Print's requirements that the schools record the "reason for involving law enforcement officers" may be fulfilled through either a narrative explanation tailored to unique circumstances of each case, or through standardized description (e.g., possession of a weapon, concerns for staff safety, etc). Whereas a narrative description may provide more nuance on the exact basis for involving law enforcement, the standardized description may aid in the analysis of large datasets and help identify trends related to law enforcement involvement. The Print leaves the decision on the best path forward to the implementing agencies.

u. Opioid Overdose Protection

Current law allows individuals to "use, or possess with the intent to use, drug paraphernalia for the personal use of a controlled substance."[146] Additionally, the law allows community-based organizations to "deliver or sell, or possess with intent to deliver or sell, drug paraphernalia for the personal use of a controlled substance."[147] In this context, community-based organizations are defined as an "organization that provides services, including medical care, counseling, homeless services, or drug treatment, to individuals and communities impacted by drug use," and specifically include "all organizations currently participating in the Needle Exchange Program with the Department of Human Services."[148] However, as the Mayor notes in her transmittal letter to the Council on B24-0809:

> "Under existing District law, the distribution of fentanyl test trips is generally considered the illegal distribution of drug paraphernalia. The law recently was amended to authorize the distribution of fentanyl testing strips by community-based organizations but this authority was not extended to government employees. Since 2015, overdose deaths containing fentanyl or a fentanyl analog have increased dramatically with 62% in 2016 and 95% in 2021. The distribution of fentanyl test strips is a key strategy to prevent opioid-related deaths and it is important that government employees be authorized to legally distribute fentanyl test strips."

B24-0809 eliminated this issue on an emergency basis by amending the law to specify that it is not:

> "[U]nlawful for an employee of the District government acting within the scope of their official duties and contractors of the District government engaged to combat opioid overdoses acting within the scope of their contract to deliver, or possess with intent to deliver, the testing equipment and objects."

[146] D.C. Official Code § 48–1103(a)(1)(1A).
[147] D.C. Official Code § 48–1103(b(1)(1A).
[148] D.C. Official Code § 7–404(a)(1).

The Committee believes the District should marshal all of the resources available to combat the surge in fentanyl overdoses. Furthermore, it makes little sense to criminalize the distribution of test strips by government employees or contractors – who are arguably subject to even greater direct oversight – than community-based organizations. Therefore, the Print makes these amendments permanent by incorporating provisions of B24-0809, with slight amendments.

v. MPD Overtime Spending Transparency

Concerns about MPD's use of overtime were also highlighted in a report issued by the Auditor.[149] The report found that MPD, the Fire and Emergency Medical Services Department ("FEMS"), the Department of Corrections, and the Department of Youth and Rehabilitation Services "accounted for more than 68 percent of the $108.2 million in overtime spending in FY 2017, with MPD ($32.2 million) and FEMS ($20.9 million) leading the group."[150] The report noted that some of the growth in overtime spending is "readily explainable", for the implementation of a paid family leave program for government employees meant that "agencies that are required to maintain service (particularly public safety agencies like MPD and FEMS) likely saw increased overtime use."[151] Additionally, both MPD and FEMS incurred overtime costs related to First Amendment assemblies. Specifically, "[f]or the three-day period encompassing the day before the inauguration, the day of the inauguration, and the day following (which was the day of the Women's March on Washington), MPD indicated the agency spent $3.47 million on overtime."[152] One result of the growth in overtime spending is that "dozens of full-time District employees more than doubled their annual salary by working overtime in FY 2017."[153] 153 MPD employees made between 50% and 100% of their salary in overtime in FY17.[154] The Auditor argued that there are "inherent risks" associated with the heavy use of overtime:

> "For example, a 2016 audit of police overtime in Seattle by that city's auditor found overtime errors and inefficiencies, including more than $160,000 in potential duplicate payments to officers. Similarly, a February 2017 audit of fire department overtime by the City of Sacramento Auditor found insufficient documentation supporting overtime use, including a lack of sufficient internal controls that increased risk. A June 2017 audit by the King County Auditor's Office in Washington state found a direct correlation between the number of hours of overtime worked by King County sheriff officers and the likelihood of "negative incidents" occurring the following week, including accidents, uses of force, ethics violations, and professionalism complaints."[155]

The original impetus for B23-1002 and its successor legislation, explained in PR23-1024, the accompanying emergency declaration resolution, was that "[o]n October 22, 2020, the Mayor

[149] Office of the District of Columbia Auditor, *District Overtime Tops $108 Million; Better Management and Additional Staff Could Reduce Costs* (May 22, 2018), http://dcauditor.org/wp-content/uploads/2018/09/Overtime.Report.FINAL_.5.22.18.pdf.
[150] *Id*. at 1.
[151] *Id*. at 2.
[152] *Id*. at 3.
[153] *Id*. at 4.
[154] *Id*. at 4-5.
[155] *Id*. at 5.

transmitted Reprogramming Request 23-0141 requesting to reprogram $43,000,000 of Fiscal Year 2020 funds to the Emergency Planning and Security Fund," which would pay for MPD's overtime spending during the summer protests. The request reallocated funds from:

> "[T]he Department of Health Care Finance, the Child and Family Services Agency, and the Workforce Investment Fund that had been allocated for the modernization of the Alliance Healthcare Program, funding the Grandparent Caregiver Program, and funding many other critical District services that serve our most vulnerable populations and that have seen cuts during these trying times."

In response, the emergency legislation (and its successor emergency and temporary acts) required that MPD submit a written report to the Council every two pay periods describing MPD's overtime spending. The Committee finds that the overtime spending reports provided by MPD have been helpful tools for both the Council and the general public to better understand MPD's overtime spending. As the ODCA pointed out in its report, the use of overtime spending can presage deeper issues or misconduct within the agency. And as the emergency declaration for B23-1002 notes, exorbitant overtime spending costs may result in a loss of funding for other critical initiatives in the District. Therefore, the Committee incorporates provisions of B23-1002 into the Committee Print.

w. MPD Cadet Program Expansion

The Committee continues to value the Cadet Program as a pipeline from which to recruit individuals with strong ties to the District. As noted by MPD Assistant Chief Morgan Kane in her testimony before the Committee at its hearing on B24-0515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021", "[m]any individuals may not have graduated from a District of Columbia high school, as currently required, but may have attended elementary, middle school, and some high school in the District." The "young adults have spent significant time attending school, working, attending a place of worship, engaging in community service programs, and developing relationships throughout the District of Columbia," and may "benefit from the program and give back to District communities." The Committee Print therefore incorporates the provisions of B24-0515 on a permanent basis. The Print makes one notable change to the bill as introduced, which is that it specifies that it restricts eligibility to individuals who "have substantial ties to the District, such as currently or formerly residing, attending school, or working in the District for a significant period of time." This added language helps ensure the Cadet Program remains focused on recruiting young adults who are familiar with the District.

x. Public Release of Records Related to Misconduct and Discipline

District law declares "that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees."[156] The law, therefore, grants any person the "right to inspect, and at his or her discretion, to copy any public record of a public body," subject to a few exemptions, including in cases where the disclosure would "[c]onstitute an unwarranted invasion of personal

[156] D.C. Official Code § 2–531.

privacy."[157] In her testimony on B23-0882, Niquelle Allen, Director of the District's Office of Open Government, noted that "MPD relies on the personal privacy exemption when it redacts information concerning individual law enforcement officers." Ahoefa Ananouko of ACLU-DC echoed this concern, stating that "MPD often invokes the personal privacy exception to deny access to public records and charge exorbitant fees to redact body-worn camera (BWC) recordings."

To address this issue, the Committee Print incorporates provisions from B24-0356 that make clear that Freedom of Information Act ("FOIA") personal privacy exemption does not allow the categorical denial or redaction of disciplinary records of MPD, HAPD, or OIG. "Disciplinary record" is a term broadly defined as "any record created in furtherance of a disciplinary proceeding," including the names of officers, the complaints or allegations against them, and the transcript and disposition of any disciplinary proceeding. However, the Print grants responding bodies the ability to redact specifically enumerated types of information when responding to requests related to disciplinary records. The Print, for example, permits redacting information related to "technical infractions" that do not involve interactions with members of the public (e.g., tardiness or improper dress), and redacting the officer's medical history in cases where it is not a material issue in the complaint or allegations of wrongdoing. The Print also clarifies that redactions may be permitted regarding anyone's personal contact information and social security number. The Print also specifically allows the redaction of "records or information that preserves the anonymity of whistleblowers, complainants, victims, and witnesses." And finally, the Print underscores that records may still be redacted for reasons other than personal privacy, as provided for in D.C. Code § 2–534, including that the records are "[i]nvestigatory records compiled for law-enforcement purposes" that could interfere with ongoing investigations or "[e]ndanger the life or physical safety of law-enforcement personnel." [158]

The Committee Print also incorporates the proposal in B24-0356 to create a publicly accessible database containing records related to officer discipline. The database is set to launch on December 31, 2024 and would include data related to allegations of sustained misconduct that occurred as of the effective date of the Print or thereafter. The Committee notes that a public database for employee records is not new or unique to law enforcement officers, nor to the District. As explained by Karen M. Dale, Market President & CEO of AmeriHealth Caritas District of Columbia, in her testimony before the Committee:

> "Public accountability and transparency have long been standard in health care. For example, DC Health maintains a list on its website of all disciplinary actions taken against physicians licensed to practice medicine in the District. Additionally, DC Health maintains a database of information about Health Professionals licensed to practice in DC including their names, license number, license status and discipline information from 1996 to the present. This information helps ensure that the highest quality of care is provided to the residents of DC. Law enforcement in DC should also embrace this level of disclosure to community members. While the information gleaned and reported from disciplinary proceedings may not be flattering – and indeed at times may be downright alarming – access to such records serves the

[157] D.C. Official Code § 2–532(a).
[158] D.C. Official Code § 2–534(a)(3).

> critical function of arming the public, press, academics and policymakers with the data needed to develop evidence-based solutions."

Similarly, the D.C. Bar maintains a database containing disciplinary decisions for members who have violated the Rules of Professional Conduct – complete with names and a description of the violation at issue. And Ms. Ananouko of ACLU-DC noted that the District "would not be the first to establish a police misconduct database. Jurisdictions such as Massachusetts, Pennsylvania, and Oregon have passed legislation expanding access to police records through some sort of public database." However, Gregg Pemberton, Chair of the D.C. Police Union, raised what he sees as a difference between existing databases and the one proposed under B24-0356:

> "The Act further requires the production of disciplinary records in which the underlying allegations were completely unfounded or that result in the officer being exonerated. Thus, officers against whom false or frivolous disciplinary allegations were made will still be placed in the Act's public database and wrongly identified as an officer who has committed an act warranting discipline. This singles-out D.C. Police Union members for disparate treatment compared to all other District government employees and creates disclosure obligations that no other regulated profession experiences. For example, attorneys practicing law in the District, with whom the highest levels of trust and fiduciary obligations are imposed, do not have disciplinary allegations made public by D.C. Bar Counsel unless and until the attorney has been served with a petition instituting formal charges or the attorney has agreed to be formally disciplined. Similarly, health care professionals in the District of Columbia are investigated by the D.C. Health Regulation and Licensing Administration ("HRLA"). Notably, the HLRA is permitted to resolve complaints informally if there is no violation of the law or regulation or if the HLRA otherwise deems such informal resolution appropriate. It is only when the HLRA takes formal disciplinary action that the matter is publicly disclosed. In stark contrast, through the Act, the Council is establishing a public database through which D.C. Police Union members will be publicly listed by name in a disciplinary database, even for completely meritless disciplinary matters that were not sustained."

The Committee is persuaded by the distinction raised by Mr. Pemberton. In response, the Committee balances the public's readily available access to the database by limiting the contents to sustained allegations of misconduct involving interactions with the public, the integrity of the officer, or the commission of a crime.

The Committee acknowledges that the database and revised FOIA provisions together represent a significant expansion of the public's access to police records, and has tried to structure the two provisions in a way that is complementary and not duplicative. The Committee's intent is that the public database serve as low-barrier entry point for quickly examining an officer's record of misconduct. The Committee does not limit its expansions to FOIA to sustained allegations of misconduct. Instead, the restriction of the personal privacy exemption regarding disciplinary records is intended to be a tool for gaining a more comprehensive understanding of complaints issued against an officer – sustained or otherwise. Taken together, the creation of the database and the limitation of the personal privacy exemption in FOIA will be a significant expansion of the

public's access to records of misconduct. OPC Director Tobin praised both components in his testimony on B24-0356:

> "The proposed legislation offers a significant step toward transparency with the requirement for MPD to publish a database of the disciplinary history of each officer. In addition, the Freedom of Information Act exemptions for officer's individual disciplinary records and complaints will also improve community trust in the disciplinary process by eliminating the cloak of secrecy that has long shielded the public's understanding of police misconduct."

y. Limitation to the Application of the Duncan Ordinance

The Committee takes this opportunity to also remove a barrier to information-sharing regarding arrest records that may thwart crime reduction efforts in the District. 1 DCMR § 1004.1 ("Duncan Ordinance") states that:

> "Unexpurgated adult arrest records, as provided under D.C. Official Code § 5-113.02, shall be released to law enforcement agents upon request, without cost and without the authorization of the persons to whom those records relate and without any other prerequisite, provided that the law enforcement agents represent that those records are to be used for law enforcement purposes."

However, there are concerns that that Duncan Ordinance prevents law enforcement officials from sharing unexpurgated adult arrest records with other agencies focused on reducing gun violence. For example, OAG and the Office of Neighborhood Safety and Engagement ("ONSE") both oversee violence intervention programs that attempt to interrupt cycles of violence stemming from neighborhood or crew conflicts by negotiating ceasefires, conducting mediations, and hosting conflict intervention sessions. Arrest records can be an important tool for determining those most at-risk of engaging in, or experiencing, violent crime. The Criminal Justice Coordinating Council ("CJCC") and the Office of Gun Violence Prevention ("OGVP") serve as forums in which District and federal criminal justice and law enforcement agencies can collaborate to address gun violence. And the Office of Victim Services and Justice Grants ("OVSJG") disburses grants for hospital-based violence intervention programs in area hospitals. The Committee Print therefore amends the DCMR to makes clear that the Duncan Ordinance does not "prohibit the Metropolitan Police Department from providing unexpurgated adult arrest records to employees or contractors working to reduce gun violence, or serve individuals at high risk of being involved in gun violence" within five District agencies focused on violence reduction efforts: the CJCC, OGVP, ONSE, OAG, and OVSJG.

z. Deputy Auditor for Public Safety

Finally, the Print incorporates provisions from B24-0356 establishing the position of the Deputy Auditor for Public Safety. The creation of a Deputy Auditor was the PRC's "cornerstone recommendation." The PRC envisioned the Deputy Auditor as "an official with broad and substantial authority, required to release findings, at least bi-annually, with respect to the quality and timeliness of MPD and OPC investigations and the disciplinary process." But where the PRC

recommended, and where the bill as introduced included, several provisions describing the authority and functions of the office, Auditor Kathy Patterson suggested a different approach. First, she noted that "[b]ecause the Home Rule Act provisions are so robust, there are no additional powers that the Deputy Auditor for Public Safety would need; that is, the position would derive its ample authority from the power of the office as it exists today." Similarly, Ms. Patterson explained that "[b]ecause the Office of the D.C. Auditor has subpoena authority and has had that authority since the office's creation in the 1970s, it is not necessary for new legislation to restate an existing authority. The Committee Print, accordingly, removes unnecessary descriptions of the Deputy Auditor's powers from the bill. The Committee finds that OCDCA, and through it the Deputy Auditor, have ample authority under existing law to review, analyze, and make findings regarding system-wide patterns and practices, including the use of force, searches, and seizures, as well as internal decisions related to hiring, training, promotions, and internal investigations – and they have already done so.

The Print also specifies two functions the Deputy Auditor should perform. First, the Print requires that the Deputy Auditor "conduct periodic reviews of the complaint review process and make recommendations" to the Mayor, Council, or designated agency principal. Second, the Deputy Auditor must review certain information related to complaints of MPD, DCHAPD, and OIG officers, including the demographics of the complainants and officers, in addition to any use of force incidents and in-custody deaths. Allowing the Deputy Auditor to review OPC's handling of complaints will help reveal "the strengths and weaknesses of OPC's internal case processing, improving the quality and timeliness of OPC investigations, and increasing the public's confidence in OPC's work."

Ms. Patterson also argued for removing the requirement that the Deputy Auditor be an attorney, as "there are other individuals who could perform well in this role without being attorneys, including some who served on the Police Reform Commission." The Committee agrees and removes the requirement. The Committee also removes the requirement that the Auditor consult a body of stakeholders when selecting the Deputy Auditor and that the Deputy Auditor only be removed for cause. The creation of the position in the Committee Print will certainly strengthen police oversight in the District, while respecting the ODCA's independence and inherent authority.

LEGISLATIVE HISTORY

June 4, 2020	B23-0771 is introduced by Councilmembers Nadeau, Grosso, Silverman, Robert White, and Trayon White.
June 9, 2020	B23-0771 is referred to the Committee on the Judiciary and Public Safety.
June 12, 2020	Notice of Intent to Act on B23-0771 is published in the *District of Columbia Register*.
July 31, 2020	B23-0882 is introduced by Councilmembers Allen, Bonds, Cheh, Gray, Grosso, McDuffie, Nadeau, Pinto, Silverman, Todd, Robert White, Trayon White, and Chairman Mendelson.

August 14, 2020	Notice of Intent to Act on B23-0882 is published in the *District of Columbia Register*.
August 28, 2020	Notice of Public Hearing on B23-0771 and B23-0882 is published in the *District of Columbia Register*.
September 22, 2020	B23-0882 is referred to the Committee on the Judiciary and Public Safety.
October 15, 2020	Public Hearing on B23-0882 is held by the Committee on the Judiciary and Public Safety.
February 22, 2021	B24-0094 is introduced by Councilmembers Robert White, Cheh, Lewis George, Nadeau, Pinto, and Silverman.
February 25, 2021	B24-0112 is introduced by Councilmembers Lewis George, Allen, Bonds, Henderson, McDuffie, Nadeau, Pinto, and Trayon White.
March 2, 2021	B24-0094 is referred to the Committee on the Judiciary and Public Safety.
March 2, 2021	B24-0112 is sequentially referred to the Committee on the Judiciary and Public Safety and the Committee of the Whole.
March 5, 2021	Notice of Intent to Act on B24-0094 and B24-0112 is published in the *District of Columbia Register*.
April 19, 2021	B24-0213 is introduced by Councilmembers Lewis George, Bonds, Cheh, Nadeau, Robert White, and Trayon White.
April 20, 2021	B24-0213 is referred to the Committee on the Judiciary and Public Safety.
April 23, 2021	Notice of Intent to Act on B24-0213 and Notice of Public Hearing on B24-0094, B24-0112, and B24-0213 are published in the *District of Columbia Register*.
May 20, 2021	Public Hearing on B24-0094, B24-0112, and B24-0213 is held by the Committee on the Judiciary and Public Safety.
May 20, 2021	B24-0254 is introduced by Councilmembers Henderson, Lewis George, McDuffie, Pinto, and Robert White and co-sponsored by Committee Chairperson Charles Allen.
May 28, 2021	Notice of Intent to Act on B24-0254 is published in the *District of Columbia Register*.

June 1, 2021	B24-0254 is sequentially referred to the Committee on the Judiciary and Public Safety and the Committee of the Whole.
June 15, 2021	B24-0320 is introduced by Councilmembers Allen, Bonds, Cheh, Gray, Henderson, Lewis George, McDuffie, Nadeau, Pinto, Silverman, Robert White, and Trayon White and Chairman Mendelson.
June 29, 2021	B24-0320 is referred to the Committee on Judiciary and Public Safety.
July 2, 2021	Notice of Intent to Act on B24-0320 is published in the *District of Columbia Register*.
July 12, 2021	B24-0356 is introduced by Chairman Mendelson.
July 13, 2021	B24-0356 is sequentially referred to the Committee on the Judiciary and Public Safety and the Committee of the Whole.
July 16, 2021	Notice of Intent to Act on B24-0356 is published in the *District of Columbia Register*.
August 27, 2021	Notice of Public Hearing on B24-0254 and B24-0356 is published in the *District of Columbia Register*.
October 21, 2021	Public Hearing on B24-0254 and B24-0356 is held by the Committee on the Judiciary and Public Safety.
November 17, 2021	B24-0515 is introduced by Chairman Mendelson at the request of the Mayor.
December 3, 2021	Notice of Intent to Act on B24-0515 Published in the *District of Columbia Register*
December 7, 2021	B24-0515 is referred to the Committee on Judiciary and Public Safety.
February 11, 2022	Notice of Public Hearing on B24-0515 is published in the *District of Columbia Register*.
March 14, 2022	Public Hearing on B24-0515 is held by the Committee on the Judiciary and Public Safety.
November 30, 2022	Consideration and vote on B24-0320 by the Committee on the Judiciary and Public Safety.

POSITION OF THE EXECUTIVE

B23-0771 and B23-0882

The Committee on the Judiciary and Public Safety received testimony on behalf of the Executive at its October 15, 2020 public hearing on B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020", from Peter Newsham, then-Chief of Police of the Metropolitan Police Department, and Dr. Roger A. Mitchell, Jr., then-Interim Deputy Mayor for Public Safety and Justice. The Chief's and Deputy Mayor's testimonies are summarized below:

Peter Newsham – Chief of Police, Metropolitan Police Department ("MPD")

Chief Newsham began his testimony by discussing efforts by MPD to improve transparency and accountability to the public. Nineteen years ago, MPD entered into a memorandum of agreement on the use of force with the Department of Justice. He believes that when "those reforms were adopted, MPD became a national model for use of force policies and practices." He also noted that the "Department continued major reform efforts thanks to the leadership of and legislation enacted by the Council in 2004, when MPD revised its practices for First Amendment assemblies, and became a national leader is supporting peaceful demonstrations." He continued to discuss reforms made by MPD through the present day. He believes that B23-0882 "will further this in areas such as improved communication about consent searches and the expanded Use of Force Review Board."

He did however express concern about "the new prohibition on officers being able to view body-worn camera . . . footage before writing routine reports." Before the emergency legislation, "officers could review their BWC video before writing reports for any incident except a police-involved shooting." He noted that the practice of allowing officers to review their BWC footage "has the support of the national and independent Police Executive Research Forum" ("PERF"). He provided some of the key rationales PERF has articulated to justify the practice, including that it "will help officers remember the incident more clearly, which leads to more accurate documentation of events." PERF has also suggested that "[r]eal-time recording of the event is considered the best evidence because "[r]esearch into eyewitness testimony demonstrates that stressful situations with many distractions are difficult even for trained observers to recall correctly." Finally, "[i]f a jury or administrative review body sees that the report says one thing and the video indicates another, this can create inconsistencies in the evidence that might damage a case or unfairly undermine the officer's credibility." He encouraged the Council to modify this provision.

Dr. Roger Mitchell, Jr. – Deputy Mayor for Public Safety and Justice

Deputy Mayor Mitchell testified on behalf of the Executive, which is generally supportive of the bills. He specifically expressed support for provisions banning the use of neck restraints, which is consistent with longstanding MPD policy. He also supported the expansion of MPD's Use of Force Review Board to include community members, as well as the addition of topics, including white supremacy, in MPD's continuing education program.

Deputy Mayor Mitchell did flag several provisions that the Executive would like to see the Council modify. Specifically, he requested flexibility on the timeline for releasing MPD body-worn camera footage, as five days may not be enough time to take the additional actions required under the bill, including notifying the family of the footage's impending release or securing their consent in a trauma-informed way. The Executive also disagrees with the proposal to prohibit officers from reviewing their body-worn camera footage in initial report writing. The Executive also encouraged the Council to amend the provision that would remove MPD's representative from the Police Complaints Board. Instead, he believes the MPD representative should become a non-voting member of the Board, as the representative can speak to MPD policy and practice.

B24-0094, B24-0112, and B24-0213

The Committee on the Judiciary and Public Safety and the Committee of the Whole received testimony on behalf of the Executive at their May 20, 2021 joint public hearing on B24-0094, the "Bias in Threat Assessments Evaluation Amendment Act of 2021", B24-0112, the "White Supremacy in Policing Prevention Act of 2021", and B24-0213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021", from Chris Geldart, then-Deputy Mayor for Public Safety and Justice. Deputy Mayor Geldart's testimony is summarized below:

Chris Geldart – Deputy Mayor for Public Safety and Justice

Deputy Mayor Geldart testified in support for some of the provisions in the bills and raised considerations for the Committees on others. In expressing support for the intent of B24-0094, he argued that due to "ill-informed media coverage," contrasts have been drawn between Black Lives Matter protests and the events of January 6, 2021, which "paints all the events and the many responding law enforcement agencies with too broad a brush." Deputy Mayor Geldart asserted that MPD handled the nearly 4,200 First Amendment assemblies over the past four years "safely and peacefully for all those involved." Emphasizing that MPD has no operational or tactical authority to protect U.S. Capitol grounds, he posited that MPD took the necessary and appropriate steps to focus on "the possibility of violence on city streets" and allowed federal law enforcement partners like the U.S. Secret Service, United States Park Police, and U.S. Capitol Police to facilitate responses on federal property. He reiterated his view that "neither this past year [*2021*] nor prior history indicates disparate preparations for First Amendment assemblies" by MPD. Furthermore, he argued that the bill will "unnecessarily divert scarce public safety resources away from the critical work of MPD."

Deputy Mayor Geldart spoke to B24-0112, saying that MPD had already engaged an independent organization, the Police Executive Research Forum ("PERF"), to "conduct a yearlong organizational health assessment to review MPD's policies and practices" across a range of functional, operational, tactical and training areas. He suggested that the PERF review would include a "specific focus on extremism, hate speech, and white supremacy," and asserted that "it is premature and unnecessary to legislate this process at this time." He argued that the bill fails to address how to balance the First Amendment interest sof officers with how best to review and assess social media and other activity with domestic hate groups or white supremacy groups that are not even identified by the U.S. government.

Lastly, Deputy Mayor Geldart argued that B24-0213 "would hinder public safety goals." In positing this view, he pointed to elements of the bill that he claimed while already mirroring current MPD policy, fall short. First, he argued that an "outright ban on discharging a firearm at or from a moving vehicle is too restrictive." In citing current policy, he noted this ban currently exists but allows for circumstances where officers must fire their weapon to prevent a ramming attack like the one that killed Heather Heyer in Charlottesville, Virginia, during an anti-hate demonstration. He went on to say this exception is imperative because it allows officers to act in extreme instances where imminent public harm is threatened and "officer[s] may have no other tool at their disposal than their gun to stop the violent attack." He pointed out other "flaws" in the bill's prohibitions and urged the Committee not to move forward with this bill, but rather consider MPD's current policy, which he asserted is "already very restrictive."

B24-0254 and B24-0356

The Committee on the Judiciary and Public Safety received testimony on behalf of the Executive at its October 21, 2021 public hearing on B24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021", and B24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021", from Robert J. Contee, III, Chief of Police of the Metropolitan Police Department. Chief Contee's testimony is summarized below:

Robert J. Contee III – Chief of Police, Metropolitan Police Department

Chief Contee testified that B24-0356 would "bog the Department down in endless bureaucracy that will prevent the agency from effectively and efficiently serving the city" and "does not protect the privacy interests of everyone who is victimized by crime or chooses to work with the Department." Regarding the bill's proposed creation of a database maintaining officers' personnel records, the Chief noted that "[n]o other public employees are subject to this level of scrutiny." He distinguished lower-level employees working at MPD who should be afforded personal privacy from higher ranking public officials who are appropriately subjected to public protests. He stated that if the goal is to provide the public with information about misconduct by government employees, then the database should apply to all District government employees. The Chief also argued that the bill violates the privacy of complainants, victims, and civilian witnesses by allowing their personal information to be published. Beyond the harm to these individuals' sense of privacy, the bill "may have a chilling effect on individuals coming forward to complain or cooperate."

The Chief next criticized provisions in the bill allowing the Office of Police Complaints ("OPC") to conduct administrative investigations while the criminal investigation into the same incident is ongoing, believing the provision "not only potentially violates the individual's rights, but it also jeopardizes the government's ability to sustain outcomes in either the criminal or administrative matter" due to "inconsistencies in parallel investigations or findings."

The Chief also took issue with the proposed expansion of the Police Complaints Board ("PCB"), noting that the bill "provides for no other qualifications for this group, such as legal, labor, or law enforcement experience or expertise" even though "they are expected to review and

advise on serious uses of force, in-custody deaths, discipline, and almost all police policy and training." Given the approximately 50 non-administrative policies and 100 trainings the PCB would be required to review, he argued that MPD would need additional staff to support the PCB's work. Additionally, subjecting MPD's policies to a 45-day review before they take effect jeopardizes MPD's ability to quickly adjust to public safety needs. The Chief argued that MPD's team of professionals is better suited to developing MPD policies, compared with a part-time PCB

Regarding the proposal that OPC have "unfettered access" to MPD's records and information, the Chief argued that the bill does not provide adequate safeguards to ensure that this access is not misused, and he cited a case in which an OPC employee had allegedly watched body-worn camera footage without adequate justification.

Chief Contee closed with comments on B24-0254. He stated that he would like to work with the Committee to form more specific language to ensure that disclosures under the law would not potentially allow the public to identify an arrested youth. He noted reasons for why identifying school-related law enforcement interactions is "not simply a matter of pulling incidents at school addresses." He also encouraged to the Council to reconsider whether officers need to ask about a student's disabilities.

B24-0515

The Committee received testimony at its March 14, 2022 public hearing on B24-0515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021", from Morgan Kane, Assistant Chief, Technical and Analytical Services Bureau of the Metropolitan Police Department. Chief Kane's testimony is summarized below:

Morgan Kane – Assistant Chief, Technical and Analytical Services Bureau, Metropolitan Police Department

Chief Kane testified in support of B24-0515. She began her testimony by focusing on the value the bill will bring to young residents who participate in MPD's Cadet Program, for the community, and for MPD. She noted that MPD's Cadet Program is where young Washingtonians, ages 17- to 24-years-old, can join MPD and serve part-time as uniformed, civilian employees. Members of the Cadet Corps earn a salary and learn about policing and MPD, while taking college courses, and earn up to 60 tuition-free credits at the University of the District of Columbia Community College. Cadets spend part of their time working specific job assignments for MPD while also working toward a college degree. Cadets can convert to career police status upon successful completion of college credits and acceptance into MPD's Recruit Officer Training Program.

Chief Kane stated that MPD's Cadet Program provides young Washingtonians with access to employment opportunities, secondary education, and a career in public service. She testified that the Cadet Program has become a key strategy for building and maintaining a strong pipeline of officers. She noted that in Fiscal Year 2021, MPD was able to hire the first full recruit class composed entirely of graduates from the Cadet Program. She said that the Cadet Program is a win-win opportunity for the District and MPD. She emphasized that the Program has the added benefit of promoting jobs and educational opportunities for historically underserved populations, noting

that all of the current cadets are Black or Hispanic. She also said the Program represents an important opportunity to recruit more women into law enforcement, with females currently representing about 47 percent of the Cadet Corps. She noted that the Cadet Program has grown from fewer than 20 cadets in 2015 to 150 funded positions in the Fiscal Year 2022 budget.

Chief Kane opined that the bill would create opportunities for other young District residents. Under current law, the Cadet Program is open to senior year high school students and young adults under 25 years of age residing in the District who are graduates of high schools in the District. She testified that the bill would remove the requirement that participants have graduated from a District high school. She reasoned that many individuals may not have graduated from a District high school, as currently required, but may have attended elementary, middle school, and some high school in the District. These individuals may have, in fact, spent more time in the District than someone who graduated from a District high school. She also reasoned that many of these young adults have spent significant time attending school, working, attending a place of worship, engaging in community service programs, and developing relationships throughout the District. She testified that these individuals can benefit from the Cadet Program and give back to the District.

Chief Kane testified that while the bill expands opportunities for more young adults, MPD will still give preference to District high school graduates who apply for the Cadet Program. However, she noted that qualified candidates who are young adults living in and connected to the District will not be automatically disqualified because they did not graduate from a District high school. She stated that as of March 2022, there were 95 cadets in the recruiting pipeline.

In response to questioning by Chairperson Allen about the intent of the legislation, Chief Kane said that the intent is to capture young Washingtonians who have a significant connection to the District but who may have graduated from a high school in Maryland or Virginia. Chairperson Allen asked whether removing the District graduation high school requirement would allow an individual who graduated in Alaska and who has very little connection to the District to qualify for the Cadet Program. Chief Kane responded by saying that the intent of the legislation is not to allow an individual in such circumstances to qualify for the Cadet Program.

ADVISORY NEIGHBORHOOD COMMISSION COMMENTS

The Committee received the following testimony or comments from Advisory Neighborhood Commissions:

B23-0771 and B23-0882

Salim Adofo – Commissioner, ANC 8C07

Commissioner Adofo testified about the historical origins of policing and its link with the preservation of slavery in the American South. He proposed ways to strengthen *Miranda* warnings for minors, including the opportunity to confer with an attorney before making statements. He criticized MPD's use of jump out tactics, describing it as "[t]he most callous example of stop-and-frisk in the District." He asked that the Council disband existing paramilitary units within MPD

and require that all officers work in full uniform and marked police cars unless involved in a targeted undercover operation. He also recommended prohibiting officers from demanding to see a person's waistband without probable cause, to suppress all evidence seized as a result of stop-and-frisk practices, and to disallow certain factors from being used to determine probable cause, including presence in a high-crime neighborhood. Turning to the topic of special police officers, Commissioner Adofo recommended that the Council disarm special police officers, increase the training required to become a special police officer, and prohibit special police officers from pursuing individuals beyond property boundaries. He also urged the Council to pass legislation reforming special police officer laws.

B24-0094, B24-0112, and B24-0213

Trupti Patel – Commissioner, ANC 2A03

Commissioner Patel testified in support of the legislation, noting her allyship with the African American community as the District's first Indian American Commissioner. She commented on the racist beginnings and legacy of policing in the United States and how law enforcement in our country has only perpetuated a cycle of systemic racism that continues to disadvantage vulnerable communities. Focusing on the criminalization of poverty, Commissioner Patel noted the need to shift the focus from overreliance on police and focus on providing community-based solutions. As a person of color, she referenced her own negative and potentially grave encounter with police, which was so egregious, it prompted her to contact the Chief of Police personally. Commissioner Patel expressed support for the legislation and urged swift action to change what policing means in the District.

Robin Nunn – Commissioner, ANC 2B03

Commissioner Nunn testified in favor of the Police Reform Commission's recommendations. She noted that ANC 2B passed a resolution broadly supporting public safety reforms, and she spoke to the misuse of government resources around responses to mental and behavioral health crises, school policing, and traffic enforcement by MPD. She urged reinvestment of funding to support community-led efforts to address many of these issues.

Mo Pasternak – Commissioner, ANC 2B04

Commissioner Pasternak testified in broad support of the Police Reform Commission's recommendations. Specifically, he addressed the shift of responsibilities for traffic enforcement from MPD to the District Department of Transportation, emphasizing this as an example of how police shouldn't be the default for all instances of making communities safer. He spoke to the impetus for many of these reforms, arguing that systemic racism and bias have long perpetuated a system that disproportionately impacts Black and brown residents. Commissioner Pasternak urged action to adopt the Police Reform Commission's recommendations and use the budget to reflect the seriousness of the priorities outlined in those recommendations.

Alexandra Bailey – Commissioner, ANC 2F08

Commissioner Bailey testified in support of the Police Reform Commission's recommendations. She spoke about the need for reforms and necessary action to make the change required to transform the system. She asserted that absent change, we effectively ask residents of color to live in violence every day because of police violence and misconduct.

Chuck Elkins – Commissioner, ANC 3D01

Commissioner Elkins testified in support of the legislation on behalf of ANC 3D. Namely, he suggested that the District transform its mental health crisis response, diverting responsibility away from MPD to trained mental health professionals with experience intervening in crises. He argued that numerous organizations specializing in mental health care agree on this issue but are not ready to assume this responsibility because of underfunding and understaffing, which he urged action to address, including continuing pilot experiment programs to explore these response units and devoting more resources to social services. Additionally, he agreed with transferring traffic violation enforcement in instances where public safety is not imminently threatened from MPD to the District Department of Transportation. He suggested that the District should develop a way to enforce traffic laws without needing to physically stop a vehicle, like photographing or videoing the violation and sending a notice of the violation, as is currently done for parking tickets, while allowing time for an infraction (like a broken taillight) to be remedied so a notice can be vacated.

Zach Israel – Commissioner, ANC 4D04

Commissioner Israel testified in support of the legislation, focusing on provisions prohibiting vehicular pursuits by MPD officers with a few exceptions. Citing the death of Karon Hylton-Brown following a vehicular pursuit by MPD in October 2020, he urged support for the Police Reform Commission's recommendations transferring authority from MPD enforcing traffic violations that do not threaten public safety to the District Department of Transportation.

Robert Brannum – Commissioner, ANC 5E08

Commissioner Brannum testified in broad support of the Police Reform Commission's recommendations and B24-0112. He spoke powerfully about the need to eradicate bigotry, racism, and white supremacy from MPD and throughout government and society. He urged that the District recognize white supremacists in law enforcement to ensure all residents can feel protected and look to other government areas to ensure residents are not discriminated against.

B24-0254 and B24-0356

The Committee did not receive testimony or comments from Advisory Neighborhood Commissions.

B24-0515

The Committee did not receive testimony or comments from Advisory Neighborhood Commissions.

WITNESS LIST AND HEARING RECORD

B23-0771 and B23-0882

On Thursday, October 15, 2020, the Committee on the Judiciary and Public Safety held a public hearing on B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020". A video recording of the public hearing can be viewed at https://entertainment.dc.gov/page/demand-2020-a. The following witnesses testified at the hearing or submitted statements to the Committee outside of the hearing:

Public Witnesses

Monica Hopkins – Executive Director, American Civil Liberties Union of the District of Columbia

Ms. Hopkins focused on three key areas of reform. She first discussed placing limitations on existing police powers that regularly violate residents' rights. She recommended banning the use of *Terry* stops, no-knock warrants, "jump outs," and any restraint that could cause asphyxiation or death (e.g., placing a knee on an individual's back). She also argued for including a standard for the use of non-deadly force to accompany the bill's standard for the use of deadly force. Additionally, she recommended that the Council ban District law enforcement from using military weapons and harmful surveillance tools.

Ms. Hopkins next discussed ways the Council can strengthen transparency, oversight, and accountability measures to ensure proper implementation of police reforms. She requested that the Council improve access to body-worn camera footage and public records. She specifically asked that the Council require the disclosure of body-worn camera footage for all officers on the scene of an officer-involved death or serious use of force. She also argued for reassigning the responsibility of disciplining officers to an entity other than MPD. She proposed language that would strengthen the bill's limitations on the use of consent searches, including an outright ban on conducting consent searches of youth. She also asked the Council to end qualified immunity and qualified privilege and, relatedly, create a private cause of action for violations of the First Amendment Assemblies Act.

Finally, to decenter policing, she recommended removing police officers from schools, limiting the role of police in traffic enforcement, and creating a non-police response to crises. She also asked that the Council expand violence intervention programming and revise the District's criminal code to decriminalize minor offenses.

Ruth Lindberg – Manager, Health Impact Project, Pew Charitable Trusts

Ms. Lindberg provided the Committee with a "health note" for B23-0882. A health note "is a brief, objective, and nonpartisan summary of how proposed legislation could affect health." She noted that people of color suffer from an increased risk of being killed by police compared to their white counterparts. She noted that 90% of all uses of force by MPD officers in 2018 involved

a Black subject. She also explained that MPD's use of chemical and projectile weapons can lead to significant injuries and even death, and that B23-0882's provisions limiting the use of projectiles or chemical irritants can reduce the risk of those negative health outcomes. Finally, she explained that adopting strict policies on the use of force "tends to reduce police officers' use of physical coercion." Such policies could help prevent physical confrontations between officers and community members and, therefore, decrease the risk of injury.

Premal Dharia – Public Witness

Ms. Dharia's testimony was based on her experiences as a public defender and civil rights attorney. She urged the Council to pass B23-0882, which includes "common-sense" criminal justice reforms. She highlighted the bill's expansion of the right to a jury trial, establishing use of force standards, and banning the use of surveillance tools. While she is supportive of the provision that makes discipline non-negotiable during collective bargaining, she is skeptical about leaving discipline in MPD's discretion.

Thomas Susman – President, D.C. Open Government Coalition

Mr. Susman testified in support of the provisions in B23-0882 that require the Mayor to release body-worn camera footage of an officer-involved involved death or serious use of force within five business days after the incident. He recommended that the Committee expand this provision to require the release of body-worn camera footage for every officer on scene. He argued against provisions in the bill that would amount to a "victim's veto," stating that the public's interest in viewing body-worn camera footage is not diminished because a bereaved family has watched the footage. He also asked that the Committee define the kinds of personal privacy interests that would warrant redactions and include cost-reduction provisions to limit the fees for obtaining body-worn camera footage.

Mana Azarmi – Policy Counsel, Center for Democracy and Technology

Ms. Azarmi expressed support for legislation that would limit MPD's use of surveillance technologies. She decried MPD's use of facial recognition technology and expressed concern that nothing requires MPD to seek Council approval before acquiring surveillance or predicting policing technology. She encouraged the Council to adopt model legislation proposed by the Community Oversight of Surveillance Coalition. This legislation would allow meaningful public input before government agencies acquire surveillance technology, improving community trust and transparency.

Grayson Clary – Stanton National Security Fellow, Reporters' Committee for Freedom of the Press

Mr. Clary noted that the right to document government activity is protected by the First Amendment. He argued that the indiscriminate use of riot-control tactics and the excessive use of force undermine individuals' ability to exercise that right safely. He recounted specific cases where police attacked clearly identified journalists in the District. He explained that while the emergency legislation that formed the basis for B23-0082 restricted the use of chemical irritants and less-than-

lethal munitions at First Amendment assemblies, MPD "appears to interpret that language to permit their use *during* a protected assembly so long as the officers' specific intent is not to disperse protected activity." That interpretation fails to provide reporters and protesters with the protection the Council intended. He argued that the Council should make clear that the use of chemical irritants or less-than-lethal munitions is prohibited when the effect – not the intent – would be to disperse those engaged in protected activity.

Jonathan Blanks -- Visiting Fellow in Criminal Justice, Foundation for Research on Equal Opportunity

Mr. Blanks noted that while he believes MPD to be "among the most professional and least corrupt major city police departments" in the country, the "state of American policing is in terrible shape." He believes that the reforms in B23-0882 would make the District safer and improve the accountability and transparency of MPD. He noted that even non-violent police encounters can weaken community trust in policing. He explained how specialized units' aggressive tactics undermine the police's legitimacy and, when held to be unconstitutional, compromise prosecutions. He echoed demands that the legislation be amended to completely ban – not just limit – the use of consent searches. He also recommended that officers in the Narcotics and Special Investigations Division be reassigned to patrol "hot spots" in the District rather than engage in dragnet policing tactics.

Akhi Johnson – Deputy Director, Vera Institute of Justice

Mr. Johnson noted the racial disparities in the District's criminal justice system. He encouraged the Council to prohibit pretextual stops, "where someone is detained for a minor infraction while police seek evidence of a more serious crime." He recounted a study that found that Black and Latinx drivers are more likely to be stopped and searched despite not being more likely to carry contraband. He believes police should focus on motor vehicle and traffic offenses that impact public safety – such as driving under the influence – instead of technical offenses such as window tint violations. He submitted proposed legislation to the Committee that would ban the use of pretextual stops.

Yvette Alexander – Public Policy Chair, Metropolitan Washington D.C. Chapter, Coalition of 100 Black Women

Ms. Alexander testified in support of B23-0882. She believes it is a significant step in reforming policing in the District. Her organization focuses on ensuring that Black women and girls are treated fairly by the District's criminal justice system. She recounted issues regarding the overpolicing of Black girls in schools. She expressed support for new provisions that would ban the use of no-knock warrants. She also recommended reallocating portions of MPD's budget to rebuild communities, though she does not support complete abolition of MPD. She proposed expanding the membership of the Police Reform Commission to include more organizations representing Black people beyond Black Lives Matter.

James Berry – Chair, MPD Citizens' Advisory Council

Mr. Berry testified in support of the general intent of establishing more equitable policing in the District. He praised police officers for being dedicated public servants and noted the difficulties police officers face, especially during the public health emergency. He urged the Council to collaborate with MPD, the Mayor, and the community to craft legislation that rebuild trust between MPD and the public while improving public safety in the District.

Robert Pittman – Chair, 1st District Police Citizens' Advisory Council

Mr. Pittman acknowledged that some members of MPD fail to live up to the community's expectations and the harm that can result from negative police encounters. However, Mr. Pittman also stressed the need for public safety in the District and believes police officers are instrumental in promoting public safety. He expressed support for allowing school resource officers to remain in schools. He also opposed the proposed legislation's repeal of the District's anti-mask law, noting several court cases in which such laws have been upheld.

Brenda Lee Richardson – Public Witness

Ms. Richardson emphasized that for B23-0882 to be successful, it must be a collaborative process between MPD and members of the community. She stressed the importance of hosting events where police officers and community members can interact with one another in positive ways. She noted that the trauma and exhaustion that can result from living in a marginalized community. In her experience, police have been guardians that have kept her safe. She is anxious about how a potential reduction in the police force would negatively impact public safety in her community.

Georgine Wallace – Community Facilitator, PSA 103/105

Ms. Wallace recommended amending B23-0882 to avoid banning outright the use of chemical irritants at a First Amendment assembly, as it limits the non-lethal tools available to police. Instead, she suggested reassigning the responsibility of deploying canisters to a higher-ranking member of MPD. She also expressed concern regarding provisions in the bill that would prevent officers from reviewing body-worn camera footage prior to drafting their initial report. She believes this will result in less accurate reporting and may undermine prosecutions. She praised the bill for expanding the Police Complaints Board's ("PCB") membership to include representatives from each Ward of the District, but she suggested maintaining at least one representative from MPD on the PCB, even if in a non-voting capacity. She also encouraged the Police Reform Commission to become more familiar with existing MPD policies. She suggested having commissioners go on a ride-along or a tour of the Police Academy.

Gregg Pemberton – Chair, D.C. Police Union

Mr. Pemberton noted that of MPD's more than 3,600 sworn officers, 66% are minorities. While he supports discussions around police reform, he believes the Council's actions are driven by anecdote, not empirical data and research. If approved, he believes B23-0882 will result in increased crime and decreased hiring and retention of officers. He expressed opposition to the bill's provision that would remove disciplinary matters as an issue that can be negotiated during

the bargaining process. He also objected to the bill's proposal to require the release of the names and body-worn camera footage of officers involved in a death or serious use of force. He opposes prohibiting officers from reviewing their body-worn camera footage prior to writing their initial report. Finally, he opposes the proposed extension of the timeline for taking corrective action against an officer from 90 to 180 days, noting the legislative history of the current 90-day limit.

Patrick Burke – Executive Director, D.C. Police Foundation

Mr. Burke criticized the legislation for not including MPD members on the Police Reform Commission and for removing an MPD representative from the PCB. He recommended including at least one non-voting member on the PCB. Finally, Mr. Burke also took issue with restrictions on deploying officers in riot gear.

Mara Verheyden-Hilliard – Executive Director, Partnership for Civil Justice Fund

Ms. Hilliard's organization has represented protesters, journalists, passers-by, and legal observers that have been subjected to arrests and uses of force while exercising, or being near others exercising, their constitutional rights. She supports B23-0882 and B23-0771's restrictions on the acquisition and use of military weapons. She urged the Council to impose greater oversight over MPD's acquisition of surveillance technology by requiring review by the public and Council. She also supports the bill's prohibition on the use of chemical irritants, noting that many less-than-lethal munitions are indiscriminate in effect and violate the First and Fourth Amendments when used in the context of mass assemblies. She urged the Council to more broadly ban the use of all weapons of indiscriminate nature, including stinger grenades and other projectile weapons. She asked that the Council create an independent review body that determines if the release of body-worn camera footage or other public information is justified, arguing that MPD, the Mayor, and OAG have conflicts in disclosing this information. She endorsed provisions in B23-0883 creating procedural safeguards on the use of consent searches. To strengthen police accountability in the wake of misconduct, she proposed creating an independent civilian review body responsible for disciplining officers. Finally, she urged the Council to end qualified immunity and create a private right of action for constitutional violations.

Nick Robinson – Legal Advisor, International Center for Not-for-Profit Law

Mr. Robinson urged the Council to adopt more robust restrictions on the use of less lethal weapons than contained in B23-0882 as introduced. He argued that MPD could avoid the proposed prohibitions on the use of less lethal munitions by declaring an assembly unlawful and then using those munitions against protesters. Instead, he suggested that the Council issue a blanket ban on using the most dangerous forms of less lethal munitions – such as kinetic impact projectile weapons – as a form of crowd control. For the munitions that are not subject to this blanket ban, Mr. Robinson argued for the need for very specific conditions under which they can be used (e.g., preventing actual physical violence). He also argued for more public reporting in cases when these weapons are used, including why de-escalation strategies were not effective. If these restrictions are violated, the officer should be disciplined, and those injured by the offense should be able to receive compensation. Finally, Mr. Robinson supports the proposed repeal of the District's anti-face mask law.

Patrice Sulton – Executive Director, D.C. Justice Lab

Ms. Sulton urged the Council to pass the bill swiftly. She also discussed resources her organization has developed regarding additional policing and criminal justice reforms.

Beverly Smith – Volunteer, D.C. Justice Lab

While Ms. Smith supported the restrictions placed on the use of force in B23-0882 as introduced, she argued that the bill is not comprehensive enough. She recounted the incident where her son, Alonzo Smith, was killed after a special police officer held his knee against Mr. Smith's back for a prolonged period. She shared cases across the country where individuals were killed due to the use of restraints that the legislation does not ban. She urged the Council to restrict special police officers from carrying firearms, to increase the training requirements for special police officers, to pass the Special Police Officer Modernization Amendment Act of 2020, and to prohibit special police officers from pursuing suspects beyond the boundaries of the properties to which the special police officer is assigned.

Virginia Spatz – Volunteer, D.C. Justice Lab

Ms. Spatz testified about the disparate treatment community members receive from police based on their race, ethnicity, and where they reside in the District. For example, she noted that First District residents, who are predominately white, were treated as clients. In contrast, Fifth District residents, who are predominately Black, were treated as inevitable victims of crime or potential criminals. She also recounted an experience where a neighbor called police on a Black guest she was hosting. Based on these experiences, she believes that "effective police reform must address structural inequities across neighborhoods and demographics." Additionally, she urged the Council to ban jump-outs, limit the use of search warrants, require age-appropriate *Miranda* warnings for youth, and eliminate consent searches. She also supports prohibiting the use of military training, tactics, and surveillance tools. Finally, she recommended disarming special police and creating a more robust system for resolving civilian complaints against special police officers.

Diontre Davis – Volunteer, D.C. Justice Lab

Mr. Davis criticized MPD's continued use of jump-out tactics, where officers "drive around in unmarked cars, without their uniforms, and 'jump out' on African American citizens, telling them to show their waistbands." He stated that these tactics are most often employed by the Gun Recovery Unit and primarily take place in Wards 7 and 8. He supports the Council's attempts to prohibit jump-outs, but he noted that MPD still uses the tactic. Mr. Davis also encouraged the Council to adopt a complete ban on consent searches unless the subject first has an opportunity to speak with a lawyer. He argued that Black subjects may fear retaliation for seeming uncooperative if they fail to consent to a search. A more complete ban on consent searches would ensure that consent is given knowingly, intelligently, and voluntarily.

Sabrin Quadi – Volunteer, D.C. Justice Lab

Ms. Quadi testified criticized the use of "no-knock" search warrants, and she recommended a total ban on the practice. She recommended that the Council adopt a more robust probable cause standard for requesting search warrants and completely eliminate the use of search warrants in cases of suspected drug activity. She also recommended a ban on officers, absent a warrant, handcuffing, pointing guns at, or conducting bodily searches of individuals. Finally, she recommended that the Council compensate victims for property damage and unnecessary violence caused by MPD.

Jordan Crunkleton – Volunteer, D.C. Justice Lab

Ms. Crunkleton encouraged the Council to pass B23-0882. She recounted the murder of George Floyd and the movement against institutionalized racism in policing that his death ignited nationwide. She believes the ban on neck restraints and the restrictions on the use of deadly force will prevent unnecessary deaths. She spoke at length against MPD's use of jump-outs and recounted statistics revealing how police interactions disproportionately affect people of color.

Emily Friedman – Volunteer, D.C. Justice Lab

Ms. Friedman encouraged the Council to pass B23-0882. She asked that the bill go further by specifying that jump-outs are prohibited and evidence seized through jump-outs be suppressed.

Katrina Jackson – Volunteer, D.C. Justice Lab

Ms. Jackson expressed support for B23-0882. She recommended that the bill include a provision that requires that youth have an opportunity to consult an attorney prior to waiving their *Miranda* rights. She discussed studies revealing understanding one's *Miranda* rights requires a college level education and that, accordingly, many youth do not fully understand their rights. She also explained the power imbalance between youth of color and officers, and how that dynamic may dissuade youth from invoking their right to remain silent.

Alexis Mayer – Volunteer, D.C. Justice Lab

Ms. Mayer asked that B23-0882 include provisions creating a more mature *Miranda* policy for children. She noted that only one in five children understand their *Miranda* rights. Given their limited understanding, the *Miranda* doctrine does not adequately protect them from coercive police questioning.

Victoria McCullough – Volunteer, D.C. Justice Lab

Ms. McCullough encouraged the Council to include provisions in the bill that would limit the use of invasive searches, including searches of undergarments or body cavities. She argued that these searches – if necessary – should be conducted by medical professionals. Additionally, these kinds of invasive searches should never be part of a routine booking procedure.

Marlene Aiyejinmi – Volunteer, D.C. Justice Lab

Ms. Aiyejinmi testified about her own experiences being harassed by police. She encouraged the Council to adopt legislation that would reform policing and ensure the safety of District residents.

Cynthia Lee – Edward F. Howrey Professor of Law, The George Washington University Law School

Professor Lee testified about the use of deadly force model language included in the bill, which was based on a model statute she proposed in a 2018 law review article. She noted that until the District enacted the emergency legislation during the summer, it was one of only ten jurisdictions without a use of force statute. However, the District was the first jurisdiction to require that both the beliefs and the actions of the officer be reasonable. It was also the first to require that a factfinder consider whether an officer engage in de-escalation tactics before resorting to deadly force and whether the officer's conduct increased the risk of deadly confrontation. Since the District passed the emergency legislation, Connecticut has adopted a statute containing these three key provisions. She also explained why her model statute does not require absolute necessity. She stated that no other jurisdiction's use of force statute includes a requirement of absolute necessity. In closing, Professor Lee proposed various amendments to strengthen the bill.

Jestelle Hanrahan – Public Witness

Ms. Hanrahan recounted the death of her partner's brother, Kyle, who was killed by police during a mental health crisis. She believes that the standards for the use of force B23-0882 would not prevent officers from doing their job, but they would prevent the needless death of individuals like Kyle.

Rachel Gale – Public Witness

Ms. Gale encouraged the Council to preserve provisions in B23-0882 that would place limits on law enforcement officers' use of deadly force. In her research into the issue of deadly force, she learned about de-escalation techniques that can help prevent the need to use force. The limitations would not unreasonably impede policing, but they will help prevent deadly encounters with police.

Jonathan Carter – Public Witness

Mr. Carter testified in support of the bill. While he acknowledged that there are situations in which the use of deadly force is justified, he underscored the need for placing limits on when such force should be used.

Steve Boughton – Public Witness

Mr. Boughton testified in support of the use of force provisions in B23-0882. He stated that the bill places humanity at the center of policing by making the use of deadly force a tool of

last resort. The bill would also help provide greater accountability in cases where life is taken during police encounters.

Lane Kauder – Public Witness

Mr. Kauder testified in support of B23-0882. He argued that the bill is in the best interest of both the public and police officers because it provides clear guidelines to prevent police misconduct without increasing the risk an officer is the target of unjustified charges.

Josephine Ross – Professor of Law, Howard University School of Law

Professor Ross encouraged the Council to amend B23-0882 to completely ban consent searches. She noted that the notion of "consent" in the context of a search is a legal fiction, and she argued that it leads to racial profiling.

Kaylah Alexander – Public Witness

Ms. Alexander noted the ways in which consent searches can disproportionally affect Black residents. She stated that in the context of consent searches, Black people are more likely to be asked for, and provide, their consent. She asked that the Council incorporate language into the bill that would dramatically change how police conduct consent searches.

Leah Wilson – Public Witness

Ms. Wilson commended the Council for taking steps to place limits on the use of consent searches. While B23-0882, as introduced, creates a *Miranda*-style warning before an officer can conduct a consent search, Ms. Wilson discussed research that shows that *Miranda* warnings are not particularly effective. Accordingly, the warnings provided in the bill may not sufficiently protect individuals from potential consent searches.

Qubilah Huddleston – Education Policy Analyst, D.C. Fiscal Policy Institute

Ms. Huddleston suggested that B23-0882 be amended to include the elimination of MPD's School Safety Division and to divert funds from that division into mental health and other school-based alternatives that support positive student behavior and healthy school climates. She argued that police presence in school is especially harmful to Black students and students with disabilities, noting that 92% of school-based arrests were of Black students and 31% were of students with disabilities. She discussed the historical link between police forces and slave patrols, "organizations of white men paid to capture Black people who fled from enslavement and who used terror and corporal punishment to deter revolt and maintain order and discipline on plantations." Rather than being surveilled and policed, she believes Black students need empathy and resources that will promote their safety and healing.

Makia Green – Organizer, D.C. Working Families Party

Mx. Green testified in support of the legislation, but they identified provisions of B23-0882 that could be strengthened. They asked the Council to completely ban jump-outs, disband paramilitary units, and limit the use of unmarked cars. They suggested that the authority to discipline officers for misconduct be reassigned to another agency and that OPC's jurisdiction be expanded. They also encouraged the Council to enact a complete ban on the use of tear gas.

Dawn Dalton – Deputy Director, D.C. Coalition Against Domestic Violence

Ms. Dalton testified that "Black and Brown survivors of domestic violence have consistently reported a hesitancy to contact law enforcement and other systems, even at the expense of their own safety." She noted the dilemma that survivors of color face when they are "forced to depend on systems that have historically mistreated victims," "minimized the harm they experience, or "branded them as angry or hostile." She recommended that the Committee ensure that survivors understand their rights under the revised provisions governing the release of body-worn camera footage. She also asked stated that "survivors should be informed regarding any OPC investigations and should not be forced or coerced to participate in investigations." She expressed concern that MPD has violated the requirement to provide interpretation services when requesting to perform a consent search and asked for additional oversight on this subject. She also requested that B23-0882 preclude an individual convicted of an intrafamily offense or comparable domestic violence offense from serving as a sworn officer. She echoed demands for removing police from schools and divesting from paramilitary-style equipment and tactics. She also recommended eliminating the requirement that survivors must report crimes to law enforcement to qualify for financial and housing resources.

April Goggans – Core Organizer, Black Lives Matter D.C.

Ms. Goggans described Black Lives Matter D.C. as an abolitionist organization that centers Black people most at risk for state violence. Ms. Goggans recounted several incidents where she and others experienced violence but did not receive assistance from police officers. She criticized the Mayor and Chief Newsham for their rhetoric regarding "repeat violent offenders", despite not working proactively to hold perpetrators of police violence accountable. She argued that the police union insulates police officers from being held accountable following instances of misconduct. She criticized the Council for not taking more serious action to promote police accountability.

Elisabeth Olds – SAVRAA Independent Expert Consultant

Ms. Olds explained that her role as the SAVRAA Independent Expert Consultant is to ensure that the hard-won rights provided under the Sexual Assault Victims' Rights Amendment Act of 2014 ("SAVRAA 1.0") are fully implemented by MPD. She argued that survivors need a "robust menu of options and supports separate from police to help them achieve safety and redress." When survivors do seek assistance from law enforcement, responding officers should be professional and empathetic while providing a thorough investigations. She explained that SAVRAA 1.0 and the Sexual Assault Victims' Rights Amendment Act of 2019 ("SAVRAA 2.0")

provided new rights to survivors and are examples of a successful co-response model. In her evaluation of 350 cases after the passage of SAVRAA 1.0, MPD's Sexual Assault Unit had significantly improved how it operates. However, these reforms are only sustainable if there is supporting infrastructure, including iterative training. When reallocating resources away from MPD, the Committee should preserve budgets related to critical training. But she still underscored the need for improving the availability of non-police responses to emergencies, such as behavioral health responders.

Gavin Nelson – Public Witness

Mr. Nelson testified based on his current role as an MPD officer. He criticized a provision in the bill that would prohibit an officer from reviewing body-worn camera footage when writing their initial report. He summarized studies regarding the limitations of human memory, and he argued that reviewing footage is the best way for officers to write accurate and complete reports. He expressed concern that discrepancies between the video and the police report could create the impression that an officer was dishonest. Alternatively, officers may begin writing generic reports that undermine the investigation and prosecution of the offense.

Samantha Davis – Executive Director, Black Swan Academy

Ms. Davis argued that the Council should amend B23-0882 to include the elimination of MPD's School Safety Division and redirect those funds to harm reduction and violence prevention programming. She argued that the District government responds to adolescent behavior in Black schools with police, but that same behavior in white schools is met with more resources for students. She noted that predominately Black schools are three times more likely than predominately white schools to have security staff than mental health personnel. She also highlighted that even in the midst of a pandemic, there were still seventy school-based arrests in the past school year. She stated that the pandemic, coupled with the viral videos of police killing Black people, have significant negative impacts on students' cognition. In addition to the elimination of the School Safety Division, she also requested that the Council prohibit police officers from carrying weapons when called to campus, disarm special police officers, prohibit officers from making arrests on school grounds, reform consent searches and the *Miranda* warnings for youth, and create a non-police crisis response system.

Eduardo Ferrer – Policy Director, Georgetown Juvenile Justice Clinic

Mr. Ferrer commended the components of the bill, but he lamented that it "does not propose any reforms specific to the manner in which youth are policed in the District." He urged the Committee to amend the bill to create a *Miranda* policy that grants youth the right to consult with an attorney prior to waiving their right to remain silent. He also asked that the Committee completely ban the use of consent searches against youth. He joined others in calling for the elimination of MPD's School Safety Division.

Dr. Ranit Mishori – Senior Medical Advisor, Physicians for Human Rights

Dr. Mishori explained some of the injuries that can occur through use of kinetic impact projectiles. She also spoke about the effects of chemical irritants, including damage to the eyes, oral lining, gastrointestinal lining, and lungs, as well as cardiovascular stress. She underscored that chemical irritants are indiscriminate in their effect, which makes them especially problematic.

Michael Payne -- Interim Advocacy Director, Physicians for Human Rights

Dr. Payne echoed the Dr. Mishori's concerns regarding the use of chemical irritants and kinetic impact projectiles. He encouraged the Council to prohibit their use except as a last resort and only in cases where their use meets the test of minimized, targeted, and proportionate force.

Lauren Spokane – Board Member, Jews United for Justice ("JUFJ")

Ms. Spokane testified that Jews United for Justice supports the recommendations of the ACLU-D.C., Black Lives Matter D.C., D.C. Justice Lab, D.C. Working Families Party, Defender Impact Initiative, HIPS, Metro D.C. DSA and others. She encouraged the Committee to strengthen B23-0882 to eliminate stop-and-frisks and ban the use of no-knock search warrants, military weapons, and harmful surveillance methods.

Sarah Novick – D.C. Senior Organizer, Jews United for Justice

Ms. Novick specifically noted her support for provisions in B23-0882 that would prohibit the use of neck restraints, expand the role and authority of the Office of Police Complaints, increase the membership of the Police Complaints Board while removing law enforcement representation, and enfranchising District residents with felony convictions. She further urged that the Council ban stop-and-frisk practices, the use of no-knock warrants, the use of military-style weapons, and end both qualified immunity and qualified privilege for officers. She requested greater public access to body-worn camera footage and a more robust, independent disciplinary system for officers. Ms. Novick joined Black Swan Academy in advocating to remove police from schools. She joined others in calling for the Council to create a non-police response to crises.

Logan Bayroff – Member, Jews United for Justice

Mr. Bayroff urged that the Council do everything in its power to protect residents, hold the police accountable, and take immediate steps to curtail the police's most dangerous practices. He encouraged the Council to defund MPD and implement the recommendations of Black Lives Matter D.C. While he testified in support of the bills before the Committee, he argued that the Council should go further and more explicitly ban stop-and-frisk, jump-outs, no-knock warrants, neck restraints, police interrogations of minors, invasive searches, and the use of military weapons and surveillance technology. He characterized these practices as indicative of a police state and occupying force, not the tools of a safe, democratic city in which citizens have equal rights.

Alana Eicher – Member, Jews United for Justice

Ms. Eichner urged the Council to take decisive action to hold officers accountable, improve the transparency of MPD, divest from policing, and re-invest in community-based solutions. She asked that B23-0882 be amended to change MPD's approach to gun recoveries, arguing that the current strategy escalates violence in Black communities and is ineffectual. She also urged the Council to adopt the Black Swan Academy's proposal to remove police officers from schools.

Rebecca Ennen – Member, Jews United for Justice

Ms. Ennen testified about the disparate treatment that Black residents receive from police. She supported the recommendations of other advocacy groups.

Hannah Weilbacher – Members, Jews United for Justice

Ms. Weilbacher testified in support of the bills, but she encouraged the Council to go further. She requested that B23-0882 be amended to ban the use of no-knock warrants and jump-outs. She urged the Council to do everything in its power to promote police accountability and transparency, and to divest from MPD. She echoed the demands of Stop Police Terror Project, the Black Swan Academy, and the other advocacy groups demanding divestment from MPD and investment in resources that address the root causes of crime. She also joined others in requesting that the Council remove police from schools.

Marques Banks – Equal Justice Works Fellow, Washington Lawyers' Committee for Civil Rights and Urban Affairs

Mr. Banks testified on behalf of the Washington Lawyers' Committee in support of B23-0882. He did, however, discuss several provisions that he would like to see strengthened. He stated that MPD has failed to adequately notify a subject's family members about their ability to view body-worn camera footage under the emergency law currently in effect, and he proposed a more detailed process for notifying next of kin. He also encouraged the Council to completely ban consent searches, noting the inherently coercive power dynamics between police and potential search subjects. Mr. Banks also recommended strengthening the proposed implicit bias training for police by engaging "people and organizations from impacted communities in the development and delivery of the training to officers, including people of color, people living in poverty, youth, LGBT persons, persons with disabilities, returning citizens, non- and limited English speakers, and others." He recommended strengthening the provisions regarding the deadly use of force by requiring that an officer attempt de-escalation before resorting to deadly force. He also believes the provision should be expanded to cover all uses of force. He suggested amending the provisions restricting the use of riot gear by requiring that the Deputy Mayor for Public Safety and Justice, the Chairman of the Council, and the Chairperson of the Council's Committee on the Judiciary and Public Safety be notified of any deployment, and including a definition of "riot gear." Finally, he agreed with proposal to remove police from schools.

Yasmin Vafa – Co-Founder & Executive Director, Rights4Girls
Rebecca Burney – Attorney & Youth Advocacy Coordinator, Rights4Girls

Ms. Vafa and Ms. Burney summarized some of the major findings of Rights4Girls' 2018 report, *Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System*. They noted that arrests of girls in the District have increased 87% over the past decade, that 97% of girls committed to the Department of Youth Rehabilitation Services are Black, that 86% of arrests of girls in D.C. are for non-violent, non-weapons offenses, and that 60% of girls arrested in the District are under 15 years of age. They recommended several amendments to the bill that would more directly address the policing of youth in the District. First, they recommended that the additional training requirements for police officers include continuing education on gender bias, trafficking, youth development, and trauma. Second, they recommended that the Council eliminate MPD's School Safety Division and reallocate funding to more holistic approaches to school safety. Finally, they urged the Council to create a more mature *Miranda* policy that includes the right to confer with an attorney before waiving the right to remain silent.

Samuel Bonar – Co-Director, Delicious Democracy

Mr. Bonar characterized the bill as an "antibiotic" strategy in which we are trying to eliminate harmful police practices. But he underscored the additional need for a "probiotic" menu of options, in which the District provides communities with robust non-law enforcement responses to certain emergencies. In addition to better supporting residents, the availability of non-police responses will help alleviate pressures on police.

Brianna McGowan – Chief Technology Officer, Delicious Democracy

Ms. McGowan noted that many other witnesses testified that police do not keep people safe. She testified in support of viable police alternatives, such as the co-response model employed by organizations such as CAHOOTS.

Harlan Yu – Executive Director, Upturn

Mr. Yu testified about his opposition to MPD and other District agencies' "rampant use of surveillance technologies." He urged the Committee to amend Subtitle F in B23-0882 to ban all consent searches or to at least ban consent searches of mobile phones. He explained "that many police departments often rely on people's consent as the legal basis to search cellphones – instead of a warrant." He argued that consent searches are a "legal fiction" given the inherent coercive nature of an officer's request. He also noted that people of color – especially African Americans – fear retaliation in response to lawfully refusing to grant consent. Mr. Yu stated that "someone consenting to a search of their phone likely doesn't even have a rough idea of what's really about to happen to their phone." Finally, he explained that there are few limitations on what law enforcement can do with the data extracted from phones.

Rebecca Shaefer – Legal Director, Fair Trials Americas

Ms. Shaefer began her testimony by noting that "access to counsel in police custody can play an important role in identifying, documenting and preventing police misconduct during a period of time where police are currently able to act with no oversight – in the perilous first hours post-arrest." She echoed the calls for including a youth-appropriate *Miranda* policy in the bill. While her organization is advocating for access to counsel for all arrested people regardless of age, she views "this youth-specific provision as an opportunity to demonstrate the value of early access to counsel" and "as a stepping stone toward the full representation of children and adults alike." She noted that several states, every member state of the European Union, the United Kingdom, Canada, Australia, and New Zealand provide access to lawyers for arrested people of any age in police custody. In addition to helping prevent the mistreatment of those in custody and protecting the right to remain silent, the assistance of counsel while in police custody can lead to cost savings through the more immediate release of arrestees. The presence of attorneys in this context can also allow for collecting "data on patterns of policing and police misconduct that are currently difficult to obtain," including "information on arrests that never lead to criminal charges."

Gavin Laughland – Member, Standing up for Racial Justice ("SURJ") DC

Mr. Laughland testified about the failings of the emergency and temporary policing bills. He noted that despite the prohibitions contained in Subtitle P, MPD continues to use chemical irritants and flashbang grenades at First Amendment assemblies. Similarly, he argued that MPD has not followed procedures regarding notifying next of kin prior to release body-worn camera footage. Without accountability mechanisms in place, he argued that MPD will continue to willingly disobey the law. He explained that MPD did not begin collecting the data required under the NEAR Act until a lawsuit forced it to do so. He asked the Council how it plans to hold MPD accountable for any misconduct. He encouraged the Council to enact a total ban on stop-and-frisk, jump-outs, kettling tactics, the use of internationally banned chemical weapons, and neck restraints. He recounted his own experience, as well as the experience of others, who were subjected to excessive force, chemical irritants, and other policing tactics during First Amendment assemblies.

Ntebo Mokuena – Public Witness

Ms. Mokuena criticized the bills as only offering "milquetoast" police reforms. She argued that meaningful reform is not possible, and defunding and abolishing the police are the only realistic options for improving community safety.

Mary Beth Tinker – Public Witness

Ms. Tinker spoke about her experience as a nurse at Prince George's Hospital's adolescent trauma center, where she treated several young Black youth from the District. She argued that we can better serve this population by allocating money away from the police and towards preventative resources and by establishing police-free schools. She summarized several statistics showing that Black communities in the District disproportionately experience poverty. She

criticized the Council for its lack of action to address the harmful impacts of policing and other policies that contribute to financial, education, housing, and food inequality. She recounted an incident in which she observed an MPD officer threaten a student without any meaningful consequences for the officer or redress for the student.

Benjamin Merrick, Kate Taylor Mighty, Eric Lewitus, Christopher Bangs, Runal Das, Lisa Pahel, Nell Geiser, Stuart Karaffa, Michael Swistara, Franklin Roberts, Jonah Furman, Sara Buettner-Connelly, Vick Baker, Thomas Boland-Reeves, Linda Gomaa, Eamon McGoldrick, Bart Sheard, Laura Van Dyke, Ben Lee, David Herman, Laura Jaghlit, Connor Czora, Eric Peterson, Ryan Carroll, Kaela Bamberger, Deidre Nelms, Robert Cline, Alexandra Seymour, Madeleine Stirling, Marli Kasdan, Shivani Desai, Ryan Anderson, Elizabeth Sawyer, Sarah Greenbaum, Greg Afinogenov, Joshua Lawson, Ana Bailey, Tamara Vatnick, George Tobias, Ben Davis, Geraldine Galdamez, Olivia Valdez, and Rebecca Rossi – Public Witnesses

The witnesses testified in support of police reform but argued that the reform proposed in B23-0882 does not go far enough. They expressed support for the comments submitted by Black Lives Matter D.C., Black Swan Academy, Stop Police Terror Project D.C., ACLU-D.C., D.C. Justice Lab, Working Families Party D.C., and all the members of the Defund MPD Coalition. They also proposed four specific revisions to the bill. First, they suggested that the bill require that the D.C. Auditor catalog and track the time spent on the various functions MPD performs. Second, they urged the Council to disarm police who are conducting basic interactions, which would decrease the likelihood of an interaction resulting in deadly force. Third, they proposed replacing police as the standard crisis response with teams composed of social workers, psychologists, violence interrupters, and traffic directors. They similarly argued that that the police should not be deployed in response to complaints concerning individuals experiencing homelessness or engaged in sex work. Finally, they proposed granting an independent PCB the authority to discipline officers for misconduct.

Dornethia Taylor – Core Organizer, Black Lives Matter D.C.

Ms. Taylor criticized the police union for shielding officers from accountability for misconduct. She listed the names of several victims of police violence, including several Black men who were killed by police. She urged the Council to reconsider its ability to meaningful reform the police, and she instead suggested allocating resources to violence interruption efforts, healthcare, jobs, education, therapists, and rehabilitation centers.

Imara Crooms – Public Witness

Mr. Crooms commended the bills for attempting to address the demands for police reform, but he does not believe the legislation is enough to end harmful policing practices. He began by recounting his own negative experience with police as a child. He then spoke about the need to prohibit the use of jump-outs, which he characterized as a more dangerous and intimidating version of stop-and-frisk practices. He next urged the Council to remove police from schools and end police interrogations of children. Finally, he advocated for clearer consequences for officers who engage in misconduct, arguing that police cannot be trusted to hold themselves accountable.

Alison Boland-Reeves – Public Witness

Ms. Boland-Reeves testified for the need to remove police from schools. She discussed her own negative experiences of being policed while in schools. She noted that 92% of school-based arrests are of Black students, and Black girls are 30 times more likely to be arrested than their white peers. She argued that police in schools contribute to the school-to-prison pipeline, which in turn fuels mass incarceration. Instead of funding police in schools, she argued that we could alternatively fund more mental health services for children that improve attendance rates, academic achievement, and graduation rates while reducing disciplinary incidents.

Laura Peterson – Public Witness

Ms. Peterson expressed concern about the state of policing in the District, and her testimony focused on ways to improve police transparency and accountability. She explained that while B23-0882 would change the membership of two oversight boards to include more community representation, the bill should provide more opportunities for public input on the boards' membership. She also criticized the bill for still allowing MPD to oversee use of force investigations. Regarding the bill's provision that prohibits MPD from hiring an officer who has engaged in "serious misconduct," she asked that the bill more clearly define "serious misconduct." She also recommended that police records be made public. Finally, she encouraged the Council to remove police from schools and to instead fund education, community-based organizations, and health services.

Katherine Crowder – Public Witness

Ms. Crowder recounted her own experience participating in demonstrations. After joining a march that took place in May, Ms. Crowder was returning to her vehicle when "[w]ithout warning, one officer began pepper spraying young Black protesters near where [she] was standing, who were visibly non-threatening." Officers next began "tossing grenades indiscriminately at people." When one of these devices detonated, it struck Ms. Crowder in her "inner elbow, leaving it bleeding and with a large contusion the size of [her] hand." She argued for banning local law enforcement officers from "using chemical irritants, impact munitions, and stun grenades to disperse" First Amendment activities.

Harper Jean Tobin – Public Witness

Ms. Tobin opened her testimony by describing the various ways policing practices harm trans people and destroy their trust in police. Ms. Tobin testified that the bill should eliminate jump-outs, no-knock warrants, consent searches, police in schools, and interrogations of children. She also argued that we should replace police officers with clinically trained civilians for emergency responses, with civil servants for traffic enforcement, and with violence interrupters for meaningful violence reduction. She echoed support for the recommendations made by other advocacy groups.

Katlyn Cotton – Public Witness

Ms. Cotton shared several incidents in which she has observed police engage in excessive uses of force or other harmful policing practices. While she supports the efforts to curb police misconduct, she cautioned that B23-0882 does not go far enough to prevent abusive police practices, such as consent searches and no-knock warrants.

Sean Young – Public Witness

Mr. Young testified regarding the lack of police accountability in the District. He recommended that the Council require the release of the names and body-worn camera footage of all officers involved in any serious use of force and establish consequences for officers who improperly turn their body-worn cameras off. Second, he recommended that the authority to discipline officers be transferred from MPD to OPC, to require that OPC investigate police misconduct related to a complaint, and to remove the MPD representative from the PCB. Similarly, he also recommended that Use of Force Review Board should be independent from MPD and not composed of members of the very agency whose actions are being reviewed. Finally, he recommended that the Council eliminate qualified immunity for police officers.

Gautham Venugopalan – Public Witness

In addition to testifying at the hearing, Mr. Venugopalan submitted written testimony containing three recommendations to improve B23-0771. First, he recommended amending the bill so that the definition of "chemical irritant" is consistent with the definition found in the Chemical Weapons Convention. Second, he characterized the prohibition on using chemical irritants to disperse a First Amendment assembly as ambiguous. He recommended providing more specific language that either completely prohibits the use of chemical irritants at First Amendment assemblies or clearly specifies the cases in which their use is permitted. Finally, he expressed concerns about "the criteria being used by law enforcement to decide whether an assembly is a First Amendment assembly." He asked that the Council consider how to define a First Amendment assembly, who would be responsible for making that determination, and what accountability and transparency mechanisms should surround that determination.

Kenithia Alston – Public Witness

Ms. Alston testified about the lack of transparency regarding the incident in which MPD officers killed her son, Marqueese Alston. She spoke about how police, when first contacting her, minimized both the extent of her son's injuries as well as their role in his death. She explained that MPD's failure to release the full unredacted video of her son's death breeds mistrust and undermines community confidence in the police. Despite the law requiring that MPD provide next of kin with adequate notice before releasing the body-worn camera footage of police-involved death, she received only a voicemail 90 minutes before the release of the footage. She also criticized MPD for not releasing the names of every officer involved in her son's death.

Wade McMullen – Public Witness

Mr. McMullen criticized the bills for not adequately preventing harmful policing practices. For example, he argued against B23-0882 still allowing the use of consent searches and permitting the use of chemical irritants outside of First Amendment assemblies.

Rob Hart – Public Witness

Mr. Hart testified that the bills are well-intentioned but ultimately propose modest reforms. He argued for defining the term "unredacted footage." He also suggested complete bans on the use of deadly force and chemical irritants.

Chuck Wexler – Executive Director, Police Executive Research Forum

Mr. Wexler explained that the mission of the Police Executive Research Forum ("PERF") is to identify "best practices on issues such as reducing police use of force, de-escalation tactics and strategies, new technologies in law enforcement, and the role of police on issues such as the opioid epidemic and homelessness." He focused his testimony on a provision in B23-0882 that would prohibit MPD officers from reviewing their body-worn camera recordings when writing their initial report. He noted a 2014 report issued by PERF that found that "[o]fficers should be permitted to review video footage of an incident in which they were involved, prior to making a statement about the incident." The report found that "[reviewing footage will help officers remember the incident more clearly, which leads to more accurate documentation of events." Furthermore, "real-time recording of the event is considered best evidence." He also cautioned that "[i]f a jury or administrative review body sees that the report says one thing and the video indicates another . . . that might damage a case or unfairly undermine the officer's credibility." Finally, he noted that the PERF has not become aware of "any major incidents in which officers' review of BWC footage has resulted in falsification of reports or created problems with prosecutions or with officer discipline."

Patricia Stamper – Public Witness

Ms. Stamper shared her experience of being married to a Black man and the mother of two Black boys, and her constant fear for their safety because law enforcement officers may perceive them as a threat. She recommended that all body-worn camera footage recorded by MPD officers be released to the public in three to six months. She also recommended that the Council require that "a social worker, therapist, or psychologist be sent out in tandem with MPD to respond" to calls for service involving domestic issues."

DeVaughn Jones – Chair, Legal Redress Committee, NAACP D.C. Branch

Mr. Jones testified in support of the recommendations submitted by the D.C. Justice Lab and Commissioner Salim Adofo. He encouraged the Council to "listen to the majority of lived experiences in the District now and throughout the short time this great city has existed."

Sarah Gertler – Public Witness

Ms. Gertler testified in support of the comments submitted by other advocacy groups. She encouraged the Committee to make several revisions to B23-0882. She explained that "a uniformed officer's presence in school halls has never made me feel safer." She argued that the presence of police officers results in the increased likelihood of students – especially those of color – being arrested. In turn, "students arrested at school are much likelier to experience incarceration as adults." She proposed eliminating police from schools and diverting that funding into "guidance, mental health, and care."

Bill Mefford – Executive Director, Festival Center

Mr. Mefford encouraged the Council to pass B23-0882. He argued that the bill will "strengthen procedural protections when the police seek to search a person's vehicle, home, or property, and it will also strengthen the District's use of force standards by clearly defining non-deadly and deadly force while limiting situations in which both non-deadly and deadly force can be used." He also praised the bill for restricting "the ability of District law enforcement agencies to acquire or request certain military equipment." Mr. Mefford expressed support for transformative and restorative justice practices that "have a much greater track record for lowering recidivism than our current retributive models." He also explained the need to limit the role of police in society, "including the schools our children attend."

Seth Stoughton – Associate Professor, University of South Carolina School of Law

Professor Stoughton submitted testimony regarding the provision in B23-0882 that would prohibit MPD officers from reviewing their body-worn camera recording when writing their initial report. He instead suggested that the prohibition only apply to writing use of force reports and that officers be allowed to review the footage in other contexts. He explained his professional and academic background regarding police reform generally and the issue of body-worn cameras specifically. He noted that the "issue of whether and to what extent officers should be allowed to review their body-worn camera video prior to writing a report – that is, to engage in "pre-report review" – is a controversial one." He explained that the balance is between "ensuring that officers do not engage in gamesmanship by using video to manufacture *ex post* justifications for their actions or unconsciously contaminate their contemporaneous perceptions of events" against the "interest in ensuring that officers' reports are complete and accurate." He argued that "[i]n the context of incident or arrest reports, which turn on objective facts rather than the officers' perception, a pre-report review may be relatively unproblematic." In contrast, "[t]he propriety of a use of force doesn't not turn on the objective facts of the situation, but on the reasonableness of an officer's perceptions and actions." Put simply, what matters for most report writing is "what *actually happened*." But for use of. force report writing, an officer's report is supposed to reflect what the officer *perceived*." As point of comparison, Professor Stoughton also noted that "no modern Western democracy prohibits officers from reviewing BWC videos prior to preparing reports (outside of the use of force context)."

He noted three specific reasons for permitting pre-report reviews outside of the use of force context. First, "most police reports are neither intended nor expected to be an auto-biographical

account of a single officer's perceptions." Second, "not only is there good reason to believe that video may be more accurate than human memory, there is also reason to believe that video may actually *aid* human memory." And finally, prohibiting pre-arrest preview deprives officers of a chance to include exculpatory information and would not, by itself, prevent officers from excluding that exculpatory information.

Debbie Smith Steiner – Public Witness

Ms. Smith Steiner criticized the qualified immunity doctrine and the police union for shielding officers who engage in misconduct from consequences, but she also argued that MPD does not suffer from the same issues present in other police departments.

Tamika Spellman – Policy and Advocacy Director, HIPS

Ms. Spellman expressed skepticism at the ability to reform policing. She argued that "the police union strengthened the ability to continue brazen lawlessness" and prevented holding officers accountable for misconduct.

Dr. Serina Floyd – Medical Director, Planned Parenthood of Metropolitan Washington, D.C.

Dr. Floyd testified in support of B23-0771. She testified that "[t]ear gas is a weapon of war that has no place on civilian streets," and the use of tear gas can produce detrimental health effects on people's skin, eyes, and respiratory and gastrointestinal systems. She also noted that "there is an emerging concern about the impact of tear gas on reproductive health." Reports show the use of tear gas has been correlated with miscarriages, and protesters exposed to tear gas have also complained about menstrual irregularities.

Shameka Stanford – Chief Operating Officer, STND4YOU

Ms. Stanford testified about the need to implement a *Miranda* doctrine for youth that accounts for their still-developing cognitive and communication skills. She explained that the frontal lobe – which is responsible for language and cognitive skills – does not fully develop until someone is approximately 25 years of age or older.

Holly Rogers – Public Witness

Ms. Rogers offered a number of recommendations to improve provisions in the bills. First, she argued for a complete ban on the use of chemical irritants by MPD, rather than just restricting their use at First Amendment assemblies. Second, she recommended a complete ban on the use of consent searches. Finally, she recommended that the Council provide individuals with a private right of action regarding violations of the law regarding consent searches.

Jayme Epstein – Public Witness

Ms. Epstein testified in support of B23-0882, but she argued that the proposed legislation does not go far enough. She recommended that the bill also remove police from schools, limit police enforcement of traffic stops, create a non-police crisis system, expand violence interruption and trauma informed approaches to public safety, and overhaul the District's criminal code to decrease penalties and decriminalize offenses.

Katherine Myer – Volunteer, D.C. Chapter, Moms Demand Action for Gun Sense in America

Ms. Myer testified in support of the bill. She specifically praised the inclusion of provisions that improve access to body-worn camera footage, prohibit the use of neck restraints, expand the authority of the OPC, and expand the membership of the Use of Force Review Board. She also expressed support for provisions in the bill that modify mandatory continuing education requirements for MPD officers, reconstitute the Police Officers Standards and Training Board, and restrict the purchase and use of military weaponry. She encouraged the Council to reallocate money from MPD to violence interruption programs.

Lauren Killalea – Public Witness

Ms. Killalea submitted testimony in support of B23-0882. She specifically praised the bill's limitations on the use of deadly force.

Yael Nagar – Member, Jews United for Justice

Mr. Nagar urged the Committee to support B23-0882 and reallocate funding from MPD to other essential services that address the root causes of crime. He praised provisions in the bill that increase police accountability, limit the use of force, and raise minimum standards for being eligible to serve as an officer. However, he recommended that the bill go further in reallocating resources from MPD to other efforts like violence intervention programming and non-law enforcement crisis response. He also encouraged the Committee to increase services for formerly incarcerated District residents, including housing, education, job assistance, and food access.

Yafet Girmay – Vice Chair of International Affairs, National Black United Front

Mr. Girmay testified in support of B23-0882. He opened his testimony by recounting several high-profile incidents that highlight the harmful effects of policing, including its disparate impact on Black communities. He provided an overview of major reform proposals that policymakers across the country are considering, some of which are included in B23-0882. He also listed several reforms the Committee should consider including in the bill, including increasing access to records documenting misconduct or excessive uses of force, eliminating legal barriers to suing officers for misconduct, and implementing penalties for officers who repeatedly engage in misconduct. He also recommended shifting funding from policing to social services, housing, education, healthcare, and drug treatment.

Robert Keithan – Minister of Social Justice, All Souls Church Unitarian

Mr. Keithan urged the Committee to approve B23-0882, but he argued that further policing reforms are needed. He criticized the militarization of police and argued that "police have been assigned too many roles in our local communities." He praised the bill for strengthening procedural protections for when police seek to conduct a consent search, for establishing clear use of force standards, and for restricting law enforcement agencies' ability to acquire and use military equipment. But he also encouraged the Committee to reallocate funding from the police to housing, healthcare, education, and meaningful employment.

Niq Clark – Public Witness

Mx. Clark testified that they were encouraged that the Council is taking the issue of police violence seriously. They echoed support for the policy recommendations issued by various advocacy organizations. They then offered a number of recommendations to decenter policing and promote police accountability. They recommended that the D.C. Auditor begin cataloging and tracking the time MPD spends performing various functions. They also suggested that the District invest in non-police emergency responses such as the CAHOOTS program in Eugene, Oregon. They encouraged the Committee to empower OPC to impose discipline on officers, decriminalize sex work, remove police and armed security from schools, and place even stricter limits on the use of consent searches. They also recommended that the Council raise the evidentiary standard for issuing search warrants and ban the use of no-knock or quick knock warrants.

Kristin Eliason – Director of Legal and Strategic Advocacy, Network for Victim Recovery of D.C.

Ms. Eliason testified about a number of ways to improve B23-0882. She suggested that provisions regarding the release of body-worn camera footage should be expanded to include notifying individuals against whom serious force was used, and providing individuals with both notice and an opportunity to be heard in cases where the decision to release the footage is being decided by the Superior Court. She underscored that the notification process should be reasonable, timely, and describe the manner in which the footage will be released.

Next, turning to the reforms to the OPC, she recommended that OPC staff receive annual training on working with those who have experienced trauma, violence, and crime to ensure complainants are treated with fairness and dignity. She also suggested adding a representative from the victim services community to the PCB. She similarly recommended that a representative from the victim services community be added to the Use of Force Review Board and two representatives be added to the POST Board.

She recounted cases in which subjects of a consent search needing interpretation services were not provided the warnings required under the emergency and temporary legislation. In response, she suggested that the officers seeking to conduct consent searches be barred from acting as the interpreter, that minimum standards be set for the interpreters used by MPD, and that subjects of a consent search be provided a rights card modeled after the Sexual Assault Victims' Rights Act.

She stated that individuals should be ineligible for appointment as a sworn police officer if they are or were subject to a court order issued against them for the commission of an intrafamily offense. She also encouraged the Committee to create a process that would allow complainants to know the outcome of a complaint. She also echoed support for several recommendations issued by the D.C. Coalition Against Domestic Violence.

Lauren Sarkesian – Senior Policy Counsel, New America's Open Technology Institute

The organization expressed support "that the Committee, and in turn the Council, are responding swiftly and seriously to calls for widespread reform, first with the emergency legislation passed in July [2020] and now with a more permanent set of bills." They encouraged the Committee to also "consider and set rules for police use of surveillance technologies." They noted that "[o]ver the past two decades, police departments and other government agencies across the country have been acquiring, deploying, and gaining access to surveillance equipment, in secret, without any notice to the public or authorization from local legislatures," including "CCTV cameras to large networks of private security and doorbell cameras, facial recognition systems, license plate readers, gunshot locators with audio surveillance, smart street light bulbs with video surveillance capabilities, drones, and much more." In addition to being able to invade the privacy of individuals in the District, this "surveillance can have a chilling effect on speech, and modern surveillance technology has dramatically increased the scope and scale of the already-concerning surveillance of protests – especially by and for communities of color." In response, the organization encourages the Committee to adopt legislation that "require transparency into what police technologies are in use, and require opportunities for both community and Council input, before they may be deployed." The organization noted that sixteen jurisdictions have adopted local laws based on the model legislation they have created.

Kris Garrity – Public Witness

Kris Garrity recommended additional provisions to include in the legislation, which are aligned with the proposals suggested by DC Justice Lab, Black Swan Academy, and Stop Police Terror Project DC + Showing Up for Racial Justice DC. They specifically recommended ending jump-outs, eliminating consent searches, limiting search warrants, disarming special police, and providing a more mature *Miranda* policy for kids. They also recommended removing police from schools, completely banning the use of deadly force and chemical irritants. Finally, they proposed prohibitions on editing or redacting body-worn camera footage, including the redaction of officers' faces.

Betty Diggs – Public Witness

Ms. Diggs testified about her experience living in ANC 7F. She expressed reservations about B23-0882 "to the extent that it does not include the perspective, ideas, and suggestions from MPD." She recounted several violent incidences near her home and described efforts taken by MPD to respond to those crimes and build personal relationships with residents in the area. She encouraged improving the 911 and 311 call systems to ensure calls are appropriately routed and that callers receive prompt service during non-business hours.

Government Witnesses

Elana Suttenberg – Special Counsel for Legislative Affairs, U.S. Attorney's Office for the District of Columbia

Ms. Suttenberg highlighted several concerns that USAO-DC has with B23-0882. First, USAO-DC disagrees with the proposal to prohibit officers from reviewing their BWC footage to assist in initial report writing. She recommended, instead, that the Council expand the exception for cases in which a police shooting was involved to also "encompass cases involving officer conduct that results in serious bodily injury or death, even when there is no firearm involved." This exception would not apply to cases involving "violent crimes committed by civilians against other civilians." USAO-DC also took issue with bill's proposal to require that the Mayor release the names and body-worn camera recordings of officers who committed an officer-involved death or serious use of force within five business days after the incident. She believes that "early publication of BWC could, in certain situations, create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony." She cautioned that "it would still be very difficult for our office to conduct a full investigation within 5 business days, as a full investigation could include all relevant parties, including involved civilians, testifying before the grand jury." Instead of the five business days, she believes "the Mayor should have discretion to release BWC footage at an appropriate time, balancing the needs of the community to see the footage with the needs of prosecutors to accurately investigate what happened, and the security and privacy rights of civilian witnesses who may be depicted in the footage."

Richard Schmechel – Executive Director, Criminal Code Reform Commission

Director Schmechel first testified on Subtitle N of the bill, which would codify a standard for the use of deadly force by law enforcement officers in the District. He noted that the District is "in a minority of jurisdictions nationally for not legislatively codifying the requirements [of] self-defense, defense of others, and other general defenses." He stated that the language in the bill mostly "appears consistent with codified language in other jurisdictions and current District case law," and he did highlight ways in which some provisions could be interpreted to differ from current law. He summarized the ways in which this provision differs from CCRC draft recommendations. He also noted that CCRC recommendations are more expansive in scope, as they "more comprehensively address the use of force (not just deadly force) in self-defense or defense of others, and they do so not only for law enforcement officers but for all persons." Overall, however, he concluded that "the differences between the bill language and CCRC draft recommendations are minor and the bill is almost entirely consistent with the draft recommendations and current law."

Mr. Schmechel then turned to the bill's repeal of the failure to arrest statute found at D.C. Code § 5-115.03. He explained that this bill defies the general idea that criminal law should be a tool of last resorts since it makes "an officer criminally liable for not making an arrest even when doing so does not advance justice." He also noted that the statute "effectively binds District law enforcement officers to follow federal crime policy on drug and other offenses even when . . . the

District has a different policy." He noted that other District laws adequately address situations when "an officer's failure to arrest an individual is because of the officer's collusion in a protection scheme or because of some other illicit motive."

Third, Director Schmechel discussed provisions of the bill affecting the jury demandability of certain offenses. He notes that this change "appears to fulfill the intent of the 2016 Neighborhood Engagement Achieves Results (NEAR) Act to let jurors decide charges of assault on police officers." He noted that "because the NEAR Act failed to amend jury demandability for simple assault charges against a police officer, the legislation failed to make a practical difference in how these cases were handled." Specifically, "[p]rosecutorial charging practices merely shifted to bring simple assault charges instead of [assault on a police officer] charges." The "drop in APO charges after passage of the NEAR Act coincides with a similar size increase in the number of simple assault charges." More fundamentally, he raised the concern that "the District is a national outlier in its restrictions on the right to a jury trial." Unlike the District, "[m]ost states make very single crime carrying an imprisonment penalty jury demandable." Despite the administrative efficiency costs increased jury demandability may have,"[p]ublic participation in deciding the facts of alleged assaults on a law enforcement officer may improve public trust and confidence even if the results were to be no different than those made by judges in non-jury bench trials."

Niquelle Allen – Director, Office of Open Government, Board of Ethics and Government Accountability

Director Allen opened by stating that B23-0882 "makes great strides in increasing government transparency through the BWC program by requiring the Mayor, with consent of the subject of the video and/or their next of kin, to publicly release BWC footage and names of officers involved in five days when there is use of excessive force or a death." She expressed concerns that the bill leaves unaddressed "problems that the Office of Open Government is aware of concerning the general release of BWC footage." These problems include "over-redaction of the video footage, timely production of the video footage, and the cost associated with processing FOIA requests."

She explained that "the investigatory records exemption and the personal privacy exemptions may cause much of the footage to require redaction." Her office has "received complaints that MPD has released BWC video that have been redacted beyond recognition – that is, videos with all the faces, all voices, all street names, badge numbers, every car tag in sight, and the like redacted." Video redacted in such a manner has no value to the public, and furthermore, suggests that the government has something to hide.

She stated that MPD often relies on the personal privacy exemption when redacting footage. She countered that "[t]here should be no expectation of personal privacy for individual officers acting on behalf of the District of Columbia and in uniform," nor should there be redactions "when in the public space." On the other hand, there may be an expectation of privacy in spaces closed to the public, including medical facilities.

She encouraged the Committee to articulate "a litmus test for the MPD to follow when determining whether releasing the video is in the public's interest and outweighs personal privacy

considerations." Factors to consider include public response to the incident, the location of the incident, and the degree of harm that could result from withholding the footage. She also suggested that the Committee include in the bill a provision "that requires MPD to waive any cost for producing BWC footage or limit . . . the cost MPD may charge a requester to receive the footage." She pointed to a recent ruling by the California Supreme Court on the California Public Records Act that is instructive. If the costs cannot be waived entirely, they should "be significantly reduced." Additionally, "[p]romulgating regulations or policies respecting cost per hour for production and guidelines for redacting would serve the public interest by clarifying the video production process and ensuring that any cost incurred is reasonable." She also suggested using MPD's internal resources to redact videos as a cost-savings measure.

Michael Tobin – Executive Director, Office of Police Complaints

Director Tobin testified on behalf of the Office of Police Complaints in general support for B23-0882. He supported the provisions that would ban the use of neck restraints. He noted that the provision closely mirrors MPD's General Orders, but it sends an important message to the community. He also expressed support for the provision that would expand OPC's jurisdiction to investigate misconduct discovered by OPC while investigating a stated claim. Regarding the Use of Force Review Board, he noted that for years he has been the only member of that Board that is not a member of MPD. He believes that the Board conducts thorough investigations and is satisfied with the outcomes of those investigations. But he believes the expanded membership will improve the Board's function. He does believe that members appointed to the Board should be trained in applicable MPD rules and regulations. Regarding Subtitle F's modification of consent searches, he stated that the change is very significant. He noted that, in reality, subjects asked for consent to search do not feel comfortable declining consent. He believes the proposed change levels the playing field between police and community members and will bolster the procedural justice of those interactions. Finally, with respect to the Police Officers Standards and Training Board, he is supportive of the Council making efforts to reconstitute the Board, which has not met in the prior six years. He believes that good policing is a function of both hiring good candidates and providing those candidates with high-quality training – two of the duties of the Board.

Katerina Semyonova – Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

Ms. Semyonova testified in support of B23-0882. She suggested a number of ways the bill could be improved. She proposed expanding the prohibition on the use of neck restraints to include the Department of Corrections and the Department of Youth Rehabilitation Services' staff, and place upon those individuals an affirmative duty to intervene when observing the use of a neck restraint. Ms. Semyonova also proposed making employees of MPD, the Department of Corrections, and the Department of Youth Rehabilitation Services mandatory reporters for abuse by staff, and to place on those same employees an affirmative duty to report misconduct.

She recommended that the Council further expand access to body-worn camera footage by not limiting the required disclosure to the officers who "committed" the officer-involved death or serious use of force. Instead, the BWC of all officers at the scene should be released. Furthermore,

she recommends that the Council codify and expand the definition of a "serious use of force," rather than defining that term by reference to an MPD General Order.

Ms. Semyonova also encouraged the Council allow the OPC to receive anonymous complaints. Furthermore, she argued that information regarding sustained allegations of misconduct should be available to the public on OPC's website. She recounted data collected under the NEAR Act that demonstrates that people of color – particularly Black residents – are disproportionally affected by policing. She believes the Council could improve the intended effect of the bill by prohibiting pretextual stops by police officers and eliminating "being in a high crime area" as a basis for a stop. She also recommended making window tint violations a secondary violation.

While PDS is supportive of the proposed changes to consent searches, she believes the Council should ban law enforcement officers from requesting to conduct a consent search during routine traffic stops absent reasonable, articulable suspicion of criminal activity. Ms. Semyonova also suggested that the bill extend the right to a jury trial to all misdemeanor defendants.

B24-0094, B24-0112, and B24-0213

On Thursday, May 20, 2021, the Committee on the Judiciary and Public Safety and the Committee of the Whole held a joint public hearing on "The Recommendations of the Police Reform Commission", B24-0094, the "Bias in Threat Assessments Evaluation Amendment Act of 2021", B24-0112, the "White Supremacy in Policing Prevention Act of 2021", and B24-0213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021". A video recording of the joint public hearing can be viewed at https://entertainment.dc.gov/page/2021-council-district-columbia-hearings. The following witnesses testified at the joint hearing or submitted statements to the Committees outside of the joint hearing:

Public Witnesses

Robert Bobb – Co-Chair, Police Reform Commission

Mr. Bobb testified in favor of police reform as a co-chair of the District's Police Reform Commission ("PRC"). Focusing on the impetus of the PRC and the mandate it had, Mr. Bobb discussed how the PRC examined the legacy of ineffectiveness and failures of MPD in addressing fundamental questions of "what makes us safe in our city" and "what limited role should police play...of nurturing a healthy and safe community." Mr. Bobb spoke at length about the PRC's 20 members, who brought a wide range of deep expertise, divided into five substantive committees, which were able to produce a comprehensive 259-page report with 60 recommendations for police reform. He urged the Council and the public to rethink public safety and understand that police reform is not simply enough; communities should be empowered and adequately resourced to address issues that are often left to the police to handle. He emphasized the need for MPD to build a culture of transparency, accountability, and guardianship to improve public safety in our communities and reduce the harm caused by policing, which is a crucial driver of distrust and disengagement from communities across the District. Mr. Bobb spoke at length about not simply "defunding the police" but decentering the police, re-envisioning the role of MPD, and the need to decrease

the number of police across the District. Mr. Bobb briefly discussed some important recommendations like eliminating qualified immunity, reinvesting in community resources, and removing welfare checks from police responsibilities.

Christy Lopez – Co-Chair, Police Reform Commission

Professor Lopez, the Director of the Innovative Policing Clinic at Georgetown Law, served as a co-chair of the PRC and focused her testimony on outlining the guiding principles that animated the PRC's work. She examined how public safety has been defined too narrowly and that, as a result, we have had to rely on the police too much for public safety needs. Ms. Lopez asserted that the PRC's work centered on the perspectives of marginalized communities and heard from a wide range of individuals who provided a wealth of views on policing and their experiences interacting with police. She discussed the scope of the PRC's recommendations, notably decriminalizing poverty and focusing investments on behavioral and mental health supports, and strengthening the public safety net to reduce the root causes of violence. She emphasized the need for investments in violence reduction programs, like the Building Blocks D.C. initiative, and ensuring that the answer is not simply more police. Ms. Lopez honed in on the PRC's work around transparency and accountability, citing numerous recommendations by the D.C. Auditor that support the need to ensure improved data collection and reporting to promote greater public trust. She summed up her testimony, arguing that police cannot do it all, and we must ensure that other social services providers are funded and allowed to respond to instances of non-violent emergencies.

Charles Brown – Public Witness

Mr. Brown testified in support of police reform legislation, though he urged more attention to penalties and punishment for police brutality. The father of Karon Hylton-Brown, the young man whom MPD killed after a vehicular pursuit, Mr. Brown pleaded for the Council's action to address police violence and ensure accountability for their actions. He urged the Council to amend any legislation to increase police-involved violence penalties.

Perry Redd – Executive Director, Sincere Seven

Mr. Redd testified as a former ANC Commissioner, community organizer, and advocate who has worked with the family of Karon Hylton-Brown following his death in a tragic chase by MPD. Focusing on the specifics of the vehicular pursuit provisions of B24-0213, which Mr. Redd calls "Karon's Law," he urged the release of post-incident reports for ANCs and residents to review, as well as officers being named publicly following all police-involved encounters that result in harm to a person. He characterized the harms of qualified immunity to the Black community and others, calling for an end to the doctrine but endorsing the idea of rehiring if facts do not justify upholding the termination. Mr. Redd also spoke about what he describes as MPD's concealment of video evidence. He recommended the Council enact a dual-stream system, where one feed from the body camera would be linked to the District's court system and the other to MPD. The court footage would only be released with a court order, allowing an unredacted or edited version to always be available.

Danielle Robinette – Policy Attorney, Children's Law Center

Ms. Robinette testified about the Children's Law Center's perspective on the PRC. She stated that her organization, in coalition with other youth advocacy organizations, submitted recommendations to the PRC and expressed confidence in the scientific backing of those recommendations to help address the harms of youth involvement with the police. She went on to highlight the reminders that Black and brown students face continually, being reminded of the constant police brutality their peers, families, and communities suffer. At the same time, their white counterparts are far less policed in the same ways. She advocated for reimagining what a safe and positive school environment should look like and moving away from using police in schools towards a more student-centered school environment. She offered two possible solutions to the issue, beginning with the divestment of local dollars from the MPD School Safety Division and investment of those dollars into programs that create and reinforce safety in our schools, like school-based mental health, trauma-informed training for teachers and school personnel, and restorative justice programming and violence interrupter programming in schools. Ms. Robinette cited numerous jurisdictions, like Alexandria, Minneapolis, and Los Angeles, that have reinvested funding away from school resource officers and toward student-centered programming and restorative justice initiatives. The other was to re-examine the role of civilian security and reimagine school security that involves community input and meets the needs of education stakeholders. Ms. Robinette stressed the need to create school environments that allow students to learn and grow in a trauma-informed environment that supports their educational and socio-emotional needs. Lastly, Ms. Robinette emphasized several vital reforms to change how youth are policed in the District, including discontinuing the practice of serving warrants on school grounds and arrests for non-school-based offenses.

Kayla Alexander – Public Witness

Ms. Alexander, a Howard Law student, testified in favor of the PRC's recommendations on behalf of a student advocacy group known as STAND. She noted the PRC's inclusion of her group's feedback in its final recommendations to eliminate consent searches in the District. Ms. Alexander discussed how Black people often concede to searches of their person solely due to the power dynamics their communities have been taught to relent to; she talked about how Black parents teach their children to comply with whatever a police officer asks them to do. She argued that research shows that *Miranda*-style warnings do little to reduce the coercion that comes with consent searches, especially for youth or persons with disabilities. She cited research in the PRC's report that showed nearly 90% of all consent searches in 2019 were of Black Washingtonians. She concluded that consent searches do nothing to stop crime, are a form of harassment, and should be eliminated to protect public safety.

Karthik Balasubramanian – Public Witness

Dr. Balasubramanian, a professor at Howard University and co-founder of the Vision Zero Accountability Project, testified in broad support of the PRC's recommendations. He focused briefly on reforming MPD's vehicle fleet and the need to reinvest away from gas-powered vehicles to electric ones.

Ron Thompson – Policy Officer, D.C. Transportation Equity Network

Mr. Thompson testified in favor of the PRC's recommendations. Specifically, he urged action to adopt traffic enforcement recommendations that shift enforcement from MPD to the District Department of Transportation ("DDOT"), with a data-centered approach necessary for proper enforcement. With nearly $500 million focused on traffic divisions in MPD, Mr. Thompson noted that the data does not show or suggest that these investments are working.

Jeremiah Lowery – Advocacy Director, Washington Area Bicyclist Association

Mr. Lowery testified in favor of the PRC recommendations as a member of the Defund MPD Coalition's Police Out of Traffic Enforcement working group. He began his testimony by asserting that MPD has not and will continue not be the solution to traffic safety. He commented that his work centers on ensuring safe commutes by investing in safe infrastructures to change the behaviors of drivers, rather than traffic enforcement. Mr. Lowery endorsed the PRC's recommendation that traffic enforcement responsibilities be moved from MPD to DDOT or the Department of Public Works and stressed that automatic traffic enforcement inadequately addresses traffic safety concerns because the District fines more than any other jurisdiction in the nation, while traffic safety issues persist. This is also true of the impact these fines have disproportionately on the District's poorest and Black residents. Mr. Lowery expressed his desire to see long-term infrastructure changes to decrease traffic violence and create safer corridors for bikers and pedestrians across the District.

Naïké Savain – Public Witness

Ms. Savain, a PRC member, attorney, and Ward 7 resident, testified in broad support of the PRC recommendations and its work over a period of eight months. She spoke to the oversimplification and mischaracterization of the PRC's recommendations by detractors, declaring it "intentional or unintentional misinformation." Arguing that real public safety cannot be achieved through centering police as the only tool to address crime, Ms. Savain emphasized that safer communities must start with massive investments in schools, housing, food assistance, mental health, and other needs. She spoke to increasing accountability and transparency around police-involved violence and ensuring that protocols and procedures are changed to ensure greater public awareness of incidents of police violence, as well a clear understanding of the complaint and disciplinary processes. Ms. Savain pointed to a few recommendations that could be readily implemented with minimal fiscal impact, like creation of the Deputy Auditor for Public Safety position and changing how MPD officers handle body-worn camera footage following officer-involved violence.

Talib Atunde – Representative, Fred Hampton Gun Club

Mr. Atunde testified in favor of B24-0213 and recounted his experience with the family of Karon Hylton-Brown on the day he passed away following a deadly vehicular pursuit by MPD officers. He discussed the trauma endured by the family following the incident and leading up to Mr. Hylton-Brown's death. He noted that MPD officers were aware of Mr. Hylton-Brown's name and address and could have opted to issue him a citation by mail or served it at his home later. Mr. Atunde noted that according to research, innocent bystanders and other vehicle operators are most

often killed during high-speed police pursuits, accounting for nearly 56% of people from 2004 to 2008.

Josephine Ross – Public Witness

Professor Ross testified in favor of the PRC recommendations, and specifically the abolition of consent searches. She specifically addressed concerns regarding the exigent circumstance exception to a warrant and when probable cause is required. She noted that the recommendation would not change the law around this and went on to explore the constitutional ramifications of the exception, concluding that MPD would still be allowed to enter a residence to provide emergency assistance, if necessary. Professor Ross also addressed how warrants provide greater protections than consent searches for all parties involved because they require probable cause, allowing police to obtain a warrant in real-time over the telephone while securing the premises to be searched in the process, and protecting domestic violence survivors by limiting the scope of a search and requiring police to acquire trustworthy information. Professor Ross summed up her testimony by noting the PRC recommendations would eliminate consent searches while protecting domestic violence survivors and continuing to enable police to respond to domestic disputes.

Zina Charles – Public Witness

Ms. Charles testified in support of the PRC's recommendations. Specifically, she addressed the need to remove police from schools and invest in trauma-informed training, mental health professionals, and social workers to address individualized student behavioral needs. She recounted her experiences with serving youth clients in these settings as a social worker and seeing firsthand their uneasiness with armed police being present.

Liz Odongo – Director of Grants and Programs, D.C. Coalition Against Domestic Violence

Ms. Odongo testified in support of PRC's recommendations, offering feedback from domestic violence survivors and service providers concerning traumatic and often violent interactions with MPD following domestic disputes. In citing support for the PRC's recommendation to expand the numbers of social services professionals deployed instead of police or along with police in cases of active violence or use of a weapon, she stressed not only more funding but additional training and changes to protocols for emergency services operators and groups who respond to domestic violence. She also commented on the recommendation for repealing the mandatory arrest law, arguing that this policy has made survivors less safe and increased mortality rates and should be replaced with updated guidance. Ms. Odongo discussed the need for stable and supportive housing and support services for domestic violence survivors, endorsing the PRC's recommendation to expand temporary shelter for survivors. Citing the District-wide strategic plan that her organization helped develop for domestic violence housing, she noted that in just one day in September 2020, nearly 37% of survivors across the District failed to have their housing-related requests met. She went on to advocate for necessary investments in community-based organizations to address survivor needs and create safe spaces for them. And finally, Ms. Odongo urged the removal of MPD from DCPS to provide a more holistic approach to school safety and crisis intervention.

Kylie Hogan – Director of Crisis Intervention Services, D.C. SAFE

Ms. Hogan testified in favor of the PRC's recommendations. She extended her organization's support to addressing the PRC's findings and recommendations around creating a 24-hour non-police response unit for domestic violence incidents comprised of mental health professionals and domestic violence advocates.

Robert Pittman – Chair, 1D Citizens Advisory Council

Mr. Pittman testified in opposition to the PRC's recommendations, arguing that they are "biased" and "not supported by the community". He asserted that young and Black people often interact with police due to failed school environments like DCPS, and teachers perpetuate fear and misunderstanding of police, projecting this onto their students based on their own biases. He went on to offer a critical assessment of the PRC's thorough and well-documented findings supported by research. He identified the numerous instances where he felt the PRC did not adequately consider specific issues. He did signal support for the PRC's recommendation for a Deputy Auditor position to oversee MPD, arguing that it would be better than creating an inspector general.

Patrice Sulton – Executive Director, D.C. Justice Lab

Ms. Sulton, also a former PRC Commissioner, testified in favor of the PRC's recommendations and spoke at length to the broad mandate afforded to it to place meaningful limits on police officers. She focused on draft statutory language that could help guide legislative action on the PRC's recommendations and went on to discuss the potential opposition from those who fail to embrace a harm reduction model of policing.

Evan Douglas – Policy and Advocacy Fellow, D.C. Justice Lab

Mr. Douglas testified in support of the PRC recommendations, noting his experience as a former MPD officer. He talked about reorienting police culture and police powers and reteaching officers to uphold a guardian model of policing. He also commented on the need for MPD to rebuild trust and legitimacy with communities, and he urged more community engagement from officers. Mr. Douglas expressed that jump-out units are wholly ineffectual, ruin the legitimacy of policing, and divide the community more than they help address public safety. He advocated returning to a community policing model, but he noted that it is impossible if jump-out units are allowed to remain at MPD.

Emory Cole – Public Witness

Mr. Cole, a law student, testified in support of the PRC recommendations. He urged the adoption of legislation to prohibit MPD from arresting and detaining students on school grounds for non-school-based offenses. With 25% of all District students missing 10% or more of in-class instruction, this is an obvious concern for how students' academic potential is weakened. With research suggesting that many Black and brown students feel unsafe and unable to focus on their learning with police in schools, Mr. Cole argued that police interactions in schools have a demoralizing effect on the student and produce an overly negative response from teachers who treat

students differently after these detention or arrest encounters. He asserted that students feel humiliated or isolated, forcing them to skip school altogether, which can be avoided by removing police from school campuses.

Eduardo Ferrer – Policy Director, Juvenile Justice Initiative, Georgetown Law/Visiting Professor of Law, Juvenile Justice Clinic

Mr. Ferrer testified in support of the PRC's recommendations, specifically on eliminating police in school and redefining school safety. He spoke extensively on DCPS's shortcomings in meeting school staffing needs, arguing that schools have centered police as the only appropriate response to normal adolescent disorderly behavior in schools. Mr. Ferrer argued that DCPS must see schools as sanctuaries where students feel safe and free from intimidation or coercion by police officers. To that end, he asserted that MPD's School Safety Division should be abolished, and more developmentally appropriate policing should be identified to allow kids to be treated differently than adults and to decriminalize youth behavior. Lastly, Mr. Ferrer urged that consent searches of minors be abolished, and counsel should be present during any interrogation or questioning of youth to protect their *Miranda* rights, which they are far less cognizant enough to understand than adults.

Ronald Hampton – Public Witness

Mr. Hampton, a retired MPD police officer, former Executive Director of the National Black Police Association, and PRC Commissioner, testified in support of the PRC's recommendations. He recounted his 24 years of experience working for MPD and how systemic racism overshadowed and informed so much of MPD's culture and individual officer behavior, particularly in Black neighborhoods. He expressed that the PRC's work and recommendations represent the best opportunity for the District to transform MPD and bring about much-needed change.

Jeffrey Richardson – Public Witness

Mr. Richardson testified as a former PRC Commissioner in broad support of the PRC's recommendations. He highlighted experiences with former students that illuminated his understanding of some recommendations, namely prohibiting jump-outs. Mr. Richardson generally spoke to the need to acknowledge the articulated realities of Black and brown communities and prioritize a vision of public safety that does not rely entirely on the police to address so many needs that they are not adequately equipped to handle.

Samantha Davis – Public Witness

Ms. Davis, Director and Founder of the Black Swan Academy and former PRC Commissioner, testified in broad support of the PRC's recommendations, specifically discussing removing police from schools and promoting healthy, safe, and positive school environments free from punitive and carceral responses. She cited PRC recommendations regarding the prohibition against MPD and other law enforcement agencies from serving warrants on school grounds and arresting or detaining students at school-related events. Ms. Davis asserted that armed police officers do little to deescalate situations, and she argued for schools to be weapon-free, with officers disarming

before entering the school campus unless they are explicitly responding to a violent incident. In advocating for the abolition of the MPD School Safety Division, she urged the reallocation of approximately $14 million from that division into other resources to support safe and healthy learning environments for positive youth development. Specifically, Ms. Davis pointed to increased investments in school-based mental health professionals and social workers to direct much-needed funding.

Bethany Young – Project Manager, Police Reform Commission

Ms. Young testified in support of the PRC's recommendations. Specifically, she discussed the PRC's process during its deliberative work over eight months. She outlined how the PRC engaged its membership to utilize members' expertise, connect with impacted communities, and hear from District residents. She identified underlying goals that motivated the PRC's work, and she emphasized commissioners' willingness to advance their recommendations.

Madison Sampson – Consultant, Impact Justice

Ms. Sampson testified in favor of the PRC's recommendations, explicitly addressing the housing issues outlined in the report. She discussed the need for safe and stable housing to help address community concerns about what real reform of public safety can look like going forward. She cited that 1 in 5 District residents who experience housing insecurity or are unhoused are not being treated for an underlying mental issue, making them less likely to receive a diagnosis or treatment and, as a result, more likely to encounter police during a crisis event. She noted that these individuals are also 16 times more likely to be killed by police during these interactions. Ms. Sampson asserted that because of the correlations between being homelessness, substance use disorders, and police interactions, housing should be used as a treatment option to help assist with recovery. Namely, she stressed the need to provide stable, supportive housing to children transitioning in and out of foster care who are also at risk of police encounters and domestic violence survivors.

Marina Streznewski – Public Witness

Ms. Streznewski testified in support of the PRC's recommendations. Still, she urged caution in assuming the implementation of those recommendations will decrease crime or result in a dramatic culture shift at MPD. She points to what she sees as shortcomings in the PRC's rationale for some of its recommendations, namely assuming that providing essential human services like jobs, physical and mental health, and housing will help to bring about an end to crime. Ms. Streznewski supports the culture shift from the warrior mindset to a guardian mindset but notes that MPD must show a willingness to bring about this shift through better training. Lastly, she expressed concern about abolishing qualified immunity for police officers, expressing worry about what could be frivolous lawsuits against officers.

Nassim Moshiree – Policy Director, ACLU of the District of Columbia

Ms. Moshiree testified in broad support of the PRC's recommendations and raised some considerations for the Committee as legislation moves forward. She focused specifically on restricting police power and reforming practices and policies that violate the rights of District residents, such as eliminating specialized units like the Gun Recovery Unit and prohibiting jump-outs, which disproportionately target Black residents. Ms. Moshiree urged more significant restrictions on intrusive body searches by MPD and more transparency and accountability in MPD and its data collection. Citing findings by the D.C. Auditor in a March 2021 report, she highlighted the urgent need to expand prohibitions on the use of force beyond neck restraints and to expand the Use of Force Review Board, as well as remedies available to the public when their rights are violated by MPD officers who act in contravention of the law. Ms. Moshiree detailed several key reforms to MPD, such as curbing their response to public assemblies like those of the Black Lives Matters protests from 2020, improving oversight of government use of surveillance tools and how that data is used and shared, and prohibiting or limiting military-style equipment from being procured. She noted ACLU-DC's strong support for eliminating no-knock warrants and limiting quick-knock warrants because of the often dangerous outcomes of their use. Ms. Moshiree urged improvement in transparency, oversight, and other accountability mechanisms at MPD, like strengthening the Office of Police Complaints for greater disciplinary capacity outside of MPD and improving their investigative responsibilities, and reforming body-worn camera review protocols and procedures related to officer-involved investigations. Lastly, she urged the elimination of qualified immunity and the adoption of a private right of action that would offer a means for the public to hold officers accountable for violating their rights.

Natacia Knapper – Field Organizer, ACLU of the District of Columbia

Ms. Knapper testified in support of the PRC's recommendation, emphasizing divestment from current police funding and resources and shifting those resources to community-driven programming. She focused on developing and funding social services supports like stable housing, food assistance, and mental health treatment to achieve public safety in a way that does not involve carceral responses. She advocated that the District utilize nearly $2.2 billion in ARPA funding to invest in violence interruption programs, affordable housing, and eliminating food deserts. Ms. Knapper also urged the decriminalization of low-level offenses like street vending and sex work in the District.

Ahoefa Ananouko – Policy Associate, ACLU of the District of Columbia

Ms. Ananouko testified in support of B24-0094 and B24-0213. She focused her testimony on urging action to prohibit vehicular pursuits by law enforcement and eliminating bias in law enforcement threat assessments. She discussed the threat to public safety posed by police chases. She urged passage of the bill to establish factors that must be considered before an officer engages in a pursuit of a vehicle. Ms. Ananouko also highlighted the disparate treatment of Black and brown residents in threat assessments, comparing responses to Black Lives Matter during 2020 to that of white supremacists who stormed the U.S. Capitol building on January 6, 2021.

Valerie Wexler – Organizer, Stop Police Terror Project D.C.

Ms. Wexler testified in support of the PRC's recommendations, focusing specifically on eliminating stops and frisks by MPD. She argued that the practice is wholly ineffective and disproportionately targeted at low-income neighborhoods and people. Ms. Wexler urged banning the practice or limiting it by changing the reasons for officers to stop an individual and requiring probable cause.

Alexander Levey – Public Witness

Mr. Levey testified in support of B24-0213. He witnessed firsthand the wreckage that resulted from a police pursuit of a fleeing suspect because their own car was totaled in the crash. Mr. Levey recounted the resulting damage and how the cost of that damage likely far outweighed any crime the suspect might have committed. He also shared a second incident from another area of the District he now resides in, with injury and damage resulting from that chase. Citing the death of Karon Hylton-Brown, he urged permanent reform to address the apparent risk to public safety from police pursuits.

Matthew Broussard – Public Witness

Mr. Broussard, a law student, testified in support of the PRC's recommendations, specifically regarding oversight of police surveillance technologies. He highlighted the need for accountability around using these technologies because the public is unaware of what MPD and other law enforcement agencies do with the data and information. He drew attention to facial recognition software and license plate readers, with the latter being used to track residents as they travel around District. He identified gunshot locators that are often used to record conversations and other audio used against individuals in criminal proceedings. He concluded that with significant privacy concerns, these technologies are viewed as a general warrant allowing police unfettered access to surveil District residents without any oversight. He urged the adoption of the PRC's recommendations so the public can understand how the technology is being used and how their civil liberties can be protected.

Jordan Crunkleton – Lead Researcher, Stop and Frisk, D.C. Justice Lab

Ms. Crunkleton testified in support of the PRC's recommendations to ban jump-outs in the District. Having researched and authored a report, she discussed how MPD's "jump-out unit" has targeted and infiltrated Black and poor neighborhoods of the District to surround, search, and stop residents, allegedly without cause. Ms. Crunkleton noted that a whistleblower confirmed its continued use despite MPD's official prohibition on the practice. She highlighted that Black Washingtonians make up only 46% of the District's total population, but they represent nearly 94% of residents stopped by MPD's jump-out unit over six months in 2020.

Caitlin Holbrook – Policy Advocate & Research Associate, D.C. Justice Lab

Ms. Holbrook testified in support of the PRC's recommendations. Namely, she focused on the PRC's recommendations for meaningful oversight and accountability for correctional officers

in the D.C. Jail by removing restrictions on filing grievances, expanding the duties and authority of the Office of Police Complaints, and establishing a deputy auditor in the Office of District of Columbia Auditor. She also spoke about the need to abolish qualified immunity for police officers and correctional officers.

Yonah Bromberg Gaber – Public Witness

Mx. Gaber, a community jail support advocate, testified in support of the PRC's recommendations. Providing jail support every week, they outlined their efforts to provide hygiene care and other resources to support arrestees at the Central Cell Block. He noted the often unsanitary conditions residents face when they are arrested and housed at the facility. Mx. Gaber pointed out that often arrestees are given no official record of their arrest or violation of the law resulting in their arrest. They spoke about the harms and effects of the systemic abuses by police on everyday Washingtonians, primarily Black and brown residents, who are most impacted.

Lauren Sarkesian – Senior Policy Counsel, New America's Open Technology Institute

Ms. Sarkesian testified in support of the PRC's recommendations, specifically urging the passing of transparency safeguards for the use of surveillance technology by MPD and other law enforcement agencies in the District. She supported the PRC's recommendation to create a Surveillance Advisory Group and establish a private right of action for violating the rules governing the use of surveillance technologies. In arguing for guardrails for these technologies, Ms. Sarkesian discussed how these tools exacerbate racial inequities and create disproportionate policing outcomes across the District and the country. She argued that facial recognition technologies are inherently biased against women and people of color, often leading to facial mismatches that result in higher arrests for Black males. She also asserted that other police technologies are extremely privacy invasive, allowing a vast amount of personal data to be collected over time with almost no oversight. She cited examples of widespread Black Lives Matter protests during the summer of 2020. Ms. Sarkesian concluded her testimony by urging the passage of legislation that would offer community control over police surveillance to ensure data is shared with the government and public and allow for greater transparency and accountability over local surveillance.

Virginia Spatz – Public Witness

Ms. Spatz offered a first-hand account of her experience filing a police complaint and the difficulties she faced throughout the process. She outlined a 2020 complaint she filed against a special police offer ("SPO") and the challenges she encountered with the lack of clear procedures for complaints against SPOs and navigating DCRA's Occupational Professional Licensing Agency and MPD's Special Operations Management Branch. She urged passage of the PRC's recommendations for improving transparency and accountability for SPOs to provide a transparent complaint process and procedures.

Imara Croons – Public Witness

Mr. Croons testified in support of the PRC's recommendations. He argued that MPD should be defunded, and investments should be made in the community instead. Rather than simply

reforming MPD, he stated that budgets are moral documents to bring about the necessary change required to reimagine the system. He characterized police officers as "violence workers" who undertake "state-sanctioned" harm against District residents. Mr. Croons urged that action beyond reforms is necessary.

Frankie Armstrong – Public Witness

Mr. Armstrong testified in support of the PRC's recommendations. He spoke about his personal experience with police, arguing that police have abused their authority in harassing Black residents. He specifically recounted how officers followed him home to his apartment and, without probable cause, entered his apartment, questioned him, and searched his home without a warrant. He noted that this happens far too often for Black residents in the District, and he said that he has lost friends to police violence. He urged the passage of the PRC's recommendations to ensure Black residents "finally feel safe".

Karen Hylton – Public Witness

Ms. Hylton-Brown, the mother of Karon Hylton-Brown, who was killed in a vehicular pursuit by MPD, testified in support of B24-0213.

Mara Verheyden-Hilliard – Co-Founder & Executive Director, Partnership for Civil Justice Fund

Ms. Verheyden-Hilliard testified in support of the PRC's recommendations. She highlighted the day-to-day repression faced by District residents at the hands of MPD and urged the adoption of the recommendations outlined in the PRC's report. She specifically addressed B24-0112 and litigation her organization is leading regarding the persistent lack of transparency by MPD in turning over documents related to its officers' communications, involvement, and relationships with far-right-wing and paramilitary groups like the Oath Keepers. She noted that this lawsuit was filed after January 6, 2021, but she highlighted the importance of identifying how and why these relationships exist within MPD. She stressed the need for greater accountability in how MPD responds to public records requests, and that this should be placed outside of MPD and the Office of the Attorney General, transferring that responsibility to the D.C. Auditor. Ms. Verheyden-Hilliard urged an independent review of OAG actions related to defending MPD in court for police misconduct to ensure they conform with the legislative policies of the District. Lastly, she argued for the elimination of qualified immunity and that a private right of action should be established to allow residents to sue for violations of their rights.

Keith Neely – Attorney, Institute for Justice

Mr. Neely testified in support of this bill, arguing for eliminating qualified immunity for all District government employees. He asserted that the end of qualified immunity is an essential solution to government misconduct writ large, including police misconduct. Mr. Neely included model legislation with recommended language for the Council's consideration, including barring a qualified immunity defense and creating a new cause of action for constitutional rights violations by District government employees with the District, not the employee, being held liable.

Chanel Cornett – Legal and Policy Officer, Fair Trials

Ms. Cornett testified in support of the PRC recommendations. She focused on the recommendations around the constitutional guarantee of the right to counsel, arguing that juveniles and adults should be allowed to consult with and have counsel present before police questioning. Offering model legislation authored by her organization and adopted by several jurisdictions like California, Maryland, and Illinois, she discussed that persons in police custody should be allowed counsel within two hours after arriving at a police precinct ,and that attorneys should be afforded unrestricted access to police precincts to consult with clients confidentially. She asserted that attorneys should be able to offer legal assistance during interrogations, with police prohibited from questioning a person until the person has consulted an attorney in police custody. Ms. Cornett also added that incriminating statements made by a person to police during an interrogation violating their right to an attorney during questioning should be inadmissible in any criminal proceedings.

Carlos Andino – Equal Justice Works Fellow, Washington Lawyers' Committee for Civil Rights and Urban Affairs

Mr. Andino testified in support of the PRC's recommendations, and he raised some concerns for the Committee's consideration as legislation advances. He urged action to disarm and eliminate the arrest powers of the 7,500 special police officer force in the District, arguing that they have evolved far beyond their mandate and injured numerous residents. He highlighted that they were established by the District to patrol buildings periodically and empowered with firearms and arrest authority – powers he noted are not needed to protect property. He highlighted that existing regulations allow private businesses to hire MPD officers when needed, so special police officers are unnecessary.

Ariel Levinson-Waldman – Founding President & Director-Counsel, Tzedek D.C.

Mr. Levinson-Waldman testified regarding the PRC's finding regarding parking traffic violations in the District and the disproportionate impacts on Black and low-income residents. He discussed similar results of a report his organization published, citing that the District is the only jurisdiction in the Metro region that disqualifies drivers from renewing driver's licenses for unpaid fines and fees and only one of three states to continue this discriminatory practice. He went on to argue that the financial impact of fines and fees for minor violations of District law impacts Black residents at a significantly higher rate, rather than white residents, with Black residents who make up only 43% of the District's adult population making up nearly 65% of those ticketed for traffic stops. Mr. Levison-Waldman cites MPD research showing that Black residents are arrested at a higher rate than white residents for driving without a valid license, a direct result of the punitive practice continued by the District. He went on to discuss legislation pending before the Council to address the criminalization of poverty and the crushing burden of fees and fines on low-income residents who are disproportionately Black.

Amber Rieke – Director of External Affairs, D.C. Health Matters Collaborative

Ms. Rieke testified in support of the PRC recommendations and outlined some further considerations for the Committee as legislation moves forward. Specifically, she discussed the need for evolution and systems change in how mental health is responded to and dealt with in the public safety context. Citing research that suggests only 42% of District residents receive mental health treatment for various conditions, she notes that mental health concerns can become an emergency or crisis. The overall response currently is calling 911 and dispatching police. Ms. Rieke argued that this is the wrong response, noting that people with severe mental illnesses are 16 times more likely to be killed by police during these encounters. She argued that the better answer to mental health crises would be dispatching trained social workers and other behavioral health professionals, who could de-escalate the situation and connect the person to services and supports that can help them long-term. She asserted that evidence suggests that a comprehensive crisis response system could be established and effectively deployed through adequate funding of government agencies and service providers and proper training for mental and behavioral health professionals.

Chris Hull – Senior Fellow, Americans for Intelligence Reform

Mr. Hull testified in opposition to B24-0094. Regarding threat assessments conducted by MPD, he argued that political affiliation should be included in the list of protected classes – like race, color, religion, sex, gender, and national origin – to guard against biased policing across the District. He highlighted concerns with B24-0213, arguing that it will hamstring officers from pursuing a fleeing suspect who may have committed a crime or attempted a crime. He asserts that the list of requirements officers must follow to pursue a suspect is onerous and will increase public safety risks.

Gordon Cummings – President, Can't Wait Foundation

Mr. Cummings testified in support of B24-0112. He spoke about the evidence identified in reports about the presence of white supremacists or those sympathetic to their ideology in law enforcement. He argued that biased policing erodes public trust in equal justice and the rule of law. He urged more comprehensive background checks and ongoing personality testing of police officers, and in comparison to other professions, suggested that police should be required to recertify regularly. Mr. Cummings asserted that MPD should require officers to sign sworn statements attesting that they have no ties to white supremacy groups and that violations could result in termination, which he argued have been upheld by the Supreme Court. He recommended that an independent review be done of MPD's social media policies, and MPD should implement new standards that will help identify biased officers.

Armand Cuevas – Public Witness

Ms. Cuevas testified in support of the PRC recommendations, arguing that police officers should be removed from schools. She discussed how police presence in schools makes students feel unsafe, and often, they are not needed because teachers can de-escalate situations. She asserted

that police should be replaced with individuals trained in mental health and de-escalation and integrated into the school culture by wearing school apparel. Ms. Cuevas concluded her testimony by urging more investments in communities and substantive changes to how police are deployed to address mental health issues, traffic enforcement, and unhoused persons, transferring these responsibilities to other professionals and service providers.

Nada Elbasha – Volunteer, D.C. Justice Lab

Ms. Elbasha testified in support of the PRC's recommendations. Specifically, she discussed the importance of the mandatory domestic violence arrest law recommendation, citing the sustained trauma and lack of agency that survivors experience when police intervene in domestic disputes. She asserted that mandatory arrests do nothing to stop or deter intimate partner violence and, instead, result in survivors being killed or assaulted by police officers responding to the dispute. Ms. Elbasha noted that the District should follow the lead of neighboring Maryland, which does not require an officer to make an arrest in every domestic violence case. Lastly, she discussed the disproportionate response by police to LGBTQIA and BIPOC domestic disputes and how ignorance and bias of police officers often result in the arrest of both preparators and survivors because officers cannot determine primary aggressors. Ms. Elbasha concluded her testimony by arguing that mandatory arrests do not deter domestic violence and only disrupt survivors' lives, impacting their ability to secure housing, food assistance, employment, and other support services.

Elizabeth Harris – Volunteer, D.C. Justice Lab

Ms. Harris testified in support of the PRC's recommendations. Specifically, she urged the adoption of the PRC's proposal to expand the exclusionary rule to guard against inherent bias in MPD practices and racial profiling of Black residents. She pointed to a recent MPD report that showed that while Black residents only make up 46% of the District's population, they accounted for 72% of the residents stopped by MPD between July 2019 to December 2019; she also noted that 91% of those stopped were also searched during this same period. Ms. Harris argued that expanding the exclusionary rule would help protect residents, particularly residents of color, and guard against overpolicing by MPD that often results from racial profiling.

Akosua Ali – President, NAACP, Washington, D.C. Branch

Mrs. Ali testified in support of the PRC recommendations and B24-0112, focusing her remarks on eliminating white supremacy in policing. Examining the history of white supremacy and the legacies of slavery and Jim Crow, she argued that police brutality against Black Americans directly resulted from not rooting out those who embrace white supremacist ideologies. Mrs. Ali cited numerous examples of police violence stemming from these radicalized ideologies, including the murder of George Floyd and the U.S. Capitol insurrection on January 6, 2021.

Shayna Druckman – Public Witness

Ms. Druckman testified in support of the PRC's recommendations. Namely, she urged action to address the vulnerability that youth experience when subject to questioning by the police without legal representation. She discussed how this vulnerability leads to self-incrimination, and

she cited research from the National Registry of Exonerations that shows that youth ages 14 and 15 falsely confessed in 57% of cases, only to be later exonerated. Ms. Druckman highlighted that youth do not understand *Miranda* warnings in the same way that adults do and thus require better safeguards for their constitutional rights through the presence of legal counsel during police interactions.

Kristin Eliason – Director of Legal & Strategic Advocacy, Network for Victim Recovery of D.C.

Ms. Eliason testified in favor of the PRC's recommendations and the bills before the Committee. She outlined the need for safe, trained, nonpolice responses to emergencies related to domestic disputes and urged a shift in philosophy surrounding crisis response. Additionally, she highlighted the need to create social structures that offer stable, affordable, and sustainable housing, employment, and educational opportunities to address the underlying cause of violence. Furthermore, Ms. Eliason noted the critical need for investments to expand community-based social service programs across the District to support residents who experience mental health conditions, substance use disorders, and housing and financial insecurity.

Yasmin Vafa – Executive Director, Rights4Girls

Ms. Vafa testified in support of the PRC's recommendations. Namely, she discussed specific recommendations for crisis intervention and supportive services for sex trafficking survivors, arguing that they need to be expanded to enable more community-based responses than police responses. Ms. Vafa argued that funding should be prioritized to provide for 24-hour crisis responders who can connect survivors with emergency shelters and other resources, rather than criminalizing their behaviors with police responses that often result in arrests and entries into the juvenile justice system. Ms. Vafa also strongly supported police-free schools and emphasized the need for more robust protections around *Miranda* rights for children.

Diana Jarek – Housing Law Fellow, Bread for the City

Ms. Jarek testified in broad support for the PRC's recommendations. She urged action to create and expand community-based services and resources that specifically address community needs. She argued that by building a more robust public safety net of accessible mental healthcare, treatment for substance use disorders, and stable and affordable housing, the community's needs could be better addressed to avoid the criminalization of poverty. Ms. Jarek emphasized the need for significant changes to MPD to achieve more innovative and more effective policing across the District and reallocate funding away from policing and to community-based programming and resources.

Brittany K. Ruffin – Affordable Housing Advocacy Attorney, Washington Legal Clinic for the Homeless

Ms. Ruffin testified in support of the PRC's recommendations. Specifically, she discussed the need to prioritize and increase affordable housing funding across the District to address housing

insecurity and decriminalize poverty. Ms. Ruffin highlighted the homelessness crisis in the District. She pointed out the failures of the implementation of the Housing Production Trust Fund to create and preserve affordable housing options. She urged action to decriminalize actions taken by unhoused and under-resourced people to survive and provide for themselves and their families.

Government Witnesses

Michael Tobin – Executive Director, Office of Police Complaints

Director Tobin testified in support of the PRC's recommendations. He began his remarks by reiterating OPC's mission is to "improve community trust", and followed up by stating that that mission has "arrived at an important crossroad." He spoke specifically to the PRC recommendations regarding a new vision for OPC and the PCB, addressing what he felt were critical insights into how the PRC arrived at their thinking on these findings and next steps for operationalizing them.

Director Tobin described OPC's history, dating back to the presidency of Abraham Lincoln, who appointed the first police oversight body in the District in August 1861. What was then the Metropolitan Police Board of the District of Columbia had five civilian commissioners to provide oversight of the newly formed police department (the same act of Congress establishing the Police Board also established what is now MPD). Director Tobin asserted that given an interpretation of historical documents, it is fair to stay that civilian oversight of MPD officially began in 1861.

Director Tobin described the current iteration of civilian oversight of MPD, stating that the oversight agency is "primarily investigative in its function and limited in its jurisdiction," and that its civilian board lacks authority to make meaningful, substantive change at MPD due to a dearth of community input into decision-making. He asserted that this is all in stark contrast to the system as it was intended by Congress in 1861 and pointed out that the first Metropolitan Police Board "did not have any of the jurisdictional or authority limitations that currently restrict civilian oversight to a nominal existence." He even described how the makeup of the PCB is compromised because of the one of the members is a sworn MPD officer who reports to the police chief.

Director Tobin posited that it is time to consider what comes next for civilian oversight of MPD, stately clearly that the current system needs improvement and that the PRC's recommendations would be "beneficial to improving oversight." He outlined several recommendations related to OPC, including renaming the PCB and expanding its jurisdiction, authority, and resources.

Katya Semyonova – Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

Ms. Semyonova testified in favor of the PRC recommendations and raised considerations for the Committee. She specifically addressed findings around police-free schools, reforming OPC, altering arrest authority in certain instances and eliminating consent searches, as well as modifying protocols and procedures for the release of body worn camera footage. Additionally, Ms. Semyonova expressed PDS' views on B24-0112.

In full support of the PRC's recommendations regarding police in schools, Ms. Semyonova argued that PDS regularly see juvenile clients who are "traumatized by being arrested and escorted out of the building in front of their teachers and peers." She argued that the current system allows for a greater police presence in schools that leads to more school-based arrests of Black students than their white counterparts. Asserting that "school should be a safe place for all students," Ms. Semyonova offered an example of how students are thrust into an unhealthy environment of fear with police in schools, with the result often being that they fall behind academically, and in the extreme cases, avoid coming to school altogether. Ms. Semyonova urged adoption of the PRC's recommendations that would "support, rather than disincentivize, school attendance," and stressed the need for funding school-based supports and resources like behavioral health programs and restorative justice initiatives.

Ms. Semyonova addressed the need to replace the presumption of arrest standard with one that "require[s] either verbal warnings or citations in lieu of arrest," expanding on MPD's current COVID-19 pandemic era citation release order. Including specifics from the PRC's findings, she goes on to describe how arrests have "adverse, and often severe, consequences for the arrested person and harm community-police relationships." The resulting cascade of effects from an arrest, Ms. Semyonova argued, far outweighs the need to unless doing so will advance public safety or community health and less intrusive means have been ineffective. She examined how arrests lead to fingerprints being automatically uploaded to national law enforcement databases, including immigration services, and how despite all this process, no charges are actually brought by a prosecutor for the alleged offense by police. She summed up her view on this point by suggesting that current arrest policies do nothing to drive down crime.

Ms. Semyonova went on to discuss other arrest alternatives, like cite and release, which does require arrest and booking at an MPD station, but with release with notice to appear in court at a later date. She argues that changing MPD's arrest policy will "minimize harm and traumatizing interactions" with police and make clears that the statute allowing for citation in lieu of arrest is outdated and should be updated to expand the offenses for which MPD can perform a field arrest or citation release.

Additionally, Ms. Semyonova noted PDS' support for ending consent searches, a practice that, as she put it, rarely allows "residents, especially in overpoliced communities," to make "a voluntary choice." She characterized MPD's consent searches as "abusive, degrading, and coercive," and evidence suggests that they are often more targeted towards Black residents. She cited research showing that while Black Washingtonians make up only 46% of DC's population, they accounted for 74.6% of reported MPD stops in 2020, and nearly 90% of all searches that did not result in a ticket, warning, or an arrest; white residents accounted for only 5.5% during the same year. Ms. Semyonova gave a compelling example of such a search in Los Angeles, CA, asserting that most people are aiming to survive the police encounter and will say anything to avoid "being killed" by the police. She argued that the District should join with other states like New Jersey, Minnesota, and Rhode Island and ban consent searches.

Ms. Semyonova argued for changes to how the public, agencies like OPC, and others have access to body worn camera footage and disciplinary records of MPD officers. Stressing the importance of transparency and accountability, she discussed the need for releasing body worn camera footage as a means to a "fairer trial and court process," allowing for informed decisions to be made by judges and juries in cases. She argued for modifying the law to allow for anonymous complaints to OPC, and that OPC should be allowed to proceed with investigations without a complainant needing to go on record to provide information about police misconduct. She also called for OPC to have a greater role in identifying patterns of misconduct, allowing them to review body worn camera footage at random intervals and use it during investigations and other oversight functions.

Lastly, Ms. Semyonova addressed PDS' views on B24-0112 concerning white supremacy in law enforcement, offering considerations for how to strengthen the bill. She argued that the Auditor should focus its investigation more widely, looking not only at ties to white supremacist and other hate groups but to how racist views might impact how officers perform their duties in communities and towards individuals. She argues that an officer can "espouse hateful and racist views" and not be proven to be affiliated with a hate group. Ms. Semyonova urged action to make any final report of findings public and to explicitly name MPD officers found to espouse views aligned or affiliated with a white supremacist or other hate group.

Kathleen Patterson – D.C. Auditor, Office of the District of Columbia Auditor ("ODCA")

Auditor Patterson testified in support of the PRC's recommendations, focusing on greater transparency and accountability surrounding MPD's use of force policy and investigations stemming from police misconduct and violence. Ms. Patterson outlined in detail several recent efforts by ODCA to understand better the instances of officer-involved fatalities resulting from excessive use of force, and how despite specific recommendations outlined in those reports and reviews, "MPD has appeared to resist or be unconcerned" with taking steps to address and remediate concerns. Ms. Patterson characterized MPD's actions surrounding four deadly uses of force in 2018 and 2019 to be concerning because, while an independent review found MPD's current policies on use of force to be "consistent with best practices in policing," MPD "failed to comprehensively review the events leading up to the four fatalities" and MPD failed to identify implications for policy, training, and implementation.

Ms. Patterson drew parallels between specific recommendations outlined in reports from ODCA and those in the PRC report, specifically related to de-escalation and transparency in police investigations. She stated that, as evidenced by findings in several OCDA reports, MPD has adopted an "excessively narrow focus" for its use of force investigations. She outlined how independent investigators for ODCA's March 2021 report concluded that "additional actions could have been taken that might have led to a different outcome," in each of the four officer-involved fatalities, underscoring the importance of de-escalation training, which the PRC also recommends. Despite MPD's current de-escalation policy, Ms. Patterson described the killing of D'Quan Young, which an ODCA report characterized as inconsistent with MPD policy because of the officer's "failure to make any effort to de-escalate the situation." Ms. Patterson noted that none of this was

explored during the investigation by the Use of Force Review Board, and that similar recommendations made to the Use of Force Review Board and MPD's Internal Affairs Division for excessive uses of force investigations have not been adopted.

Lastly, Ms. Patterson highlighted the need for transparency in officers' personnel records regarding misconduct and the public interest in making them accessible. Citing findings from the PRC's report, she noted that the District joins 23 other states where personnel records are "confidential" or "mostly confidential," or as the PRC put it, 'confidential' and 'mostly unavailable.' With a growing number of states making these personnel and disciplinary records public, she believed the District should follow their example and close the information gap that has "[led] to a lack of public confidence in MPD's investigations."

Karl Racine – Attorney General for the District of Columbia

Attorney General Racine testified in support of the PRC's recommendations. He noted that while the Office of the Attorney General ("OAG") did not formally vote on the recommendations (OAG was a non-voting member), OAG made significant contributions to discourse that shaped the final findings of the report. Attorney General Racine made clear that he has long believed this "requires thinking creatively and broadly about how to address residents' needs," and cited programs that he has developed and led as Attorney General to reduce crime and justice system involvement. He also noted his clear support for B24-0213. Pointing to evidence from 1995-2015, he posited that nearly one person on average died each day a result of police chases, many innocent bystanders, and some police officers. He noted that vehicular pursuits by officers should be a last resort only when it is "necessary for public safety and the need for it outweighs the danger it is creating." He urged action to codify existing MPD restrictions around these pursuits.

B24-0254 and B24-0356

On Thursday, October 21, 2021, the Committee on the Judiciary and Public Safety held a public hearing on B24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021", and B24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021". A video recording of the public hearing can be viewed at https://entertainment.dc.gov/page/2021-council-district-columbia-hearings. The following witnesses testified at the hearing or submitted statements to the Committee outside of the hearing:

Public Witnesses

Emily Tatro – Deputy Director, Council for Court Excellence

Ms. Tatro testified on behalf of the Council for Court Excellence ("CCE") in support of B24-0356. CCE has facilitated conversations with survivors of crime, justice system actors, and individuals who have experienced police violence. Police reform has been a consistent topic during these conversations. She noted that the District "has the highest per capita rate of law enforcement officers per resident of any large U.S. city" and 20% more than Chicago, the next most heavily policed city. Ms. Tatro also discussed racial disparities in policing. Between 2013 and 2017, Black people composed only 47% of the District's population, yet represented 86% of its arrestees. At a

discussion hosted by CCE, participants spoke about the intergenerational impact of overpolicing on communities of color and the uniquely traumatizing effects of policing children. Participants' proposed solutions included improving services for returning citizens, creating non-police responses for call for service related to domestic violence, and increasing transparency and accountability within MPD. Ms. Tatro testified that B24-0356 is directly responsive to these concerns.

Danielle Robinette – Policy Attorney, Children's Law Center

Ms. Robinette testified on behalf of the Children's Law Center in support of B24-0254 and B24-0306. She stated that the Children's Law Center supports B24-0254 because it improves transparency in school policing incidents. Ms. Robinette praised the more inclusive definition of law enforcement, given the plan to phase school resource officers ("SROs") out of schools. However, she was concerned that the bill will only reflect the perspective of schools and MPD in reporting school disciplinary concerns and may not "capture informal interactions between students and law enforcement that may feel coercive or inappropriate to students as the law enforcement officer would have to report their own misbehavior." She encouraged the Committee to create a mechanism to "report concerns regarding their experiences with law enforcement at school without fear of retaliation." She also urged the Committee to ensure that the ability to file complaints is not limited to SROs but includes other school security personnel.

Gregg Pemberton – Chair, Fraternal Order of Police, Metropolitan Police Department Labor Committee

Mr. Pemberton testified that B24-0356 "proposes sweeping changes to many of the laws, rules, and regulations that govern police officers in the District, and will have a significant negative impact on current D.C. Police Union Members." He focused his comments on three components of the bill that he believed were most troubling. First, he criticized provisions that would create a publicly accessible database for disciplinary records and expand access to such records through the District's Freedom of Information Act ("FOIA"). He noted that the provision does not create a distinction between sustained and unfounded allegations of misconduct. He also took issue with the bill's proposal to allow the disclosure of an officer's name, medical history, and mental health or substance abuse treatment, and to eliminate the personal privacy exemption under FOIA. He contrasted provisions in the bill with rules regarding the disclosure of misconduct in other professions, such as lawyers and health care professionals. He believes current officers have a legitimate expectation of privacy regarding these issues that would be subverted by the bill.

Mr. Pemberton next criticized the bill's proposed expansion to OPC's authority. He argued that, under the bill, the PCB would not be representative of the District and include individuals "not best suited to perform the functions of the . . . Board." He took issue with the bill allowing the submission of anonymous complaints to OPC. Mr. Pemberton argued that anonymous complaints undermine an officer's due process rights and prevent resolution of a complaint through conciliation or mediation. He also stated that the provision allowing the OPC Executive Director to conduct investigations before USAO has decided to pursue a criminal investigation would lead to one-sided investigations because many officers will simply invoke their Fifth Amendment rights during an administrative investigation.

Finally, Mr. Pemberton argued that the Deputy Auditor for Public Safety should be required to have law enforcement experience.

Akosua Ali – President, NAACP, Washington, D.C. Branch

Ms. Ali testified in support of all three bills, but she believes all three could benefit from additional clarification, performance metrics, and compliance measures. She focused her testimony on B24-0356, which she believes is necessary to promote justice and equity. In response to Chief Contee's opposition to the database on the grounds that other public employees are not subject to that same level of transparency, she argued that MPD officers' ability to carry firearms distinguishes them from other government employees. She also dismissed concerns that the bill will create too much work for the PCB, believing that the community is ready to embrace these additional responsibilities in order to achieve true transparency and accountability. She did acknowledge the need to clarify and amplify protections for officers' privacy. But disclosing evidence related to misconduct or racial bias in policing are imperative.

Caitlin Holbrook – Policy Advocate & Research Associate, D.C. Justice Lab

Ms. Holbrook testified in support of B24-0356, but she urged the Council to add provisions for meaningful oversight of corrections officers and special police officers. She noted that there are more than 7,500 special police officers in the District – many of whom are armed and receive only one week of training. She discussed an Office of Inspector General report finding that the Department of Corrections had mishandled all 453 use-of-force grievances filed by residents.

Yonah Bromberg Gaber – Public Witness

Mx. Gaber expressed support for all three bills, but they believe they do not go far enough. They echoed Ms. Holbrook's support for creating more meaningful accountability of corrections officers. They criticized mandatory arrest laws and asked for greater scrutiny regarding arrests that result in no-papering decisions, since these subject individuals to confinement seemingly without reason.

Ahoefa Ananouko – Policy Associate, American Civil Liberties Union of the District of Columbia

Ms. Ananouko testified in general support of B24-0356. She argued that a robust system of public safety must create a system through which police are held accountable for abuse of powers. While the ACLU-DC supports the general intent to create a more meaningful disciplinary process for MPD officers and expand the authority of the OPC, she testified on components that could benefit from more clarity and specificity.

While not strictly opposed to the creation of a new Deputy Auditor for Public Safety, Ms. Ananouko cautioned that "the duties and responsibilities of the Deputy Auditor, as contemplated by this legislation, are largely already within the powers of the D.C. Auditor, and in some cases are duplicative of functions that OPC and the Police Complaints Board currently perform." She also commended the bill's intent to provide greater oversight and accountability over SPOs but

argued that "the Council must first create clear and uniform guidelines for all SPOs operating in the District." Without standardized rules governing how all SPOs, OPC's ability to conduct effective oversight is limited.

She criticized a component of the bill that would grant MPD one seat on the PCB, even as a non-voting member. She, on the other hand, praised the bill specifying subpopulations that should have membership on the board, including young people, neighborhoods impacted by policing, and LGBTQIA communities. She acknowledged, however, that the specific language in the bill may complicate attempts to have the PCB fully staffed. She asked that the Committee amend the legislation so that the PCB can make recommendations on MPD policy *sua sponte*, and not just in advance of MPD implementing that policy. She argued that without requiring MPD to follow the PCB's recommendations, it "does not create an avenue for real accountability." Similarly, she recommended that OPC's recommendations regarding the discipline to be imposed on an officer be binding. She noted that according to an October 2020 OPC report, 60% of sustained complaints of misconduct result in only minor disciplinary sanctions for the officer. These low-level reprimands, according to the report, "allow officers to believe that complaints from community members are unimportant."

Ms. Ananouko next praised the bill allowing for the submission of anonymous complaints to OPC, but she asked the Council to create a separate process for resolving anonymous complaints. She also asked that the bill be amended to allow for complainants to request that their personally identifiable information be removed prior to the case information being shared with MPD to assuage fears of retaliation.

Ms. Ananouko testified that the ACLU-DC strongly supports provisions in the bill that would increase the public's access to MPD disciplinary records through FOIA. She asked that the Council clarify MPD's ability to deny fee waivers for records requests since fees can thwart public access. Additionally, she asked that the Council clarify the scope of the personal privacy exemption under FOIA, expand the public access to BWC footage, and require more detailed reporting regarding MPD's timeliness in responding to FOIA requests.

Ms. Ananouko next testified about the bill's proposal to create a database for officer misconduct. She believes such a database is crucial tool in identifying systemic issues within MPD, as well as discovering patterns of misconduct by individual officers. She encouraged the Council to consider an enforcement mechanism for the database that include deadlines for reporting and penalties for not meeting those deadlines, such as reductions to its annual budget. She also recommended "that the Council include a provision providing that each officer be assigned a unique identifier to track certification and misconduct history" for cases where an officer's ID or badge number changes over their service.

Finally, Ms. Ananouko urged the Council to create a meaningful process through which the community can weigh in on the selection of the next Chief of Police.

Miya Walker – Policy & Advocacy Manager, Black Swan Academy

Ms. Walker testified on behalf of Black Swan Academy regarding B24-0254. She believes more robust data collection will help build support for removing SROs from schools. She criticized the bill for not providing youth with a direct outlet to report their interactions with law enforcement, and instead relying on information submitted by law enforcement. She recommended the Council create a formal data collection and reporting process for students to anonymously share concerning interactions with law enforcement. She also asked that reporting requirements be expanded to include whenever an officer is on campus. Additionally, she suggested that security guards be added to the definition of "law enforcement" so that their interactions with youth are still reported. She asked the Council to consider adding an enforcement guardrail for MPD to complete the required data collection and reporting to a high standard of compliance.

Kristi Matthews - Director, D.C. Girls' Coalition

Ms. Matthews testified to advocate for a youth-centered complaint process to be added to B24-0254. She believes that this process needs to be clear and accessible to allow students to report interactions with law enforcement, including SROs and security officers, where they have been harmed or targeted. This entity needs to be separate from the existing reporting system, so it does not lead to more harm or trauma.

Fritz Mulhauser – Co-Chair, Coalition Legal Committee, D.C. Open Government Coalition

Mr. Mulhauser testified in support of B24-0356. He praised the bill's proposal to provide greater public access to police disciplinary records by removing "roadblocks" in the FOIA process and through the creation of a database. He noted that some states have limited the release of disciplinary records to those relating to a sustained allegation of misconduct. However, evaluating complaint investigations and outcomes requires access to all allegations of misconduct, not just sustained allegations, "since a large fraction are not adjudicated." He noted that the New York legislature recently adopted the second approach.

He next walked through ways in which the bill could further specify the records eligible for disclosure. He explained how the bill's definition of "disciplinary records" could be improved. He also explained possible benefits for setting a time limit for how long records are available to the public, since "large volumes [] retained under a lengthy retention schedule" could lead to "serious bottleneck." He also noted that the definition of "disciplinary records" is used in reference to the revised FOIA system and the contents of proposed database. It may be helpful to decouple those definitions.

Despite praising the bill for promoting greater public access to records, Mr. Mulhauser argued that some FOIA exemptions should be preserved. He noted that records of "other persons that should be considered for privacy protection include some body worn camera video, some victim autopsy details such as photos, and witness interview details." To prevent duplicative efforts from multiple agencies regarding an incident, he recommended "requiring designation of a lead agency to handle review and redaction once for the body of common records." He further recommended that the bill limit or eliminate fees for misconduct records requests. Given the volume of records requested under the expanded access to disciplinary records, he recommended that

the Council consider a special response deadline for these records. Finally, he cautioned that it "will be more or less difficult to create depending on what is in it" since, for example, preparing redacted versions of all disciplinary records will be time consuming. He stated that a database with basic elements may still be useful, especially as a companion to a more robust FOIA. In supplemental testimony submitted to the Committee, Mr. Mulhauser discussed proposed amendments to the bill in even greater detail.

Joy Masha – Program Administrator, D.C. Freedom Schools, Children's Defense Fund

Ms. Masha testified on behalf of D.C. Freedom Schools in support of B24-0254 and B24-0306. Her organization works to strengthen *Miranda* rights for kids, data collection policies within schools, and to ensure that interactions with law enforcement account for their youth. She urged the Council to center the conversation on the real-life impacts of children and families, especially Black youth who are disproportionately targeted by law enforcement. She encouraged the Council to engage parents in the development of the bills and consider them in the context of family, and not young people in isolation.

Eva Richardson – Staff Attorney, Disability Rights D.C., University Legal Services

Ms. Richardson testified in support of B24-0254. She shared how comprehensive, disaggregated, publicly available data will specifically benefit students with disabilities who are more likely to face school discipline. She suggested that the stop and arrest data should not only be able to be disaggregated by disability, but also by the type of disability.

NeeNee Tay – Co-Conductor, Harriet's Wildest Dreams

Ms. Tay focused her comments on B24-0356. She first summarized the bill's main components. She then discussed instances in which she personally experienced unjustified uses of force but was never notified whether the officer faced discipline. She explained that community members suspect that the officers involved in the death of Karon Hylton have faced multiple complaints of misconduct, but lack of public access to their disciplinary records prevents the community from fully understanding the extent of their misconduct. She noted the need for the bill to include meaningful consequences for noncompliance, to be adequately funded, and concerns that the bill would not be fully implemented because of opposition from the police union.

Karen M. Dale – Market President & CEO, Amerihealth Caritas District of Columbia

Ms. Dale testified in support of B24-0356. She expressed support for the bill's proposed creation of a publicly accessible database for officers' disciplinary records. She noted a Gallup poll finding that, "for the first time in 27 years, public confidence in law enforcement dipped below 50%." Promoting access to officers' disciplinary records "would be a critical step to restoring public confidence in the institution of policing." She noted that DC Health maintains a list of all disciplinary actions taken against physicians licensed to practice in the District, which "helps ensure the that the highest quality of care is provided." She believes law enforcement should embrace

a similar style of public accountability. She encouraged the Council include "funding for the creation of the database, requirements for police departments to report discipline data on a prescribed schedule, and penalties for noncompliance."

Nikki D'Angelo – Community Organizer, Democrats for Education Reform D.C.

Ms. Angelo provided written testimony in support of B24-0254, praising it for "improving transparency and accountability for both schools and the Metropolitan Police Department regarding school-based disciplinary actions involving law enforcement." She recommended including special education transportation to be tracked for school-based incidents.

Sunny Kuti – Youth Organizer, The National Reentry Network for Returning Citizens

Mr. Kuti testified in support of B24-0356, but he encouraged the Council to consider implementing more oversight of corrections officers within the Department of Corrections ("DOC"). He argued that residents at the DOC are subjected to disrespectful and assaultive behavior by staff without accountability or recourse. He briefly discussed a report issued by the Office of Inspector General finding that DOC systematically mishandled use-of-force grievances.

Roz Brooks – Policy Leader, CEO Action for Racial Equity

Ms. Brooks testified on behalf of CEO Action for Racial Equity ("CEOARE") in support of B24-0356. CEOARE is a "fellowship of over 100 companies that mobilizes a community of business leaders" to advance public policy across various areas, including public safety. CEOARE expressed its support "for the creation of police misconduct registries that can provide law enforcement agencies with complete access to candidates' misconduct records." Such a database will prevent law enforcement agencies from hiring individuals who have been terminated for misconduct (or resigned in lieu of termination) from being rehired by other law enforcement agencies. CEOARE issued six recommendations to improve the proposal to create a database. First, establish a prescribed schedule for reporting misconduct with penalties for noncompliance. Second, make sure to include records of officers who resign while a misconduct claim is pending. Third include officer and complainant demographic information as part of the record. Fourth, revise or clarify MPD's policy of automatically purging records of misconduct. Fifth, establish an audit schedule. And sixth, mandate screening of candidates for hire by a District law enforcement agency using this and other disciplinary databases.

Shanni Alon – Public Witness

Ms. Alon provided written testimony in support of B24-0254. She emphasized the importance of ensuring that the proposed metrics are disaggregated and published by both OSSE and MPD. She believes that the publication timeline for OSSE should be biannually – after the first semester and at the end of the academic year – to allow for necessary policy changes during the academic year. Additionally, she recommended providing an enforcement mechanism to ensure that OSSE and MPD publish the data on a timely basis. The enforcement mechanism could include the Chief of Police and Superintendent testifying to the Council regarding the data findings.

Christy E. Lopez – Professor from Practice, Faculty Co-Director, Center for Innovations in Community Safety, Georgetown Law

Professor Lopez testified in support of B24-0356. While she was supportive of many components in the legislation, she focused her comments on two aspects of the bill: the creation of the Deputy Auditor for Public Safety position and continuing administrative investigations of misconduct while the decision whether to prosecute is pending. She recounted OPC Director Tobin's characterization of police oversight in the District, which he described as primarily focused on evaluating an officer's conduct after misconduct has already taken place. The Deputy Auditor would provide "front-end" oversight aimed at preventing misconduct by examining the practices and culture that increase the likelihood of misconduct. While one option is to empower and fund OPC to perform this function, her "consistent experience and observation in agencies across the country is that it is difficult for an oversight entity focused on the review or investigation of individual instances of police misconduct to also serve a front-end, systemic function." The Deputy Auditor position must be structured in a way that complements, rather than duplicates, the oversight functions of other agencies. One option would be to have the Deputy Auditor, rather than the PCB, "be responsible for providing comments about certain new policies and training updates," though it could solicit input from the PCB. She underscored the need to clarify "which oversight entity will investigate or review which types of incidents or complaints."

Next, Professor Lopez discussed how the bill would allow for administrative investigations into an officer's conduct to go forward during the pendency of criminal investigations. She noted that "[i]ncident referred to prosecutors for potential criminal prosecution generally include the most serious allegations of misconduct," but "the vast majority of these referred cases . . . are not prosecuted." Taken together, this means "there is a systemic delay in the full-investigation and resolution of the most serious allegations of misconduct." Furthermore, the U.S. Attorney's Office "has a particularly egregious record regarding the timely review of cases" – with some pending for as long as 1,497 days. She recommends that the legislation require that MPD and OPC change the practice of delaying administrative investigations. Her suggestion is that the language permit, but not require, that the Chief of Police complete administrative investigations before the conclusion of the criminal investigation.

Finally, Professor Lopez asked that the Council require that the OPC Executive Director conduct investigations in cases where he discovers evidence of abuse not alleged by the complainant. The provision's use of the word "may" leaves the decision to investigate in the Executive Director's discretion.

Bobby Pittman – Chair, First District Citizens' Advisory Council

Mr. Pittman provided written testimony on behalf of the First District Citizens' Advisory Council. He acknowledged the potential traumatic impacts of an arrest, but he remained concerned that requiring a more mature *Miranda* policy for youth will impede investigations. He was also skeptical of the practicability of providing youth with access to counsel, including who would provide the lawyers and what the system would be for contacting a lawyer before questioning.

Mr. Pittman recognized the limited role that MPD plays in school disciplinary incidents and suggested that teachers and administrators should be better equipped to respond to school incidents instead of calling MPD. He also acknowledged the reality that police may be responding to incidents involving adults, not students on school grounds.

Government Witnesses

Sarah Jane Forman – General Counsel, Office of the State Superintendent of Education ("OSSE")

Ms. Forman testified on behalf of OSSE. She expressed interest in revisiting the current language of the bill in light of existing data collection practices around school discipline. She believed that several of the new metrics added in the bill are currently being measured and publicly shared by OSSE. Ms. Forman shared how OSSE's Discipline Data Collection and Template Certification "requires each local education agency or entity operating a publicly funded community-based organization to provide statutorily mandated discipline data in the form and manner prescribed by OSSE." Ms. Forman said that this template already includes some of the metrics proposed in the bill. For example, Appendix A provides a comprehensive list of conduct leading to discipline, which includes the additional conduct proposed in the bill - "recovery of weapons, recovery of contraband, recovery of controlled dangerous substances." She believes that misconduct should continue to be presented in the current format, instead of a narrative, to ensure standardization of the data. Additionally, the proposed bill calls for reporting on "the type and count of weapons, contraband or controlled substances recovered." Ms. Forman stated that this information is detailed in Appendix A (list of misconduct, including contraband or controlled substances) and Appendix E (list of weapons).

Furthermore, Ms. Forman believes that the requirement for LEAs to "report law enforcement involvement in any school action or activity" is too broad. She recommends that the language should clarify what is constituted by "any school action or activity." She believes that the reporting of law enforcement involvement should be limited to student misconduct.

Michael Tobin – Executive Director, Office of Police Complaints

Director Tobin began with a general overview of civilian oversight of police in the District, which began with the Metropolitan Police Board in 1861. The commissioners of this body were "granted far greater responsibility and oversight than most police boards in the country currently have," without the "jurisdictional or authority limitations that currently restrict civilian oversight to a nominal advisory role." In contrast, under the present system, "we have an oversight agency that is primarily investigative in its function and limited in its jurisdiction, and a civilian board that has little authority to provide meaningful community input into police policy, procedure, discipline, and training."

Director Tobin's remaining testimony focused on specific provisions within B24-0356. Regarding the proposed creation of a Deputy Auditor for Public Safety, Director Tobin noted that the proposed duties and responsibilities of that position duplicate the background of functions of both the Office of the District of Columbia Auditor ("ODCA"), as well as the Office of Police

Complaints. As proof that the ODCA already possesses the requisite authority, he noted that ODCA is already conducting an audit concerning MPD officers' use of force and the impact of civil lawsuits concerning police misconduct. Rather than creating a new position, Director Tobin instead recommended that the Council provide OPC with the resources and statutory authority to perform more vigorous oversight.

Turning to proposed changes to the Police Complaints Board ("PCB"), he argued that the "proposal [that] allows the renamed oversight board to provide comments on MPD policy, procedure, or training" is "not substantively different from authority it currently possesses." Despite the bill giving the PCB input on the job description and qualifications for the Chief of Police, the bill fails to give the PCB any meaningful participation in the selection process. Without changes to the PCB's authority, Director Tobin was skeptical that its expanded membership would lead to any significant change in police oversight.

Director Tobin next discussed provisions in the bill that would allow OPC to investigate complaints against SPOs. He argued that the lack of uniformity regarding SPOs – whether they are employed by the government or private businesses, how they were trained, their jurisdiction and function, and how any records of their misconduct are maintained – complicates oversight. He encouraged that the Council rectify inconsistent standards and guidelines for SPOs before attempting to implement a system for investigating misconduct. He also noted that the proposal "lacks any ability to take any disciplinary action against the individual or private companies" even with a sustained allegation of misconduct.

He commended the legislation's proposal to give OPC the authority "to conduct administrative investigations and make findings on all serious use of force incidents and in-custody deaths involving MPD, HAPD, or special police." However, he cautioned that "this function would likely require OPC to have a 24/7/365 incident response capability" at significant cost.

Director Tobin praised provisions in the bill allowing OPC to investigate complaints submitted anonymously. He criticized the provision requiring OPC to report to the Deputy Auditor for Public Safety regarding the status of complaint investigations, as this would undermine OPC's independence. He also expressed concerns about the resulting delays, should the bill's requirement that three PCB members agree on dismissing a complaint take effect.

Director Tobin then addressed the bill's proposal to allow OPC's director to recommend a specific form of discipline after a sustained allegation of misconduct. He was critical of the proposal to allow the police chief to not follow such recommendations, provided he submit an explanation within 45 days. In addition to unnecessarily extending the timeline for resolving a case, he noted that this system "ignores the fact that MPD has historically failed to follow the recommendations of both the executive director or oversight board." He instead argued that the Council should implement the disciplinary system that the PCB recommended.

Finally, he praised provisions in the bill that would limit FOIA exemptions related to police records and require that MPD maintain a database regarding an officer's disciplinary history.

Kathy Patterson – D.C. Auditor, Office of the District of Columbia Auditor

Ms. Patterson testified on behalf of the Office of the District of Columbia Auditor. She opened her testimony by underscoring the importance of drawing clear lines between the duties of ODCA and OPC. She proposed two different ways for distinguishing OPC and ODCA's roles: first, a system in which OPC looks forward by reviewing MPD policies before they take effect while ODCA reviews how MPD policies have played out after the fact, or second, a system in which OPC focuses on individual members' conduct, while ODCA focuses on institutional policies and practices.

Regarding the proposed creation of a Deputy Auditor for Public Safety, Ms. Patterson acknowledged that the position may very well be better situated in other agencies, but she would be "ready and willing to take on the responsibility" of creating that role within ODCA. She did note that if the position were placed within ODCA, "there are no additional powers that the Deputy Auditor for Public Safety" would need. She also expressed reservations concerning the bill's proposal to create a search committee for hiring a deputy auditor, the requirement that the deputy auditor be an attorney, and the limitation that the deputy auditor may only be removed for cause.

She recommended that the Council amend the bill to "require a single annual discipline collection to be provided by LEAs to OSSE and reported publicly." This data collection and public report could align with federal requirements, as well as be augmented with other local specific data collection requests. Additionally, Ms. Patterson testified that LEAs have varying data collection practices, which significantly hinder the data quality. Ms. Patterson attributes these issues to the fact that there is not enough data collection through the automated data system ("ADT"), and public charter schools are reporting "discipline data through a multi-step process instead of directly to OSSE." She offered numerous examples of other states that have committed to an automated system and suggested that the "Council require that all student discipline data be collected via the ADT and with controls that ensure that all data is comparable." This would replace the existing "discipline data submission process requiring LEAs to submit discipline data four times a year directly to OSSE," which is prone to "error and increased burden on LEAs."

Katerina Semyonova – Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

Ms. Semyonova praised components of B24-0356 that would expose law enforcement disciplinary records to public scrutiny, that allow for anonymous complaints to be investigated by OPC, and that allow OPC to conduct its own investigations while the U.S. Attorney's Office investigates the same conduct. She underscored that these provisions should be passed alongside more comprehensive reforms recommended by the PRC and community members.

She proposed that OPC's authority be expanded to include the Department of Corrections, noting the lack of an effective oversight body. She also proposed that OPC be required to provide complainants with an easier way of uploading video that can serve as the basis of a complaint and to remove the requirement that a complaint be "reduced to writing" by someone with "personal knowledge." She further argued that, even without a complaint, OPC should have the ability to pull body-worn camera footage of particular officers to determine if there is a pattern of misconduct and to randomly select footage to review for misconduct. She also suggested that OPC be

required to recommend a specific form of discipline after a sustained allegation of misconduct, and that MPD should be bound by that recommendation.

While she praised provisions related to Freedom of Information Act requests, she argued that the bill should clarify which specific redactions are allowed. She stated that the bill should also allow disclosures of instances in which police act as witnesses and the terms of any mediation, and she provided a modified definition of "disciplinary records" to be used in the law. Finally, she proposed various enforcement mechanisms that would provide greater accountability, including tightened time limits, financial penalties for unreasonable delays, and the direct disclosure of documents by OPC regarding complaint investigations. She argued that defense counsel should have even greater access to OPC's case files than the general public, instead of relying on subpoenas for the same evidence.

B24-0515

On Monday, March 14, 2022, the Committee on the Judiciary and Public Safety held a public hearing on B24-0515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021". A video recording of the public hearing can be viewed at https://entertainment.dc.gov/page/2022-council-district-columbia-hearings. The Committee did not receive testimony in addition to the Executive's testimony summarized above.

IMPACT ON EXISTING LAW

Title 1 of the Committee Print includes twenty-six subtitles reforming police practices, expanding the authority and membership of related oversight bodies, and expanding access to records and information related to police conduct.

First, Subtitle A amends the Limitation on the Use of the Chokehold Act of 1985 to expand the prohibition on the use of trachea holds and carotid artery holds by law enforcement officers to more broadly prohibit the use of neck restraints and asphyxiating restraints.

Subtitle B amends the Body-Worn Camera Regulation and Reporting Requirements Act of 2015 and the District of Columbia Municipal Regulations to expand public access to body-worn camera ("BWC") footage and to prohibit officers from reviewing their BWC recordings and BWC recordings that have been shared with them to assist in writing initial reports. Subtitle B also establishes a process for the subjects of a serious use of force, or their next of kin, to object to the release of BWC footage regarding the incident, to require that the MPD report out data related to FOIA requests for BWC, including the outcome, cost, and length of time to complete the request, to prohibit the redaction of the likeness of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, from being redacted or otherwise obscured, to clarify the process for MPD notifying the next of kin before releasing footage, and to clarify that the BWC footage of officers "directly involved" in the use of force be disclosed, to require that MPD consult with an organization on ways to notify the next of kin, and to require that the notification process incorporate the organization's feedback.

Subtitle C amends the Office of Citizen Complaint Review Establishment Act of 1998 to

clarify OPC's ability to investigate complaints related to the DCHAPD, to expand OPC's jurisdiction to investigate complaints related to certain OIG officers, expand OPC's jurisdiction to receive and investigate complaints for law enforcement officers making false statements, to expand the membership of the PCB, to require that the Police Chief submit new or amended written directives to the PCB for written feedback, except when exigent circumstances exist, and to describe the factors PCB should consider when reviewing written directives, to allow OPC to receive anonymous complaints, to allow OPC's Executive Director to initiate their own complaint or take other appropriate action upon the discovery of any evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint, to require that the Executive Director issue a recommendation for the discipline to be imposed on a police officer after a sustained allegation of misconduct, to grant OPC's Executive Director access to the subject police officer's personnel file and the most recent Table of Offenses and Penalties Guide to allow the Executive Director to make an informed recommendation on the discipline to be imposed, and to require that the Chief of Police provide a written rationale for following or not following the Executive Director's recommendation of discipline.

Subtitle D establishes in statute the Use of Force Review Board, composed of the Executive Director of the Office of Police Complaints, three civilian members who have no current or prior affiliation with law enforcement, and seven members of MPD selected by the Chief of Police.

Subtitle E amends the Anti-Intimidation and Defacing of Public or Private Property to Criminal Penalty Act of 1982 to repeal the ban on wearing masks and hoods.

Subtitle F amends Title 23, Chapter 5, Subchapter II of the District of Columbia Official Code to establish an informed consent process where officers must, before conducting a consent search, inform the person of their rights.

Subtitle G amends the Metropolitan Police Department Application, Appointment, and Training Requirements of 2000 to require that MPD's continuing education requirements include instruction on racism and white supremacy, limiting the use of force and employing de-escalation tactics, the prohibition on the use of prohibited techniques, the limitations on the use of consent searches, and the duty to report excessive force or misconduct, to reconstitute and expand the membership of the POST Board, to allow lawfully admitted permanent residents to serve as MPD officers, and to require that the POST Board establish minimum application and appointment criteria related to an applicant has prior service with another law enforcement and whether it involved alleged or sustained misconduct or resulted in discipline imposed.

Subtitle H amends the First Amendment Assemblies Act of 2004 to require that the uniforms and helmets of officers policing the First Amendment assemblies prominently identify the officers' affiliation with District law enforcement.

Subtitle I amends D.C. Code § 16-705 to grant defendants the right to a jury trial when charged with criminal threats, resisting arrest, or intent-to-frighten assault committed against a law enforcement officer.

Subtitle J amends the Revised Statutes of the District of Columbia to repeal the offense of

failure to arrest.

Subtitle K amends the Omnibus Police Reform Amendment Act of 2000 to prohibit MPD from hiring officers who have committed serious misconduct while employed at, who were terminated or forced to resign from, or who resigned to avoid disciplinary action while employed at, a law enforcement agency

Subtitle L amends the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to prohibit MPD management from negotiating discipline during collective bargaining.

Subtitle M amends the Omnibus Public Safety Agency Reform Amendment Act of 2004 to repeal the 180-day statute of limitations for initiating investigations regarding potential criminal conduct or serious uses of force.

Subtitle N creates a standard for when officers may use deadly force and specifies the factors a trier of fact must consider when evaluating an officer's deadly use of force.

Subtitle O prohibits District law enforcement from acquiring certain types of military weaponry, requires that District law enforcement agencies publish the notice of request for, and acquisitions of, property through federal government programs, requires that District law enforcement agencies return or dispose of any prohibited military weaponry, and requires that the law enforcement agency publish an inventory of any weaponry so returned or disposed.

Subtitle P amends the First Amendment Assemblies Act of 2004 to establish more specific guidelines for when law enforcement officers may disperse a First Amendment assembly or other gathering and how dispersal orders are issued, to establish a more nuanced framework for determining when chemical irritants, riot gear, and less-lethal projectiles may be used, to require more detailed reporting after the use of these weapons, and to require that District law enforcement agencies publish information on a publicly accessible website regarding efforts to purchase or acquire less-lethal weapons.

Subtitle Q amends the Office of Citizen Complaint Review Establishment Act of 1998, to require that OPC conduct a study if bias impacted threat assessments during protests between January 2017 and January 2021.

Subtitle R requires that the Deputy Auditor for public safety examine MPD officer's ties to, or affiliation with White Supremacist organizations and other hate groups

Subtitle S establishes a standard for when vehicular pursuits are permissible and designates certain law enforcement tactics during vehicular pursuits as either a deadly use of force or serious use of force.

Subtitle T amends the Attendance Accountability Amendment Act of 2013 to require that local education agencies report out data related to school-based arrests and other law enforcement actions on school grounds, in school vehicles, or at school-sponsored events. Subtitle also amends

the Revised Statutes of the District of Columbia to require MPD to maintain data related to law enforcement actions performed on school grounds.

Subtitle U amends the Drug Paraphernalia Act of 1982 to allow District employees acting in within scope of their official duties, as well contractors and grantees engaged to combat opioid overdoses acting within the scope of their contract, to deliver, or possess with intent to deliver, drug testing equipment.

Subtitle V amends the Revised Statutes of the District of Columbia to require that MPD submit overtime reports to the Council every two pay periods and maintain copies of these reports on its website

Subtitle W amends the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982 to extend eligibility for MPD's Cadet Program to high school graduates under 25 years of age and senior-year high school students who have substantial ties to the District, such as currently or formerly residing, attending school, or working in the District for a significant period of time.

Subtitle X amends the Freedom of Information Act of 1976 to clarify that the person privacy exemption does not preclude the release of disciplinary records for MPD, HAPD, or OIG officers. Subtitle X also amends the Office of Citizen Complaint Review Establishment Act of 1998 to require that OPC establish and maintain a publicly accessible database that contains the information related to sustained allegations of misconduct, and to create an advisory group to consult with OPC on policies regarding the database and FOIA disclosures for disciplinary records.

Subtitle Y amends the District of Columbia Municipal Regulations to allow MPD to share unexpurgated adult arrest records with employees working to reduce gun violence, or serve individuals at high risk of being involved in gun violence within the Criminal Justice Coordinating Council, the Office of Gun Violence Prevention, the Office of Neighborhood Safety and Engagement, the Office of the Attorney General, and the Office of Victim Services and Justice Grants.

Subtitle Z amends the District of Columbia Auditor Subpoena and Oath Authority Act of 2004 to create within the Office of the District of Columbia Auditor the new position of Deputy Auditor for Public Safety

FISCAL IMPACT

The Committee adopts the fiscal impact statement of the District's Chief Financial Officer.

RACIAL EQUITY IMPACT

A racial equity impact assessment issued by the Council Office of Racial Equity is attached to this report.

SECTION-BY-SECTION ANALYSIS

Title I

Subtitle A: Amends the Limitation on the Use of the Chokehold Act of 1985 to more broadly prohibit the use of neck restraints and asphyxiating restraints.

Subtitle B: Amends the Body-Worn Camera Regulation and Reporting Requirements Act of 2015 and the District of Columbia Municipal Regulations to expand public access to body-worn camera ("BWC") footage, to prohibit officers from reviewing their BWC recordings and BWC recordings that have been shared with them to assist in writing initial reports, to establish a process for the subjects of a serious use of force, or their next of kin, to object to the release of BWC footage regarding the incident, to require that the MPD report out data related to FOIA requests for BWC, to prohibit redacting the likeness of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, to clarify the process for MPD notifying the next of kin before releasing footage, to clarify that the BWC footage of officers "directly involved" in the use of force be disclosed, to require that MPD consult with an organization specializing in grief and trauma on ways to notify the next of kin, and to require that the notification process incorporate the organization's feedback.

Subtitle C: Amends the Office of Citizen Complaint Review Establishment Act of 1998 to clarify OPC's ability to investigate complaints related to the DCHAPD, to expand OPC's jurisdiction to investigate complaints related to certain OIG officers, to expand OPC's jurisdiction to receive and investigate complaints for law enforcement officers making false statements, to expand the membership of the PCB, to require that the Police Chief submit new or amended written directives to the PCB for written feedback, except when exigent circumstances exist, to describe the factors PCB should consider when reviewing written directives, to allow OPC to receive anonymous complaints, to allow OPC's Executive Director to initiate their own complaint or take other appropriate action upon the discovery of any evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint, to require that the Executive Director issue a recommendation for the discipline to be imposed on a police officer after a sustained allegation of misconduct, to grant OPC's Executive Director access to the subject police officer's personnel file and the most recent Table of Offenses and Penalties Guide to allow the Executive Director to make an informed recommendation on the discipline to be imposed, and to require that the Chief of Police provide a written rationale for following or not following the Executive Director's recommendation on discipline.

Subtitle D: Establishes in statute the Use of Force Review Board and describes its membership.

Subtitle E: Amends the Anti-Intimidation and Defacing of Public or Private Property to Criminal Penalty Act of 1982 to repeal the ban on wearing masks and hoods.

Subtitle F: Amends Title 23, Chapter 5, Subchapter II of the District of Columbia Official Code to establish an informed consent process where officers must, before conducting a consent search, inform the subject of their rights.

Subtitle G: Amends the Metropolitan Police Department Application, Appointment, and Training Requirements of 2000 to require that MPD's continuing education requirements include instruction on racism and white supremacy, limiting the use of force and employing de-escalation tactics, the prohibition on the use of prohibited techniques, the limitations on the use of consent searches, and the duty to report excessive force or misconduct, to reconstitute and expand the membership of the POST Board, to allow lawfully admitted permanent residents to serve as MPD officers, and to require that the POST Board establish minimum application and appointment criteria related to an applicant with prior service at another law enforcement agency and whether it involved alleged or sustained misconduct or resulted in discipline.

Subtitle H: Amends the First Amendment Assemblies Act of 2004 to require that the uniforms and helmets of officers policing the First Amendment assemblies prominently identify the officers' affiliation with District law enforcement.

Subtitle I: Amends D.C. Code § 16-705 to grant defendants the right toa jury trial when charged with criminal threats, resisting arrest, or intent-to-frighten assault committed against a law enforcement officer.

Subtitle J: Amends the Revised Statutes of the District of Columbia to repeal the offense of failure to arrest.

Subtitle K: Amends the Omnibus Police Reform Amendment Act of 2000 to prohibit MPD from hiring officers who have committed serious misconduct while employed at, who were terminated or forced to resign from, or who resigned to avoid disciplinary action while employed at, a law enforcement agency.

Subtitle L: Amends the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to make discipline a sole management right that cannot negotiated during collective bargaining.

Subtitle M: Amends the Omnibus Public Safety Agency Reform Amendment Act of 2004 to repeal the 180-day statute of limitations for initiating investigations regarding potential criminal conduct or serious uses of force.

Subtitle N: Establishes a standard for when officers may use deadly force and specifies the factors a trier of fact must consider when evaluating an officer's deadly use of force.

Subtitle O: Prohibits District law enforcement from acquiring certain types of military weaponry, requires that District law enforcement agencies publish the notice of request for, and acquisitions of, property through federal government programs, requires that District law enforcement agencies return or dispose of any prohibited military weaponry, and requires that the law enforcement agency publish an inventory of any weaponry so returned or disposed.

Subtitle P: Amends the First Amendment Assemblies Act of 2004 to establish more specific guidelines for when law enforcement officers may disperse a First Amendment assembly or other gathering and how dispersal orders are issued, to establish a more nuanced framework for determining when chemical irritants, riot gear, and less-lethal projectiles may be used, to require more detailed reporting after the use of these weapons, and to require that District law enforcement agencies publish information on a publicly accessible website regarding efforts to purchase or acquire less-lethal weapons.

Subtitle Q: Amends the Office of Citizen Complaint Review Establishment Act of 1998, to require that OPC conduct a study if bias impacted threat assessments during protests between January 2017 and January 2021.

Subtitle R: Requires that the Deputy Auditor for public safety examine MPD officer's ties to, or affiliation with White Supremacist organizations and other hate groups

Subtitle S: Establishes a standard for when vehicular pursuits are permissible, and designates certain law enforcement tactics during vehicular pursuits as either a deadly use of force or serious use of force.

Subtitle T: Amends the Attendance Accountability Amendment Act of 2013 to require that local education agencies report out data related to school-based arrests and other law enforcement actions on school grounds, in school vehicles, or at school-sponsored events. Subtitle also amends the Revised Statutes of the District of Columbia to require MPD to maintain data related to law enforcement actions performed on school grounds.

Subtitle U: Amends the Drug Paraphernalia Act of 1982 to allow District employees acting in within scope of their official duties, as well contractors and grantees engaged to combat opioid overdoses acting within the scope of their contract, to deliver, or possess with intent to deliver, drug testing equipment.

Subtitle V: Amends the Revised Statutes of the District of Columbia to require that MPD submit overtime reports to the Council every two pay periods and maintain copies of these reports on its website

Subtitle W: Amends the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982 to extend eligibility for MPD's Cadet Program to high school graduates under 25 years of age and senior-year high school students who have substantial ties to the District, such as currently or formerly residing, attending school, or working in the District for a significant period of time.

Subtitle X: Amends the Freedom of Information Act of 1976 to clarify that the person privacy exemption does not preclude the release of disciplinary records for MPD, HAPD, or OIG officers; amends the Office of Citizen Complaint Review Establishment Act of 1998 to require that OPC establish and maintain a publicly accessible database that contains the information related to certain sustained allegations of misconduct, and to create an advisory group to consult with OPC on policies regarding the database and FOIA disclosures for disciplinary records.

Subtitle Y: Amends the District of Columbia Municipal Regulations to allow MPD to share unexpurgated adult arrest records with employees working to reduce gun violence, or serve individuals at high risk of being involved in gun violence within the Criminal Justice Coordinating Council, the Office of Gun Violence Prevention, the Office of Neighborhood Safety and Engagement, the Office of the Attorney General, and the Office of Victim Services and Justice Grants.

Subtitle Z: Amends the District of Columbia Auditor Subpoena and Oath Authority Act of 2004 to create within the Office of the District of Columbia Auditor the new position of Deputy Auditor for Public Safety; amends the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to provide ODCA with 5 excepted service employees.

Title II Provides conforming amendments.

Title III Provides the applicability clause, fiscal impact statement, and effective date

COMMITTEE ACTION

On November 30, 2022, the Committee on the Judiciary and Public Safety held an Additional Meeting to consider B24-0320, the "Comprehensive Policing and Justice Reform Amendment Act of 2022". The meeting was called to order at 2:10 p.m. Chairperson Charles Allen recognized a quorum consisting of himself and Councilmembers Mary M. Cheh and Brooke Pinto.

Councilmember Pinto stated that B24-0320 is a direct response to the movement on police reform ignited by the police killings of Breonna Taylor, George Floyd, and others. She noted the creation of the Police Reform Commission and how its recommendations have informed B24-0320. She believes the bill will help restore public trust in the institution of policing by eliminating problematic policing practices, increasing transparency of police operations, and improving accountability for police misconduct. Councilmember Cheh then asked a number of questions about different provisions in the bill that had been raised by MPD.

Without objection, Chairperson Allen moved the Committee Report and Print for B24-0320 en bloc, with leave for staff to make technical, conforming, and editorial changes. The Committee then voted 3-0 to approve the Committee Report and Print, with the Members voting as follows:

YES: Chairperson Allen and Councilmembers Cheh and Pinto

NO: None

PRESENT: None

ABSENT: Councilmembers Anita Bonds and Vincent C. Gray

LIST OF ATTACHMENTS

(A) B24-0320, as introduced
(B) B23-0771, as introduced
(C) B23-0882, as introduced
(D) B24-0094, as introduced
(E) B24-0112, as introduced
(F) B24-0213, as introduced
(G) B24-0254, as introduced
(H) B24-0356, as introduced
(I) B24-0515, as introduced
(J) Notice of Public Hearing on B23-0771 and B23-0882, as published in the *District of Columbia Register*
(K) Agenda and Witness List for B23-0771 and B23-0882
(L) Witness Testimony for B23-0771 and B23-0882
(M) Notice of Public Hearing on B24-0094, B24-0112, and B24-0213, as published in the *District of Columbia Register*
(N) Agenda and Witness List for B24-0094, B24-0112, and B24-0213

(O) Witness Testimony for B24-0094, B24-0112, and B24-0213
(P) Notice of Public Hearing on B24-0254 and B24-0356, as published in the *District of Columbia Register*
(Q) Agenda and Witness List for B24-0254 and B24-0356
(R) Witness Testimony for B24-0254 and B24-0356
(S) Notice of Public Hearing on B24-0515, as published in the *District of Columbia Register*
(T) Agenda and Witness List for B24-0515
(U) Witness Testimony for B24-0515
(V) Fiscal Impact Statement for B24-0320
(W) Racial Equity Impact Assessment for B24-0320
(X) Legal Sufficiency Determination for B24-0320
(Y) Comparative Committee Print for B24-0320
(Z) Committee Print for B24-0320

ATTACHMENT A

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, June 28, 2021

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Tuesday, June 15, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Comprehensive Policing and Justice Reform Amendment Act of 2021", B24-0320

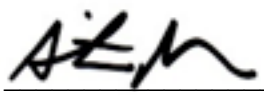
INTRODUCED BY: Councilmembers Allen, Cheh, Henderson, McDuffie, Pinto, R. White, Bonds, Gray, Lewis George, Nadeau, Silverman, T. White, and Chairman Mendelson

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

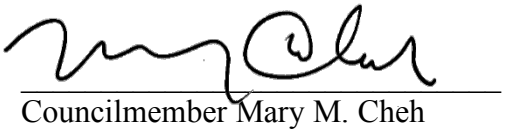
Attachment
cc: General Counsel
Budget Director
Legislative Services

Chairman Phil Mendelson

Councilmember Charles Allen



Councilmember Anita Bonds



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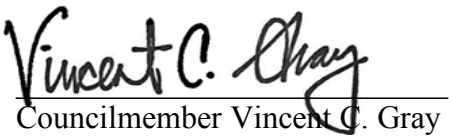

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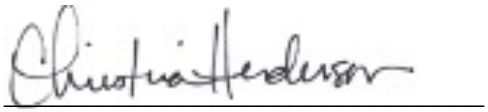

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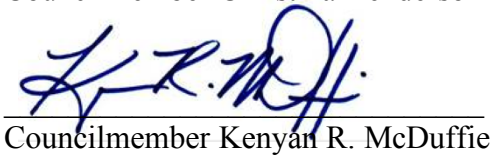
Councilmember Janeese Lewis George



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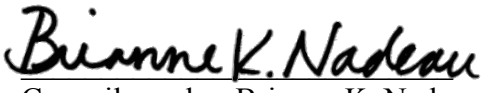

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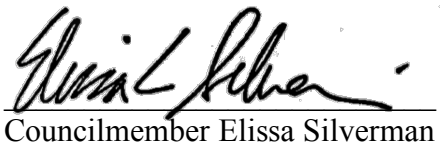
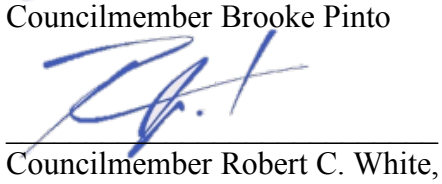
Councilmember Brooke Pinto



Councilmember Elissa Silverman



Councilmember Robert C. White, Jr.

Councilmember Trayon White, Sr.

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To provide for comprehensive policing and justice reform for District residents and visitors, and for other purposes.

TABLE OF CONTENTS

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Comprehensive Policing and Justice Reform Amendment Act of 2021".

TITLE I. IMPROVING POLICE ACCOUNTABILITY AND TRANSPARENCY

SUBTITLE A. PROHIBITING THE USE OF NECK RESTRAINTS

Sec. 101. The Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.01 *et seq.*), is amended as follows:

(a) Section 2 (D.C. Official Code § 5-125.01) is amended to read as follows:

"Sec. 2. The Council of the District of Columbia finds and declares that law enforcement and special police officer use of neck restraints constitutes the use of lethal and excessive force. This force presents an unnecessary danger to the public. On May 25, 2020, Minneapolis Police Department officer Derek Chauvin murdered George Floyd by applying a neck restraint to Floyd with his knee for 8 minutes and 46 seconds. Hundreds of thousands, if not millions, of people in cities and states across the world, including in the District, have taken to the streets to peacefully protest injustice, racism, and police brutality against Black people and other people of color. Police brutality is abhorrent and does not reflect the District's values. It is the intent of the Council in the enactment of this act to unequivocally ban the use of neck restraints by law enforcement and special police officers.".

(b) Section 3 (D.C. Official Code § 5-125.02) is amended as follows:

(1) Paragraph (1) is repealed.

(2) Paragraph (2) is repealed.

(3) A new paragraph (3) is added to read as follows:

"(3) "Neck restraint" means the use of any body part or object to attempt to control or disable a person by applying pressure against the person's neck, including the trachea or carotid artery, with the purpose, intent, or effect of controlling or restricting the person's movement or restricting their blood flow or breathing.".

(c) Section 4 (D.C. Official Code § 5-125.03) is amended to read as follows:

"Sec. 4. Unlawful use of neck restraints by law enforcement officers and special police officers.

"(a) It shall be unlawful for:

"(1) Any law enforcement officer or special police officer ("officer") to apply a neck restraint; and

"(2) Any officer who applies a neck restraint and any officer who is able to observe another officer's application of a neck restraint to fail to:

"(A) Immediately render, or cause to be rendered, first aid on the person on whom the neck restraint was applied; or

"(B) Immediately request emergency medical services for the person on whom the neck restraint was applied.

"(b) Any officer who violates the provisions of subsection (a) of this section shall be fined no more than the amount set forth in section 101 of the Criminal Fine Proportionality Amendment Act of 2012, effective June 11, 2013 (D.C. Law 19-317; D.C. Official Code § 22-3571.01), or incarcerated for no more than 10 years, or both.".

Sec. 102. Section 3 of the Federal Law Enforcement Officer Cooperation Act of 1999, effective May 9, 2000 (D.C. Law 13-100; D.C. Official Code § 5-302), is amended by striking the phrase "trachea and carotid artery holds" and inserting the phrase "neck restraints" in its place.

SUBTITLE B. IMPROVING ACCESS TO BODY-WORN CAMERA VIDEO RECORDINGS

Sec. 103. Section 3004 of the Body-Worn Camera Regulation and Reporting Requirements Act of 2015, effective October 22, 2015 (D.C. Law 21-36; D.C. Official Code § 5-116.33), is amended as follows:

(a) Subsection (a)(3) is amended by striking the phrase "interactions;" and inserting the phrase "interactions, and the results of those internal investigations, including any discipline imposed;" in its place.

(b) New subsections (c), (d), and (e) are added to read as follows:

"(c)(1) Notwithstanding any other law:

"(A) Within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Metropolitan Police Department, the Metropolitan Police Department shall provide unredacted copies of the requested body-worn camera recordings to the Chairperson. Such body-worn camera recordings shall not be publicly disclosed by the Chairperson or the Council; and

"(B) The Mayor:

"(i) Shall, except as provided in paragraph (2) of this subsection:

"(I) Within 5 business days after an officer-involved death or the serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force; and

"(II) By August 15, 2020, publicly release the names and body-worn camera recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

"(ii) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request.

"(2)(A) The Mayor shall not release a body-worn camera recording pursuant to paragraph (1)(B)(i) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

"(i) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and

"(ii) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

"(B)(i) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (A) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

"(ii) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interests of justice.

"(d) Before publicly releasing a body-worn camera recording of an officer-involved death, the Metropolitan Police Department shall:

"(1) Consult with an organization with expertise in trauma and grief on best practices for creating an opportunity for the decedent's next of kin to view the body-worn camera recording in advance of its release;

"(2) Notify the decedent's next of kin of its impending release, including the date when it will be released; and

"(3) Offer the decedent's next of kin the opportunity to view the body-worn camera recording privately in a non-law enforcement setting in advance of its release, and if the next of kin wish to so view the body-worn camera recording, facilitate its viewing.

"(e) For the purposes of this subsection, the term:

"(1) "FOIA" means Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*);

"(2) "Next of kin" shall mean the priority for next of kin as provided in Metropolitan Police Department General Order 401.08, or its successor directive; and

"(3) "Serious use of force" shall have the same meaning as that term is defined in MPD General Order 901.07, or its successor directive.".

Sec. 104. Chapter 39 of Title 24 of the District of Columbia Municipal Regulations is amended as follows:

(a) Section 3900 is amended as follows:

(1) Subsection 3900.9 is amended to read as follows:

"3900.9. Members may not review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing.".

(2) Subsection 3900.10 is amended to read as follows:

"3900.10. (a) Notwithstanding any other law, the Mayor:

"(1) Shall, except as provided in paragraph (b) of this subsection:

"(A) Within 5 business days after an officer-involved death or the serious use of force, publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force; and

"(B) By August 15, 2020, publicly release the names and BWC recordings of all officers who have committed an officer-involved death since the BWC Program was launched on October 1, 2014; and

"(2) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, publicly release any other BWC recordings that may not otherwise be releasable pursuant to a FOIA request.

"(b)(1) The Mayor shall not release a BWC recording pursuant to paragraph (a)(1) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

"(A) For a BWC recording of an officer-involved death, the decedent's next of kin; and

"(B) For a BWC recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or is unable to consent, the individual's next of kin.

"(2)(A) In the event of a disagreement between the persons who must consent to the release of a BWC recording pursuant to subparagraph (1) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

"(B) The Superior Court of the District of Columbia shall order the release of the BWC recording if it finds that the release is in the interests of justice.

"(c) Before publicly releasing a BWC recording of an officer-involved death, the Metropolitan Police Department shall:

"(1) Consult with an organization with expertise in trauma and grief on best practices for creating an opportunity for the decedent's next of kin to view the BWC recording in advance of its release;

"(2) Notify the decedent's next of kin of its impending release, including the date when it will be released; and

"(3) Offer the decedent's next of kin the opportunity to view the BWC recording privately in a non-law enforcement setting in advance of its release, and if the next of kin wish to so view the BWC recording, facilitate its viewing.".

(b) Section 3901.2 is amended by adding a new paragraph (a-1) to read as follows:

"(a-1) Recordings related to a request from or investigation by the Chairperson of the Council Committee with jurisdiction over the Department;".

(c) Section 3902.4 is amended to read as follows:

"3902.4. Notwithstanding any other law, within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Department, the Department shall provide unredacted copies of the requested BWC recordings to the Chairperson. Such BWC recordings shall not be publicly disclosed by the Chairperson or the Council.".

(d) Section 3999.1 is amended by inserting definitions between the definitions of "metadata" and "subject" to read as follows:

""Next of kin" shall mean the priority for next of kin as provided in MPD General Order 401.08, or its successor directive.

""Serious use of force" shall have the same meaning as that term is defined in MPD General Order 901.07, or its successor directive.".

SUBTITLE C. OFFICE OF POLICE COMPLAINTS REFORMS

Sec. 105. The Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1101 *et seq*.), is amended as follows:

(a) Section 5(a) (D.C. Official Code § 5-1104(a)) is amended by striking the phrase "There is established a Police Complaints Board ("Board"). The Board shall be composed of 5 members, one of whom shall be a member of the MPD, and 4 of whom shall have no current affiliation with any law enforcement agency." and inserting the phrase "There is established a Police Complaints Board ("Board"). The Board shall be composed of 9 members, which shall include one member from each Ward and one at-large member, none of whom, after the expiration of the term of the

currently serving member of the MPD, shall be affiliated with any law enforcement agency." in its place.

(b) Section 8 (D.C. Official Code § 5-1107) is amended as follows:

(1) A new subsection (g-1) is added to read as follows:

"(g-1)(1) If the Executive Director discovers evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint, the Executive Director may:

"(A) Initiate the Executive Director's own complaint against the subject police officer; and

"(B) Take any of the actions described in subsection (g)(2) through (6) of this section.

"(2) The authority granted pursuant to paragraph (1) of this subsection shall include circumstances in which the subject police officer failed to:

"(A) Intervene in or subsequently report any use of force incident in which the subject police officer observed another law enforcement officer, including an MPD officer, utilizing excessive force or engaging in any type of misconduct, pursuant to MPD General Order 901.07, its successor directive, or a similar local or federal directive; or

"(B) Immediately report to their supervisor any violations of the rules and regulations of the MPD committed by any other MPD officer, and each instance of their use of force or a use of force committed by another MPD officer, pursuant to MPD General Order 201.26, or any successor directive.".

(2) Subsection (h) is amended by striking the phrase "subsection (g)" and inserting the phrase "subsection (g) or (g-1)" in its place.

SUBTITLE D. USE OF FORCE REVIEW BOARD MEMBERSHIP EXPANSION

Sec. 106. Use of Force Review Board; membership.

(a) There is established a Use of Force Review Board ("Board"), which shall review uses of force as set forth by the Metropolitan Police Department in its written directives.

(b) The Board shall consist of the following 13 voting members, and may also include non-voting members at the Mayor's discretion:

(1) An Assistant Chief selected by the Chief of Police, who shall serve as the Chairperson of the Board;

(2) The Commanding Official, Special Operations Division, Homeland Security Bureau;

(3) The Commanding Official, Criminal Investigations Division, Investigative Services Bureau;

(4) The Commanding Official, Metropolitan Police Academy;

(5) A Commander or Inspector assigned to the Patrol Services Bureau;

(6) The Commanding Official, Recruiting Division;

(7) The Commanding Official, Court Liaison Division;

(8) Three civilian members appointed by the Mayor, pursuant to section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01(e)), with the following qualifications and no current or prior affiliation with law enforcement:

(A) One member who has personally experienced the use of force by a law enforcement officer;

(B) One member of the District of Columbia Bar in good standing; and

(C) One District resident community member;

(9) Two civilian members appointed by the Council with the following qualifications and no current or prior affiliation with law enforcement:

(A) One member with subject matter expertise in criminal justice policy; and

(B) One member with subject matter expertise in law enforcement oversight and the use of force; and

(10) The Executive Director of the Office of Police Complaints.

Sec. 107. Section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01(e)), is amended as follows:

(a) Paragraph (38) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(b) Paragraph (39) is amended by striking the period and inserting the phrase "; and" in its place.

(c) A new paragraph (40) is added to read as follows:

"(40) Use of Force Review Board, established by section 106 of the Comprehensive Policing and Justice Reform Amendment Act of 2021, introduced on June 10, 2021 (Bill 24-_____).

SUBTITLE E. ANTI-MASK LAW REPEAL

Sec. 108. The Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code § 22-3312 *et seq.*), is amended as follows:

(a) Section 4 (D.C. Official Code § 22-3312.03) is repealed.

(b) Section 5(b) (D.C. Official Code § 22-3312.04(b)) is amended by striking the phrase "or section 4 shall be" and inserting the phrase "shall be" in its place.

Sec. 109. Section 23-581(a-3) of the District of Columbia Official Code is amended by striking the phrase "sections 22-3112.1, 22-3112.2, and 22-3112.3" and inserting the phrase "sections 22-3112.1 and 22-3112.2" in its place.

SUBTITLE F. LIMITATIONS ON CONSENT SEARCHES

Sec. 110. Subchapter II of Chapter 5 of Title 23 of the District of Columbia Official Code is amended by adding a new section 23-526 to read as follows:

"§ 23–526. Limitations on consent searches.

"(a) In cases where a search is based solely on the subject's consent to that search, and is not executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement, sworn members of District Government law enforcement agencies shall:

"(1) Prior to the search of a person, vehicle, home, or property:

"(A) Explain, using plain and simple language delivered in a calm demeanor, that the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to a search;

"(B) Advise the subject that:

"(i) A search will not be conducted if the subject refuses to provide consent to the search; and

"(ii) The subject has a legal right to decline to consent to the search;

"(C) Obtain consent to search without threats or promises of any kind being made to the subject;

"(D) Confirm that the subject understands the information communicated by the officer; and

"(E) Use interpretation services when seeking consent to conduct a search of a person:

"(i) Who cannot adequately understand or express themselves in spoken or written English; or

"(ii) Who is deaf or hard of hearing.

"(2) If the sworn member is unable to obtain consent from the subject, refrain from conducting the search.

"(b) The requirements of subsection (a) of this section shall not apply to searches executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement.

"(c)(1) If a defendant moves to suppress any evidence obtained in the course of the search for an offense prosecuted in the Superior Court of the District of Columbia, the court shall consider an officer's failure to comply with the requirements of this section as a factor in determining the voluntariness of the consent.

"(2) There shall be a presumption that a search was nonconsensual if the evidence of consent, including the warnings required in subsection (a) of this section, is not captured on body-worn camera or provided in writing.

"(d) Nothing in this section shall be construed to create a private right of action.".

SUBTITLE G. MANDATORY CONTINUING EDUCATION EXPANSION; RECONSTITUTING THE POLICE OFFICERS STANDARDS AND TRAINING BOARD

Sec. 111. Title II of the Metropolitan Police Department Application, Appointment, and Training Requirements of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01 *et seq.*), is amended as follows:

(a) Section 203(b) (D.C. Official Code § 5-107.02(b)) is amended as follows:

(1) Paragraph (2) is amended by striking the phrase "biased-based policing" and inserting the phrase "biased-based policing, racism, and white supremacy" in its place.

(2) Paragraph (3) is amended to read as follows:

"(3) Limiting the use of force and employing de-escalation tactics;".

(3) Paragraph (4) is amended to read as follows:

"(4) The prohibition on the use of neck restraints;".

(4) Paragraph (5) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(5) Paragraph (6) is amended by striking the period and inserting a semicolon in its place.

(6) New paragraphs (7) and (8) are added to read as follows:

"(7) Obtaining voluntary, knowing, and intelligent consent from the subject of a search, when that search is based solely on the subject's consent; and

"(8) The duty of a sworn officer to report, and the method for reporting, suspected misconduct or excessive use of force by a law enforcement official that a sworn member observes or that comes to the sworn member's attention, as well as any governing District laws and regulations and Department written directives.".

(b) Section 204 (D.C. Official Code § 5-107.03) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "the District of Columbia Police" and inserting the phrase "the Police" in its place.

(2) Subsection (b) is amended as follows:

(A) The lead-in language is amended by striking the phrase "11 persons" and inserting the phrase "15 persons" in its place.

(B) A new paragraph (2A) is added to read as follows:

"(2A) Executive Director of the Office of Police Complaints or the Executive Director's designee;".

(C) Paragraph (3) is amended to read as follows:

"(3) The Attorney General for the District of Columbia or the Attorney General's designee;".

(D) Paragraph (8) is amended by striking the period and inserting the phrase "; and" in its place.

(E) Paragraph (9) is amended to read as follows:

"(9) Five community representatives appointed by the Mayor, one each with expertise in the following areas:

"(A) Oversight of law enforcement;

"(B) Juvenile justice reform;

"(C) Criminal defense;

"(D) Gender-based violence or LGBTQ social services, policy, or advocacy; and

"(E) Violence prevention or intervention.".

(3) Subsection (i) is amended by striking the phrase "promptly after the appointment and qualification of its members" and inserting the phrase "by September 1, 2020" in its place.

(c) Section 205(a) (D.C. Official Code § 5-107.04(a)) is amended by adding a new paragraph (9A) to read as follows:

"(9A) If the applicant has prior service with another law enforcement or public safety agency in the District or another jurisdiction, information on any alleged or sustained misconduct or discipline imposed by that law enforcement or public safety agency;".

SUBTITLE H. IDENTIFICATION OF MPD OFFICERS DURING FIRST AMENDMENT ASSEMBLIES AS LOCAL LAW ENFORCEMENT

Sec. 112. Section 109 of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.09), is amended as follows:

(a) Designate the existing text as subsection (a).

(b) A new subsection (b) is added to read as follows:

"(b) During a First Amendment assembly, the uniforms and helmets of officers policing the assembly shall prominently identify the officers' affiliation with local law enforcement.".

SUBTITLE I. PRESERVING THE RIGHT TO JURY TRIAL

Sec. 113. Section 16-705(b)(1) of the District of Columbia Official Code is amended as follows:

(a) Subparagraph (A) is amended by striking the phrase "; or" and inserting a semicolon in its place.

(b) Subparagraph (B) is amended by striking the phrase "; and" and inserting the phrase "; or" in its place.

(c) A new subparagraph (C) is added to read as follows:

"(C)(i) The defendant is charged with an offense under:

"(I) Section 806(a)(1) of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1322; D.C. Official Code § 22–404(a)(1));

"(II) Section 432a of the Revised Statutes of the District of Columbia (D.C. Official Code § 22–405.01); or

"(III) Section 2 of An Act To confer concurrent jurisdiction on the police court of the District of Columbia in certain cases, approved July 16, 1912 (37 Stat. 193; D.C. Official Code § 22–407); and

"(ii) The person who is alleged to have been the victim of the offense is a law enforcement officer, as that term is defined in section 432(a) of the Revised Statutes of the District of Columbia (D.C. Official Code § 22-405(a)); and".

SUBTITLE J. REPEAL OF FAILURE TO ARREST CRIME

Sec. 114. Section 400 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-115.03), is repealed.

SUBTITLE K. AMENDING MINIMUM STANDARDS FOR POLICE OFFICERS

Sec. 115. Section 202 of the Omnibus Police Reform Amendment Act of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01), is amended by adding a new subsection (f) to read as follows:

"(f) An applicant shall be ineligible for appointment as a sworn member of the Metropolitan Police Department if the applicant:

"(1) Was previously determined by a law enforcement agency to have committed serious misconduct, as determined by the Chief by General Order;

"(2) Was previously terminated or forced to resign for disciplinary reasons from any commissioned or recruit or probationary position with a law enforcement agency; or

"(3) Previously resigned from a law enforcement agency to avoid potential, proposed, or pending adverse disciplinary action or termination.".

SUBTITLE L. POLICE ACCOUNTABILITY AND COLLECTIVE BARGAINING AGREEMENTS

Sec. 116. Section 1708 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-617.08), is amended by adding a new subsection (c) to read as follows:

"(c)(1) All matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable.

"(2) This subsection shall apply to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020.".

SUBTITLE M. OFFICER DISCIPLINE REFORMS

Sec. 117. Section 502 of the Omnibus Public Safety Agency Reform Amendment Act of 2004, effective September 30, 2004 (D.C. Law 15-194; D.C. Official Code § 5-1031), is amended as follows:

(a) Subsection (a-1) is amended as follows:

(1) Paragraph (1) is amended by striking the phrase "subsection (b) of this section" and inserting the phrase "paragraph (1A) of this subsection and subsection (b) of this section" in its place.

(2) A new paragraph (1A) is added to read as follows:

"(1A) If the act or occurrence allegedly constituting cause involves the serious use of force or indicates potential criminal conduct by a sworn member or civilian employee of the Metropolitan Police Department, the period for commencing a corrective or adverse action under this subsection shall be 180 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.".

(3) Paragraph (2) is amended by striking the phrase "paragraph (1)" and inserting the phrase "paragraphs (1) and (1A)" in its place.

(b) Subsection (b) is amended by striking the phrase "the 90-day period" and inserting the phrase "the 90-day or 180-day period, as applicable," in its place.

Sec. 118. Section 6-A1001.5 of Chapter 10 of Title 6 of the District of Columbia Municipal Regulations is amended by striking the phrase "reduce the penalty" and inserting the phrase "reduce or increase the penalty" in its place.

SUBTITLE N. USE OF FORCE REFORMS

Sec. 119. Use of deadly force.

(a) For the purposes of this section, the term:

(1) "Deadly force" means any force that is likely or intended to cause serious bodily injury or death.

(2) “Deadly weapon” means any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use, is likely to cause serious bodily injury or death.

(3) “Serious bodily injury” means extreme physical pain, illness, or impairment of physical condition, including physical injury, that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

(b) A law enforcement officer shall not use deadly force against a person unless:

(1) The law enforcement officer reasonably believes that deadly force is immediately necessary to protect the law enforcement officer or another person, other than the subject of the use of deadly force, from the threat of serious bodily injury or death;

(2) The law enforcement officer’s actions are reasonable, given the totality of the circumstances; and

(3) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(c) A trier of fact shall consider:

(1) The reasonableness of the law enforcement officer’s belief and actions from the perspective of a reasonable law enforcement officer; and

(2) The totality of the circumstances, which shall include:

(A) Whether the subject of the use of deadly force:

(i) Possessed or appeared to possess a deadly weapon; and

(ii) Refused to comply with the law enforcement officer's lawful order to surrender an object believed to be a deadly weapon prior to the law enforcement officer using deadly force;

(B) Whether the law enforcement officer engaged in de-escalation measures prior to the use of deadly force, including taking cover, waiting for back-up, trying to calm the subject of the use of force, or using non-deadly force prior to the use of deadly force; and

(C) Whether any conduct by the law enforcement officer prior to the use of deadly force increased the risk of a confrontation resulting in deadly force being used.

SUBTITLE O. RESTRICTIONS ON THE PURCHASE AND USE OF MILITARY WEAPONRY

Sec. 120. Limitations on military weaponry acquired by District law enforcement agencies.

(a) Beginning in Fiscal Year 2021, District law enforcement agencies shall not acquire the following property through any program operated by the federal government:

(1) Ammunition of .50 caliber or higher;

(2) Armed or armored aircraft or vehicles;

(3) Bayonets;

(4) Explosives or pyrotechnics, including grenades;

(5) Firearm mufflers or silencers;

(6) Firearms of .50 caliber or higher;

(7) Firearms, firearm accessories, or other objects, designed or capable of launching explosives or pyrotechnics, including grenade launchers; and

(8) Remotely piloted, powered aircraft without a crew aboard, including drones.

(b)(1) If a District law enforcement agency requests property through a program operated by the federal government, the District law enforcement agency shall publish notice of the request on a publicly accessible website within 14 days after the date of the request.

(2) If a District law enforcement agency acquires property through a program operated by the federal government, the District law enforcement agency shall publish notice of the acquisition on a publicly accessible website within 14 days after the date of the acquisition.

(c) District law enforcement agencies shall disgorge any property described in subsection (a) of this section that the agencies currently possess within 180 days after the effective date of the Comprehensive Policing and Justice Reform Second Temporary Amendment Act of 2020, effective December 3, 2020 (D.C. Law 23-151; 67 DCR 9920).

SUBTITLE P. LIMITATIONS ON THE USE OF INTERNATIONALLY BANNED CHEMICAL WEAPONS, RIOT GEAR, AND LESS-LETHAL PROJECTILES

Sec. 121. The First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.01 *et seq*.), is amended as follows:

(a) Section 102 (D.C. Official Code § 5-331.02) is amended as follows:

(1) Paragraphs (1) and (2) are redesignated as paragraphs (2) and (4) respectively.

(2) A new paragraph (1) is added to read as follows:

"(1) "Chemical irritant" means tear gas or any chemical that can rapidly produce sensory irritation or disabling physical effects in humans, which disappear within a short time following termination of exposure, or any substance prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, effective April 29, 1997.".

(3) A new paragraph (3) is added to read as follows:

"(3) "Less-lethal projectiles" means any munition that may cause bodily injury or death through the transfer of kinetic energy and blunt force trauma. The term "less-lethal projectiles" includes rubber or foam-covered bullets and stun grenades.".

(b) Section 116 (D.C. Official Code § 5-331.16) is amended to read as follows:

"Sec. 116. Use of riot gear and riot tactics at First Amendment assemblies.

"(a)(1) No officers in riot gear may be deployed in response to a First Amendment assembly unless there is an immediate risk to officers of significant bodily injury. Any deployment of officers in riot gear:

"(A) Shall be consistent with the District's policy on First Amendment assemblies; and

"(B) May not be used as a tactic to disperse a First Amendment assembly.

"(2) Following any deployment of officers in riot gear in response to a First Amendment assembly, the commander at the scene shall make a written report to the Chief of Police within 48 hours, and that report shall be available to the public.

"(b)(1) Chemical irritants shall not be used by MPD to disperse a First Amendment assembly.

"(2) The Mayor shall request that any federal law enforcement agency operating in the District refrain from the use of chemical irritants to disperse a First Amendment assembly.

"(c)(1) Less-lethal projectiles shall not be used by MPD to disperse a First Amendment assembly.

"(2) The Mayor shall request that any federal law enforcement agency operating in the District refrain from the use of less-lethal projectiles to disperse a First Amendment assembly.".

TITLE II. FISCAL IMPACT STATEMENT; EFFECTIVE DATE

Sec. 201. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 202. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 60-day period of congressional review as provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(2)), and publication in the District of Columbia Register.

ATTACHMENT B

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, June 8, 2020

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Thursday, June 04, 2020. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", B23-0771

INTRODUCED BY: Councilmembers Nadeau, R. White, Todd, Grosso, T. White, and Silverman

CO-SPONSORED BY: Councilmember Allen

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment
cc: General Counsel
Budget Director
Legislative Services

Councilmember David Grosso

Councilmember Brianne K. Nadeau

Councilmember Trayon White, Sr.

Councilmember Robert C. White, Jr.

Councilmember Elissa Silverman

Councilmember Brandon T. Todd

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the First Amendment Rights and Police Standards Act of 2004 to prohibit the use of chemical irritants at First Amendment assemblies.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020".

Sec. 2. The First Amendment Rights and Police Standards Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.01 *et seq.*), is amended as follows:

(a) Section 102 is amended by adding a new paragraph (3) to read as follows:

"(3) "Chemical irritant" means tear gas or any chemical which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure, or any substance prohibited by the Convention on the

Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Opened for Signature and Signed by the United States at Paris on January 13, 1993.

(b) Section 116(b) is amended to read as follows:

"(b) Chemical irritant shall not be used by MPD to disperse a First Amendment assembly.

"(c) The Mayor shall request that any federal law enforcement agency operating in the District of Columbia refrain from the use of chemical irritant to disperse a First Amendment assembly.".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 4. Effective date.

This act shall take effect after approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

ATTACHMENT C

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, August 3, 2020

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Friday, July 31, 2020. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Comprehensive Policing and Justice Reform Amendment Act of 2020", B23-0882

INTRODUCED BY: Councilmembers Allen, Cheh, Grosso, Nadeau, Silverman, R. White, Bonds, Gray, McDuffie, Pinto, Todd, T. White, and Chairman Mendelson

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment
cc: General Counsel
Budget Director
Legislative Services

Chairman Phil Mendelson

Councilmember Charles Allen

Councilmember Anita Bonds

Councilmember Mary M. Cheh

Councilmember Vincent C. Gray

Councilmember David Grosso

Councilmember Kenyan R. McDuffie

Councilmember Brianne K. Nadeau

Councilmember Brooke Pinto

Councilmember Elissa Silverman

Councilmember Brandon T. Todd

Councilmember Robert C. White, Jr.

Councilmember Trayon White, Sr.

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To provide for comprehensive policing and justice reform for District residents and visitors, and for other purposes.

TABLE OF CONTENTS

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Comprehensive Policing and Justice Reform Amendment Act of 2020".

TITLE I. IMPROVING POLICE ACCOUNTABILITY AND TRANSPARENCY

SUBTITLE A. PROHIBITING THE USE OF NECK RESTRAINTS

Sec. 101. The Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.01 *et seq.*), is amended as follows:

(a) Section 2 (D.C. Official Code § 5-125.01) is amended to read as follows:

"Sec. 2. The Council of the District of Columbia finds and declares that law enforcement and special police officer use of neck restraints constitutes the use of lethal and excessive force. This force presents an unnecessary danger to the public. On May 25, 2020, Minneapolis Police Department officer Derek Chauvin murdered George Floyd by applying a neck restraint to Floyd with his knee for 8 minutes and 46 seconds. Hundreds of thousands, if not millions, of people in cities and states across the world, including in the District, have taken to the streets to peacefully protest injustice, racism, and police brutality against Black people and other people of color. Police brutality is abhorrent and does not reflect the District's values. It is the intent of the Council in the enactment of this act to unequivocally ban the use of neck restraints by law enforcement and special police officers.".

(b) Section 3 (D.C. Official Code § 5-125.02) is amended as follows:

(1) Paragraph (1) is repealed.

(2) Paragraph (2) is repealed.

(3) A new paragraph (3) is added to read as follows:

"(3) "Neck restraint" means the use of any body part or object to attempt to control or disable a person by applying pressure against the person's neck, including the trachea

or carotid artery, with the purpose, intent, or effect of controlling or restricting the person's movement or restricting their blood flow or breathing.".

(c) Section 4 (D.C. Official Code § 5-125.03) is amended to read as follows:

"Sec. 4. Unlawful use of neck restraints by law enforcement officers and special police officers.

"(a) It shall be unlawful for:

"(1) Any law enforcement officer or special police officer ("officer") to apply a neck restraint; and

"(2) Any officer who applies a neck restraint and any officer who is able to observe another officer's application of a neck restraint to fail to:

"(A) Immediately render, or cause to be rendered, first aid on the person on whom the neck restraint was applied; or

"(B) Immediately request emergency medical services for the person on whom the neck restraint was applied.

"(b) Any officer who violates the provisions of subsection (a) of this section shall be fined no more than the amount set forth in section 101 of the Criminal Fine Proportionality Amendment Act of 2012, effective June 11, 2013 (D.C. Law 19-317; D.C. Official Code § 22-3571.01), or incarcerated for no more than 10 years, or both.".

Sec. 102. Section 3 of the Federal Law Enforcement Officer Cooperation Act of 1999, effective May 9, 2000 (D.C. Law 13-100; D.C. Official Code § 5-302), is amended by striking the phrase "trachea and carotid artery holds" and inserting the phrase "neck restraints" in its place.

SUBTITLE B. IMPROVING ACCESS TO BODY-WORN CAMERA VIDEO RECORDINGS

Sec. 103. Section 3004 of the Body-Worn Camera Regulation and Reporting Requirements Act of 2015, effective October 22, 2015 (D.C. Law 21-36; D.C. Official Code § 5-116.33), is amended as follows:

(a) Subsection (a)(3) is amended by striking the phrase "interactions;" and inserting the phrase "interactions, and the results of those internal investigations, including any discipline imposed;" in its place.

(b) New subsections (c), (d), and (e) are added to read as follows:

"(c)(1) Notwithstanding any other law:

"(A) Within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Metropolitan Police Department, the Metropolitan Police Department shall provide unredacted copies of the requested body-worn camera recordings to the Chairperson. Such body-worn camera recordings shall not be publicly disclosed by the Chairperson or the Council;

"(B) The Mayor:

"(i) Shall, except as provided in paragraph (2) of this subsection:

"(I) Within 5 business days after an officer-involved death or the serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force; and

"(II) By August 15, 2020, publicly release the names and body-worn camera recordings of all officers who have committed an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

"(ii) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request.

"(2)(A) The Mayor shall not release a body-worn camera recording pursuant to paragraph (1)(B)(i) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

"(i) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and

"(ii) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

"(B)(i) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (A) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

"(ii) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interests of justice.

"(d) Before publicly releasing a body-worn camera recording of an officer-involved death, the Metropolitan Police Department shall:

"(1) Consult with an organization with expertise in trauma and grief on best practices for creating an opportunity for the decedent's next of kin to view the body-worn camera recording in advance of its release;

"(2) Notify the decedent's next of kin of its impending release, including the date when it will be released; and

"(3) Offer the decedent's next of kin the opportunity to view the body-worn camera recording privately in a non-law enforcement setting in advance of its release, and if the next of kin wish to so view the body-worn camera recording, facilitate its viewing.

"(e) For the purposes of this subsection, the term:

"(1) "FOIA" means Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*);

"(2) "Next of kin" shall mean the priority for next of kin as provided in Metropolitan Police Department General Order 401.08, or its successor directive; and

"(3) "Serious use of force" shall have the same meaning as that term is defined in MPD General Order 901.07, or its successor directive.".

Sec. 104. Chapter 39 of Title 24 of the District of Columbia Municipal Regulations is amended as follows:

(a) Section 3900 is amended as follows:

(1) Subsection 3900.9 is amended to read as follows:

"3900.9. Members may not review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing.".

(2) Subsection 3900.10 is amended to read as follows:

"3900.10. (a) Notwithstanding any other law, the Mayor:

"(1) Shall, except as provided in paragraph (b) of this subsection:

"(A) Within 5 business days after an officer-involved death or the serious use of force, publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force; and

"(B) By August 15, 2020, publicly release the names and BWC recordings of all officers who have committed an officer-involved death since the BWC Program was launched on October 1, 2014; and

"(2) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, publicly release any other BWC recordings that may not otherwise be releasable pursuant to a FOIA request.

"(b)(1) The Mayor shall not release a BWC recording pursuant to paragraph (a)(1) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

"(A) For a BWC recording of an officer-involved death, the decedent's next of kin; and

"(B) For a BWC recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or is unable to consent, the individual's next of kin.

"(2)(A) In the event of a disagreement between the persons who must consent to the release of a BWC recording pursuant to subparagraph (1) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

"(B) The Superior Court of the District of Columbia shall order the release of the BWC recording if it finds that the release is in the interests of justice.

"(c) Before publicly releasing a BWC recording of an officer-involved death, the Metropolitan Police Department shall:

"(1) Consult with an organization with expertise in trauma and grief on best practices for creating an opportunity for the decedent's next of kin to view the BWC recording in advance of its release;

"(2) Notify the decedent's next of kin of its impending release, including the date when it will be released; and

"(3) Offer the decedent's next of kin the opportunity to view the BWC recording privately in a non-law enforcement setting in advance of its release, and if the next of kin wish to so view the BWC recording, facilitate its viewing.".

(b) Section 3901.2 is amended by adding a new paragraph (a-1) to read as follows:

"(a-1) Recordings related to a request from or investigation by the Chairperson of the Council Committee with jurisdiction over the Department;".

(c) Section 3902.4 is amended to read as follows:

"3902.4. Notwithstanding any other law, within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Department, the Department shall provide unredacted copies of the requested BWC recordings to the Chairperson. Such BWC recordings shall not be publicly disclosed by the Chairperson or the Council.".

(d) Section 3999.1 is amended by inserting definitions between the definitions of "metadata" and "subject" to read as follows:

231 ""Next of kin" shall mean the priority for next of kin as provided in MPD General Order
232 401.08, or its successor directive.
233 ""Serious use of force" shall have the same meaning as that term is defined in MPD
234 General Order 901.07, or its successor directive.".
235 SUBTITLE C. OFFICE OF POLICE COMPLAINTS REFORMS
236
237 Sec. 105. The Office of Citizen Complaint Review Establishment Act of 1998, effective
238 March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1101 *et seq.*), is amended as follows:
239 (a) Section 5(a) (D.C. Official Code § 5-1104(a)) is amended by striking the phrase
240 "There is established a Police Complaints Board ("Board"). The Board shall be composed of 5
241 members, one of whom shall be a member of the MPD, and 4 of whom shall have no current
242 affiliation with any law enforcement agency." and inserting the phrase "There is established a
243 Police Complaints Board ("Board"). The Board shall be composed of 9 members, which shall
244 include one member from each Ward and one at-large member, none of whom, after the
245 expiration of the term of the currently serving member of the MPD, shall be affiliated with any
246 law enforcement agency." in its place.
247 (b) Section 8 (D.C. Official Code § 5-1107) is amended as follows:
248 (1) A new subsection (g-1) is added to read as follows:
249 "(g-1)(1) If the Executive Director discovers evidence of abuse or misuse of police
250 powers that was not alleged by the complainant in the complaint, the Executive Director may:
251 "(A) Initiate the Executive Director's own complaint against the subject
252 police officer; and

"(B) Take any of the actions described in subsection (g)(2) through (6) of this section.

"(2) The authority granted pursuant to paragraph (1) of this subsection shall include circumstances in which the subject police officer failed to:

"(A) Intervene in or subsequently report any use of force incident in which the subject police officer observed another law enforcement officer, including an MPD officer, utilizing excessive force or engaging in any type of misconduct, pursuant to MPD General Order 901.07, its successor directive, or a similar local or federal directive; or

"(B) Immediately report to their supervisor any violations of the rules and regulations of the MPD committed by any other MPD officer, and each instance of their use of force or a use of force committed by another MPD officer, pursuant to MPD General Order 201.26, or any successor directive.".

(2) Subsection (h) is amended by striking the phrase "subsection (g)" and inserting the phrase "subsection (g) or (g-1)" in its place.

SUBTITLE D. USE OF FORCE REVIEW BOARD MEMBERSHIP EXPANSION

Sec. 106. Use of Force Review Board; membership.

(a) There is established a Use of Force Review Board ("Board"), which shall review uses of force as set forth by the Metropolitan Police Department in its written directives.

(b) The Board shall consist of the following 13 voting members, and may also include non-voting members at the Mayor's discretion:

(1) An Assistant Chief selected by the Chief of Police, who shall serve as the Chairperson of the Board;

(2) The Commanding Official, Special Operations Division, Homeland Security Bureau;

(3) The Commanding Official, Criminal Investigations Division, Investigative Services Bureau;

(4) The Commanding Official, Metropolitan Police Academy;

(5) A Commander or Inspector assigned to the Patrol Services Bureau;

(6) The Commanding Official, Recruiting Division;

(7) The Commanding Official, Court Liaison Division;

(8) Three civilian members appointed by the Mayor, pursuant to section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1- 523.01(e)), with the following qualifications and no current or prior affiliation with law enforcement:

(A) One member who has personally experienced the use of force by a law enforcement officer;

(B) One member of the District of Columbia Bar in good standing; and

(C) One District resident community member;

(9) Two civilian members appointed by the Council with the following qualifications and no current or prior affiliation with law enforcement:

(A) One member with subject matter expertise in criminal justice policy; and

(B) One member with subject matter expertise in law enforcement oversight and the use of force; and

(10) The Executive Director of the Office of Police Complaints.

Sec. 107. Section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01(e)), is amended as follows:

(a) Paragraph (38) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(b) Paragraph (39) is amended by striking the period and inserting the phrase "; and" in its place.

(c) A new paragraph (40) is added to read as follows:

"(40) Use of Force Review Board, established by section 106 of this act.".

SUBTITLE E. ANTI-MASK LAW REPEAL

Sec. 108. The Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code § 22-3312 *et seq.*), is amended as follows:

(a) Section 4 (D.C. Official Code § 22-3312.03) is repealed.

(b) Section 5(b) (D.C. Official Code § 22-3312.04(b)) is amended by striking the phrase "or section 4 shall be" and inserting the phrase "shall be" in its place.

Sec. 109. Section 23-581(a-3) of the District of Columbia Official Code is amended by striking the phrase "sections 22-3112.1, 22-3112.2, and 22-3112.3" and inserting the phrase "sections 22-3112.1 and 22-3112.2" in its place.

SUBTITLE F. LIMITATIONS ON CONSENT SEARCHES

Sec. 110. Subchapter II of Chapter 5 of Title 23 of the District of Columbia Official Code is amended by adding a new section 23-526 to read as follows:

"§ 23–526. Limitations on consent searches.

"(a) In cases where a search is based solely on the subject's consent to that search, and is not executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement, sworn members of District Government law enforcement agencies shall:

"(1) Prior to the search of a person, vehicle, home, or property:

"(A) Explain, using plain and simple language delivered in a calm demeanor, that the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to a search;

"(B) Advise the subject that:

"(i) A search will not be conducted if the subject refuses to provide consent to the search; and

"(ii) The subject has a legal right to decline to consent to the search;

"(C) Obtain consent to search without threats or promises of any kind being made to the subject;

"(D) Confirm that the subject understands the information communicated by the officer; and

"(E) Use interpretation services when seeking consent to conduct a search of a person:

"(i) Who cannot adequately understand or express themselves in spoken or written English; or

"(ii) Who is deaf or hard of hearing.

"(2) If the sworn member is unable to obtain consent from the subject, refrain from conducting the search.

"(b) The requirements of subsection (a) of this section shall not apply to searches executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement.

"(c)(1) If a defendant moves to suppress any evidence obtained in the course of the search for an offense prosecuted in the Superior Court of the District of Columbia, the court shall consider an officer's failure to comply with the requirements of this section as a factor in determining the voluntariness of the consent.

"(2) There shall be a presumption that a search was nonconsensual if the evidence of consent, including the warnings required in subsection (a), is not captured on body-worn camera or provided in writing.

"(d) Nothing in this section shall be construed to create a private right of action.".

SUBTITLE G. MANDATORY CONTINUING EDUCATION EXPANSION; RECONSTITUTING THE POLICE OFFICERS STANDARDS AND TRAINING BOARD

Sec. 111. Title II of the Metropolitan Police Department Application, Appointment, and Training Requirements of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01 *et seq.*), is amended as follows:

(a) Section 203(b) (D.C. Official Code § 5-107.02(b)) is amended as follows:

(1) Paragraph (2) is amended by striking the phrase "biased-based policing" and inserting the phrase "biased-based policing, racism, and white supremacy" in its place.

(2) Paragraph (3) is amended to read as follows:

"(3) Limiting the use of force and employing de-escalation tactics;".

(3) Paragraph (4) is amended to read as follows:

"(4) The prohibition on the use of neck restraints;".

(4) Paragraph (5) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(5) Paragraph (6) is amended by striking the period and inserting a semicolon in its place.

(6) New paragraphs (7) and (8) are added to read as follows:

"(7) Obtaining voluntary, knowing, and intelligent consent from the subject of a search, when that search is based solely on the subject's consent; and

"(8) The duty of a sworn officer to report, and the method for reporting, suspected misconduct or excessive use of force by a law enforcement official that a sworn member observes or that comes to the sworn member's attention, as well as any governing District laws and regulations and Department written directives.".

(b) Section 204 (D.C. Official Code § 5-107.03) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "the District of Columbia Police" and inserting the phrase "the Police" in its place.

(2) Subsection (b) is amended as follows:

(A) The lead-in language is amended by striking the phrase "11 persons" and inserting the phrase "15 persons" in its place.

(B) A new paragraph (2A) is added to read as follows:

"(2A) Executive Director of the Office of Police Complaints or the Executive Director's designee;".

(C) Paragraph (3) is amended to read as follows:

"(3) The Attorney General for the District of Columbia or the Attorney General's designee;".

(D) Paragraph (8) is amended by striking the period and inserting the phrase "; and" in its place.

(E) Paragraph (9) is amended to read as follows:

"(9) Five community representatives appointed by the Mayor, one each with expertise in the following areas:

"(A) Oversight of law enforcement;

"(B) Juvenile justice reform;

"(C) Criminal defense;

"(D) Gender-based violence or LGBTQ social services, policy, or advocacy; and

"(E) Violence prevention or intervention.".

(3) Subsection (i) is amended by striking the phrase "promptly after the appointment and qualification of its members" and inserting the phrase "by September 1, 2020" in its place.

(c) Section 205(a) (D.C. Official Code § 5-107.04(a)) is amended by adding a new paragraph (9A) to read as follows:

"(9A) If the applicant has prior service with another law enforcement or public safety agency in the District or another jurisdiction, information on any alleged or sustained misconduct or discipline imposed by that law enforcement or public safety agency;".

SUBTITLE H. IDENTIFICATION OF MPD OFFICERS DURING FIRST AMENDMENT ASSEMBLIES AS LOCAL LAW ENFORCEMENT

Sec. 112. Section 109 of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.09), is amended as follows:

(a) Designate the existing text as subsection (a).

(b) Add a new subsection (b) to read as follows:

"(b) During a First Amendment assembly, the uniforms and helmets of officers policing the assembly shall prominently identify the officers' affiliation with local law enforcement.".

SUBTITLE I. PRESERVING THE RIGHT TO JURY TRIAL

Sec. 113. Section 16-705(b)(1) of the District of Columbia Official Code is amended as follows:

(a) Subparagraph (A) is amended by striking the phrase "; or" and inserting a semicolon in its place.

(b) Subparagraph (B) is amended by striking the phrase "; and" and inserting the phrase "; or" in its place.

(c) A new subparagraph (C) is added to read as follows:

"(C)(i) The defendant is charged with an offense under:

"(I) Section 806(a)(1) of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1322; D.C. Official Code § 22–404(a)(1));

"(II) Section 432a of the Revised Statutes of the District of Columbia (D.C. Official Code § 22–405.01); or

"(III) Section 2 of An Act To confer concurrent jurisdiction on the police court of the District of Columbia in certain cases, approved July 16, 1912 (37 Stat. 193; D.C. Official Code § 22–407); and

"(ii) The person who is alleged to have been the victim of the offense is a law enforcement officer, as that term is defined in section 432(a) of the Revised Statutes of the District of Columbia (D.C. Official Code § 22-405(a)); and".

SUBTITLE J. REPEAL OF FAILURE TO ARREST CRIME

Sec. 114. Section 400 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-115.03), is repealed.

SUBTITLE K. AMENDING MINIMUM STANDARDS FOR POLICE OFFICERS

Sec. 115. Section 202 of the Omnibus Police Reform Amendment Act of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01), is amended by adding a new subsection (f) to read as follows:

"(f) An applicant shall be ineligible for appointment as a sworn member of the Metropolitan Police Department if the applicant:

"(1) Was previously determined by a law enforcement agency to have committed serious misconduct, as determined by the Chief by General Order;

"(2) Was previously terminated or forced to resign for disciplinary reasons from any commissioned or recruit or probationary position with a law enforcement agency; or

"(3) Previously resigned from a law enforcement agency to avoid potential, proposed, or pending adverse disciplinary action or termination.".

SUBTITLE L. POLICE ACCOUNTABILITY AND COLLECTIVE BARGAINING AGREEMENTS

Sec. 116. Section 1708 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-617.08), is amended by adding a new subsection (c) to read as follows:

"(c)(1) All matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable.

"(2) This subsection shall apply to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020.".

SUBTITLE M. OFFICER DISCIPLINE REFORMS

Sec. 117. Section 502 of the Omnibus Public Safety Agency Reform Amendment Act of 2004, effective September 30, 2004 (D.C. Law 15-194; D.C. Official Code § 5-1031), is amended as follows:

(a) Subsection (a-1) is amended as follows:

(1) Paragraph (1) is amended by striking the phrase "subsection (b) of this section" and inserting the phrase "paragraph (1A) of this subsection and subsection (b) of this section" in its place.

(2) A new paragraph (1A) is added to read as follows:

"(1A) If the act or occurrence allegedly constituting cause involves the serious use of force or indicates potential criminal conduct by a sworn member or civilian employee of the Metropolitan Police Department, the period for commencing a corrective or adverse action under this subsection shall be 180 days, not including Saturdays, Sundays, or legal holidays, after the

date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.".

(3) Paragraph (2) is amended by striking the phrase "paragraph (1)" and inserting the phrase "paragraphs (1) and (1A)" in its place.

(b) Subsection (b) is amended by striking the phrase "the 90-day period" and inserting the phrase "the 90-day or 180-day period, as applicable," in its place.

Sec. 118. Section 6-A1001.5 of Chapter 10 of Title 6 of the District of Columbia Municipal Regulations is amended by striking the phrase "reduce the penalty" and inserting the phrase "reduce or increase the penalty" in its place.

SUBTITLE N. USE OF FORCE REFORMS

Sec. 119. Use of deadly force.

(a) For the purposes of this section, the term:

(1) "Deadly force" means any force that is likely or intended to cause serious bodily injury or death.

(2) "Deadly weapon" means any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use, is likely to cause serious bodily injury or death.

(3) "Serious bodily injury" means extreme physical pain, illness, or impairment of physical condition, including physical injury, that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

(b) A law enforcement officer shall not use deadly force against a person unless:

(1) The law enforcement officer reasonably believes that deadly force is immediately necessary to protect the law enforcement officer or another person, other than the subject of the use of deadly force, from the threat of serious bodily injury or death;

(2) The law enforcement officer's actions are reasonable, given the totality of the circumstances; and

(3) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(c) A trier of fact shall consider:

(1) The reasonableness of the law enforcement officer's belief and actions from the perspective of a reasonable law enforcement officer; and

(2) The totality of the circumstances, which shall include:

(A) Whether the subject of the use of deadly force:

(i) Possessed or appeared to possess a deadly weapon; and

(ii) Refused to comply with the law enforcement officer's lawful order to surrender an object believed to be a deadly weapon prior to the law enforcement officer using deadly force;

(B) Whether the law enforcement officer engaged in de-escalation measures prior to the use of deadly force, including taking cover, waiting for back-up, trying to

calm the subject of the use of force, or using non-deadly force prior to the use of deadly force; and

(C) Whether any conduct by the law enforcement officer prior to the use of deadly force increased the risk of a confrontation resulting in deadly force being used.

SUBTITLE O. RESTRICTIONS ON THE PURCHASE AND USE OF MILITARY WEAPONRY

Sec. 120. Limitations on military weaponry acquired by District law enforcement agencies.

(a) Beginning in Fiscal Year 2021, District law enforcement agencies shall not acquire the following property through any program operated by the federal government:

(1) Ammunition of .50 caliber or higher;

(2) Armed or armored aircraft or vehicles;

(3) Bayonets;

(4) Explosives or pyrotechnics, including grenades;

(5) Firearm mufflers or silencers;

(6) Firearms of .50 caliber or higher;

(7) Firearms, firearm accessories, or other objects, designed or capable of launching explosives or pyrotechnics, including grenade launchers; and

(8) Remotely piloted, powered aircraft without a crew aboard, including drones.

(b)(1) If a District law enforcement agency requests property through a program operated by the federal government, the District law enforcement agency shall publish notice of the request on a publicly accessible website within 14 days after the date of the request.

(2) If a District law enforcement agency acquires property through a program operated by the federal government, the District law enforcement agency shall publish notice of the acquisition on a publicly accessible website within 14 days after the date of the acquisition.

(c) District law enforcement agencies shall disgorge any property described in subsection (a) of this section that the agencies currently possess within 180 days after the effective date of this act.

SUBTITLE P. LIMITATIONS ON THE USE OF INTERNATIONALLY BANNED CHEMICAL WEAPONS, RIOT GEAR, AND LESS-LETHAL PROJECTILES

Sec. 121. The First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.01 *et seq.*), is amended as follows:

(a) Section 102 (D.C. Official Code § 5-331.02) is amended as follows:

(1) Paragraphs (1) and (2) are redesignated as paragraphs (2) and (4) respectively.

(2) A new paragraph (1) is added to read as follows:

"(1) "Chemical irritant" means tear gas or any chemical that can rapidly produce sensory irritation or disabling physical effects in humans, which disappear within a short time following termination of exposure, or any substance prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, effective April 29, 1997.".

(3) A new paragraph (3) is added to read as follows:

"(3) "Less-lethal projectiles" means any munition that may cause bodily injury or death through the transfer of kinetic energy and blunt force trauma. The term "less-lethal projectiles" includes rubber or foam-covered bullets and stun grenades.".

(b) Section 116 (D.C. Official Code § 5-331.16) is amended to read as follows:

"Sec. 116. Use of riot gear and riot tactics at First Amendment assemblies.

"(a)(1) No officers in riot gear may be deployed in response to a First Amendment assembly unless there is an immediate risk to officers of significant bodily injury. Any deployment of officers in riot gear:

"(A) Shall be consistent with the District's policy on First Amendment assemblies; and

"(B) May not be used as a tactic to disperse a First Amendment assembly.

"(2) Following any deployment of officers in riot gear in response to a First Amendment assembly, the commander at the scene shall make a written report to the Chief of Police within 48 hours, and that report shall be available to the public.

"(b)(1) Chemical irritants shall not be used by MPD to disperse a First Amendment assembly.

"(2) The Mayor shall request that any federal law enforcement agency operating in the District refrain from the use of chemical irritants to disperse a First Amendment assembly.

"(c)(1) Less-lethal projectiles shall not be used by MPD to disperse a First Amendment assembly.

"(2) The Mayor shall request that any federal law enforcement agency operating in the District refrain from the use of less-lethal projectiles to disperse a First Amendment assembly.".

SUBTITLE Q. POLICE REFORM COMMISSION

Sec. 122. Police Reform Commission.

(a) There is established, supported by the Council's Committee of the Whole, a Police Reform Commission ("Commission") to examine policing practices in the District and provide evidence-based recommendations for reforming and revisioning policing in the District.

(b)(1) The Commission shall be comprised of 20 representatives from among the following entities:

(A) Non-law enforcement District government agencies;

(B) The Office of the Attorney General for the District of Columbia;

(C) Criminal and juvenile justice reform organizations;

(D) Black Lives Matter DC;

(E) Educational institutions;

(F) Parent-led advocacy organizations;

(G) Student- or youth-led advocacy organizations;

(H) Returning citizen organizations;

(I) Victim services organizations;

(J) Social services organizations;

(K) Mental and behavioral health organizations;

(L) Small businesses;

(M) Faith-based organizations; and

(N) Advisory Neighborhood Commissions.

(2) The Chairman of the Council shall:

(A) Appoint the Commission representatives no later than July 22, 2020; and

(B) Designate a representative who is not employed by the District government as the Commission's Chairperson.

(c)(1) The Commission shall submit its recommendations in a report to the Mayor and Council by December 31, 2020.

(2) The report required by paragraph (1) of this subsection shall include analyses and recommendations on the following topics:

(A) The role of sworn and special police officers in District schools;

(B) Alternatives to police responses to incidents, such as community-based, behavioral health, or social services co-responders;

(C) Police discipline;

(D) The integration of conflict resolution strategies and restorative justice practices into policing; and

(E) The provisions of the Comprehensive Policing and Justice Reform Second Temporary Amendment Act of 2020, passed on 2nd reading on July 21, 2020 (Enrolled version of Bill 23-826).

(d) The Commission shall sunset upon the delivery of its report or on December 31, 2020, whichever is later.

SUBTITLE R. METRO TRANSIT POLICE DEPARTMENT OVERSIGHT AND ACCOUNTABILITY

Sec. 123. Section 76 of Article XVI of Title III of the Washington Metropolitan Area Transit Regulation Compact, approved November 6, 1966 (80 Stat. 1324; D.C. Official Code § 9-1107.01(76)), is amended as follows:

(a) Subsection (f) is amended by adding a new paragraph (1A) to read as follows:

"(1A) prohibit the use of enforcement quotas to evaluate, incentivize, or discipline members, including with regard to the number of arrests made or citations or warnings issued;".

(b) A new subsection (i) is added to read as follows:

"(i)(1) The Authority shall establish a Police Complaints Board to review complaints filed against the Metro Transit Police.

"(2) The Police Complaints Board shall comprise eight members, two civilian members appointed by each Signatory, and two civilian members appointed by the federal government.

"(3) Members of the Police Complaints Board shall not be Authority employees and shall have no current affiliation with law enforcement.

"(4) Members of the Police Complaints Board shall serve without compensation but may be reimbursed for necessary expenses incurred as incident to the performance of their duties.

"(5) The Police Complaints Board shall appoint a Chairperson and Vice-Chairperson from among its members.

"(6) Four members of the Police Complaints Board shall constitute a quorum, and no action by the Police Complaints Board shall be effective unless a majority of the Police Complaints Board present and voting, which majority shall include at least one member from each Signatory, concur therein.

"(7) The Police Complaints Board shall meet at least monthly and keep minutes of its meetings.

"(8) The Police Complaints Board, through its Chairperson, may employ qualified persons or utilize the services of qualified volunteers, as necessary, to perform its work, including the investigation of complaints.

"(9) The duties of the Police Complaints Board shall include:

"(A) Adopting rules and regulations governing its meetings, minutes, and internal processes; and

"(B) With respect to the Metro Transit Police, reviewing:

"(i) The number, type, and disposition of citizen complaints received, investigated, sustained, or otherwise resolved;

"(ii) The race, national origin, gender, and age of the complainant and the subject officer or officers;

"(iii) The proposed and actual discipline imposed on an officer as a result of any sustained citizen complaint;

"(iv) All use of force incidents, serious use of force incidents, and serious physical injury incidents; and

"(v) Any in-custody death.

"(10) The Police Complaints Board shall have the authority to receive complaints against members of the Metro Transit Police, which shall be reduced to writing and signed by the complainant, that allege abuse or misuse of police powers by such members, including:

"(A) Harassment;

"(B) Use of force;

"(C) Use of language or conduct that is insulting, demeaning, or humiliating;

"(D) Discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, physical disability, matriculation, political affiliation, source of income, or place of residence or business;

"(E) Retaliation against a person for filing a complaint; and

"(F) Failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public.

"(11) If the Metro Transit Police receives a complaint containing subject matter that is covered by paragraph (10) of this subsection, the Metro Transit Police shall transmit the complaint to the Police Complaints Board within 3 business days after receipt.

"(12) The Police Complaints Board shall have timely and complete access to information and supporting documentation specifically related to the Police Complaints Board's duties and authority under paragraphs (9) and (10) of this subsection.

"(13) The Police Complaints Board shall have the authority to dismiss, conciliate, mediate, investigate, adjudicate, or refer for further action to the Metro Transit Police a complaint received under paragraph (10) of this subsection.

"(14)(A) If deemed appropriate by the Police Complaints Board, and if the parties agree to participate in a conciliation process, the Police Complaints Board may attempt to resolve a complaint by conciliation.

"(B) The conciliation of a complaint shall be evidenced by a written agreement signed by the parties which may provide for oral apologies or assurances, written undertakings, or any other terms satisfactory to the parties. No oral or written statements made in conciliation proceedings may be used as a basis for any discipline or recommended discipline against a subject police officer or officers or in any civil or criminal litigation.

"(15) If the Police Complaints Board refers the complaint to mediation, the Board shall schedule an initial mediation session with a mediator. The mediation process may continue as long as the mediator believes it may result in the resolution of the complaint. No oral or written statement made during the mediation process may be used as a basis for any discipline or recommended discipline of the subject police officer or officers, nor in any civil or criminal litigation, except as otherwise provided by the rules of the court or the rules of evidence.

"(16) If the Police Complaints Board refers a complaint for investigation, the Board shall assign an investigator to investigate the complaint. When the investigator completes the investigation, the investigator shall summarize the results of the investigation in an investigative report which, along with the investigative file, shall be transmitted to the Board, which may order an evidentiary hearing.

"(17) The Police Complaints Board may, after an investigation, assign a complaint to a complaint examiner, who shall make written findings of fact regarding all material issues of fact, and shall determine whether the facts found sustain or do not sustain each allegation of misconduct. If the complaint examiner determines that one or more allegations in the complaint is sustained, the Police Complaints Board shall transmit the entire complaint file,

including the merits determination of the complaint examiner, to the Metro Transit Police for appropriate action.

"(18) Employees of the Metro Transit Police shall cooperate fully with the Police Complaints Board in the investigation and adjudication of a complaint. An employee of the Metro Transit Police shall not retaliate, directly or indirectly, against a person who files a complaint under this subsection.

"(19) When, in the determination of the Police Complaints Board, there is reason to believe that the misconduct alleged in a complaint or disclosed by an investigation of a complaint may be criminal in nature, the Police Complaints Board shall refer the matter to the appropriate authorities for possible criminal prosecution, along with a copy of all of the Police Complaints Board's files relevant to the matter being referred; provided, that the Police Complaints Board shall make a record of each referral, and ascertain and record the disposition of each matter referred and, if the appropriate authorities decline in writing to prosecute, the Police Complaints Board shall resume its processing of the complaint.

"(20) Within 60 days before the end of each fiscal year, the Police Complaints Board shall transmit to the Board and the Signatories an annual report of its operations, including any policy recommendations.".

TITLE II. BUILDING SAFE AND JUST COMMUNITIES

SUBTITLE A. RESTORE THE VOTE

Sec. 201. The District of Columbia Election Code of 1955, approved August 12, 1955 (69 Stat. 669; D.C. Official Code § 1-1001.01 *et seq.*), is amended as follows:

(a) Section 2(2) (D.C. Official Code § 1–1001.02(2)) is amended as follows:

(1) Subparagraph (C) is amended by striking the semicolon and inserting the phrase "; and" in its place.

(2) Subparagraph (D) is repealed.

(b) Section 5(a) (D.C. Official Code § 1-1001.05(a)) is amended by adding new paragraphs (9B) and (9C) to read as follows:

"(9B) In advance of any applicable voter registration or absentee ballot submission deadlines, provide, to every qualified elector in the Department of Corrections' care or custody, and, beginning January 1, 2021, endeavor to provide to every qualified elector in the Bureau of Prisons' care or custody:

"(A) A voter registration form;

"(B) A voter guide;

"(C) Educational materials about the importance of voting and the right of an individual currently incarcerated or with a criminal record to vote in the District; and

"(D) Without first requiring an absentee ballot application to be submitted, an absentee ballot;

"(9C) Beginning January 1, 2021, upon receiving information pursuant to section 7(k)(3), (4), or (4A) from the Superior Court of the District of Columbia, the United States District Court for the District of Columbia, or the Bureau of Prisons, notify a qualified elector incarcerated for a felony of the qualified elector's right to vote;".

(c) Section 7(k) (D.C. Official Code § 1–1001.07(k)) is amended as follows:

(1) Paragraph (1) is amended by striking the phrase "registrant, upon notification of a registrant's incarceration for a conviction of a felony" and inserting the phrase "registrant," in its place.

(2) A new paragraph (4A) is added to read as follows:

"(4A) Beginning on January 1, 2021, at least monthly, the Board shall request from the Bureau of Prisons the name, location of incarceration, and contact information for each qualified elector in the Bureau of Prisons' care or custody.".

Sec. 202. Section 8 of An Act To create a Department of Corrections in the District of Columbia, effective April 26, 2019 (D.C. Law 22-309; D.C. Official Code § 24-211.08), is amended by adding a new subsection (b-1) to read as follows:

"(b-1) The Department shall notify eligible individuals in its care or custody of their voting rights pursuant to section 201 of the act.".

TITLE III. APPLICABILITY; FISCAL IMPACT STATEMENT; EFFECTIVE DATE

Sec. 301. Applicability.

Section 123 shall apply after the enactment of concurring legislation by the State of Maryland and the Commonwealth of Virginia, the signing and execution of the legislation by the Mayor of the District of Columbia and the Governors of Maryland and Virginia, and approval by the United States Congress.

Sec. 302. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 303. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 60-day period of congressional review as provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(2)), and publication in the District of Columbia Register.

ATTACHMENT D

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, March 1, 2021

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Monday, February 22, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Bias in Threat Assessments Evaluation Amendment Act of 2021", B24-0094

INTRODUCED BY: Councilmembers R. White, Silverman, Lewis George, Cheh, Nadeau, and Pinto

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment
cc: General Counsel
Budget Director
Legislative Services

Councilmember Mary M. Cheh

Councilmember Robert C. White, Jr.

Councilmember Brianne K. Nadeau

Councilmember Elissa Silverman

Councilmember Brooke Pinto

Councilmember Janeese Lewis George

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Attorney General of the District of Columbia Clarification and Elected Term Amendment Act of 2010 to require the Attorney General of the District of Columbia to conduct a study to determine whether the Metropolitan Police Department engaged in biased policing when they conducted threat assessments of assemblies within the District of Columbia and to grant the Attorney General of the District of Columbia subpoena power as needed to carry out the study.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this Act may be cited as the "Bias in Threat Assessments Evaluation Amendment Act of 2021".

Sec. 2. The Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010, effective May 27, 2010 (D.C. Law 18-160; D.C. Official Code § 1-301.81 *et seq.*), is amended as follows:

(a) Section 101 (D.C. Official Code § 1-301.81) is amended as follows:

(1) Subsection (a) is amended by adding a new paragraph (4) to read as follows:

"(4) The Attorney General shall conduct a study, in collaboration with eligible outside partners as defined in subparagraph (B) of this paragraph, to determine whether the Metropolitan Police Department ("MPD") engaged in biased policing when it conducted threat assessments before or during assemblies within the District.

"(A) At a minimum, the study shall:

"(i) Examine MPD's use of threat assessments before or during assemblies in the District from January 2017 through January 2021;

"(ii) Determine whether MPD engaged in biased policing when they conducted threat assessments before or during assemblies in the District from January 2017 through January 2021;

"(iii) Provide a detailed analysis of MPD's response to each assembly in the District between January 2017 through January 2021, including but not limited to:

"(I) Number of arrests made;

"(II) Number of civilian and officer injuries;

"(III) Type of injuries;

"(IV) Number of fatalities;

"(V) Number of officers deployed;

"(VI) What type of weaponry and crowd control tactics were used;

"(VII) Whether riot gear was used; and

"(VIII) Whether any of the inviduals involved in the assembly were on the Federal Bureau of Investigation's terrorist watchlist;

"(iv) If there is a finding that biased policing has occurred, determine whether MPD's response varied based on the race, color, religion, sex, national origin, or gender of those engaged in the assembly;

"(vi) Provide recommendations based on the findings in the study, including but not limited to:

"(I) If biased policing occurrred, how to prevent bias from impacting whether or not MPD conducts a threat assessment and how to ensure bias does not impact a threat assessment going forward; or

"(II) If biased policing has not been found to have occurred, how to ensure that there is not a disparity in MPD's response to all assemblies across all groups, of proportionate size and characteristics, in the District in the future; or

"(III) If the study is inconclusive on the occurrence of biased policing, what additional steps must be taken to reach a conclusion.

"(B) Any collaborating outside partners shall, at a minimum, meet the following criteria:

"(i) Be nonpartisan;

"(ii) Have research and legal expertise;

"(iii) Have expertise and knowledge of law enforcement practices in the District, bias in policing, homegrown domestic terrorism in the United States, and intelligence data sharing practices;

"(iv) Have a history of conducting studies and evaluations of law enforcement procedures, regulations, and practices; and

"(v) Have experience developing solutions to policy or legal challenges.

"(C) The Attorney General shall submit a report on the study to the Council no later than six months from the effective date of the Bias in Threat Assessments Evaluation Amendment Act of 2021 (B24-XX as introduced on XX, 2021).".

(b) Section 108 (D.C. Official Code § 1-301.88c) is amended by adding a new subsection (g) to read as follows:

"(g) The Attorney General, or his or her designee, shall have the authority to issue subpoenas for the production of documents or materials or for the attendance and testimony of witnesses under oath, or both, as necessary to carry out the investigation pursuant to section 101(a)(4).".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.03(c)(1)), and publication in the District of Columbia Register.

ATTACHMENT E

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, March 1, 2021

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Thursday, February 25, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "White Supremacy in Policing Prevention Act of 2021", B24-0112

INTRODUCED BY: Councilmembers Lewis George, Nadeau, Bonds, Pinto, Allen, Henderson, McDuffie, and T. White

The Chairman is referring this legislation sequentially to the Committee on Judiciary and Public Safety and the Committee of the Whole.

Attachment

cc: General Counsel
Budget Director
Legislative Services

Councilmember Charles Allen

Councilmember Janeese Lewis George

Councilmember Christina Henderson

Councilmember Brianne K. Nadeau

Councilmember Kenyan R. McDuffie

Councilmember Anita Bonds

Councilmember Trayon White, Sr.

Councilmember Brooke Pinto

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To require the Office of the District of Columbia Auditor to initiate an assessment into any ties between white supremacist or other hate groups and members of the Metropolitan Police Department that suggest an individual cannot enforce the law fairly and to recommend reforms to Metropolitan Police Department policy, practice, and personnel to better detect and prevent ties to white supremacist or other hate groups in the Department that may prevent fair enforcement of the law in order to increase public trust in the Department and improve officer and public safety.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "White Supremacy in Policing Prevention Act of 2021".

Sec. 2. Definitions.

(1) "Auditor" means the Office of the District of Columbia Auditor or its designees.

(2) "Council" means the Council of the District of Columbia.

(3) "Department" means the Metropolitan Police Department.

(4) “Hate group” means an organization or social group whose goals, activities, and advocacy are primarily or substantially based on a shared hatred, hostility, or violence towards people of one or more other different races, ethnicities, religions, nationalities, genders, and/or sexual identities.

(5) “Mayor” means the Mayor of the District of Columbia.

(6) “Policy” or “policies” means written directives that guide Department policy, including General Orders, Special Orders, Circulars, Standard Operating Procedures, and Bureau/Division Orders.

(7) “White supremacy” means a hate group whose shared hatred, hostility, or violence towards people of one or more other different races, ethnicities, religions, nationalities, genders, and/or sexual identities is based on the belief that white people are innately superior to other races and may include one of the following tenants: 1) white people should have control over people of other races; 2) white people should live by themselves in a whites-only society; 3) white people have their own "culture" that is superior to other cultures; or 4) white people are genetically superior to other people.

Sec. 3. Scope of the assessment and recommendations.

(a) The Office of the DC Auditor shall carry out a comprehensive assessment, in collaboration with eligible external partners as defined in subsection (b) of this section, to, at a minimum:

(1) Determine whether members of the Department have ties to white supremacist or other hate groups, including information about the ties, that may affect identified officers in carrying out their duties properly and fairly;

(A) This may include accessing information about officers' organizational affiliations and memberships; speech; photographs or video footage; social media engagement; complaints; and interviews with officers, witnesses, or relevant stakeholders, that suggest an individual cannot enforce the law fairly.

(B) This may include providing specific recommendations around Department officer or staff training, discipline, or other outcomes as a result of findings.

(C) This assessment shall not violate Department officer and staff members' legal rights or protections as employees, including those addressing privacy and free speech.

(2) Recommend reforms to Department policy, practice, and personnel to better detect and prevent white supremacist or other hate group ties among Department officers and staff that suggest they are not able to enforce the law fairly, and to better investigate and discipline officers for such behavior.

(b) Any collaborating outside partners shall, at a minimum, meet the following criteria:

(1) Be nonpartisan;

(2) Have expertise in civil rights, racial equity, and the threat of white supremacist and other hate groups, movements, and organizing efforts; and

(3) Have experience in law enforcement and intelligence oversight and reform or in conducting investigations and evaluations of law enforcement procedures, policies, and practices.

(c) If during the course of an investigation undertaken pursuant to this act, the auditor determines that criminal activity or other wrongdoing has occurred or is occurring, the auditor

shall, as soon as practicable, report the facts that support such information to the appropriate prosecuting authority.

(d) The Office of the DC Auditor shall submit and present its final report and recommendations to the Council no later than 12 months from the effective date of this act.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4aofthe General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code§ 1-301.47a).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

ATTACHMENT F

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, April 19, 2021

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Monday, April 19, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Law Enforcement Vehicular Pursuit Reform Act of 2021", B24-0213

INTRODUCED BY: Councilmembers Lewis George, R. White, Bonds, T. White, Cheh, and Nadeau

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment
cc: General Counsel
Budget Director
Legislative Services

Councilmember Trayon White, Sr.

Councilmember Janeese Lewis George

Councilmember Mary M. Cheh

Councilmember Robert C. White, Jr.

Councilmember Brianne K. Nadeau

Councilmember Anita Bonds

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To prohibit District of Columbia law enforcement officers from engaging in vehicular pursuits of an individual operating a motor vehicle, unless the officer reasonably believes that the fleeing suspect has committed or has attempted to commit a crime of violence and that the pursuit is necessary to prevent an imminent death or serious bodily injury and is not likely to put others in danger of death or serious bodily injury; and to prohibit the use of dangerous vehicular pursuit practices.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Law Enforcement Vehicular Pursuit Reform Act of 2021".

Sec. 2. Definitions

For the purposes of this act, the term:

(1) "Boxing in" means a tactic designed to stop a suspect motor vehicle by surrounding it with motor vehicles and then slowing them to a stop.

(2) "Caravanning" means the practice, during a vehicular pursuit, of more than 2 law enforcement motor vehicles following each other in relative single file, usually with less than sufficient reactionary distance between the vehicles to adjust for sudden movement or actions by the preceding vehicles.

(3) “Crime of Violence” shall have the same meaning as provided in D.C. Official Code § 23-1331.

(4) “Law enforcement officer” shall have the same meaning as provided in D.C. Official Code § 23-501.

(5) “Motor vehicle” means any automobile, all-terrain vehicle, motorcycle, moped, or other vehicle designed to be propelled only by an internal-combustion engine or electricity.

(6) “Paralleling” means participating in the pursuit of a suspect motor vehicle by proceeding in the same direction and maintaining approximately the same speed as the suspect motor vehicle while traveling on an alternate street or highway that parallels the pursuit route.

(7) “Pursuit intervention technique” means a low-speed maneuver intended to terminate the pursuit of a suspect motor vehicle by causing the suspect motor vehicle to spin out of control and come to a stop.

(8) “Ramming” means the deliberate act of impacting a suspect motor vehicle with another vehicle to damage or otherwise force a motor vehicle to stop.

(9) “Roadblock” means a tactic designed to stop a suspect motor vehicle by intentionally placing a vehicle or immovable object in the path of the motor vehicle.

(10) “Serious bodily injury” means a bodily injury or significant bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

(11) “Tire deflation device” means a device, including spikes or tack strips, that extends across the roadway and is designed to puncture the tires of the suspect motor vehicle.

(12) “Vehicle intercept” means a slow-speed, coordinated maneuver where 2 or more law enforcement motor vehicles simultaneously intercept and block the movement of a suspect motor vehicle to constrain the movement of a motor vehicle and prevent a pursuit.

Sec. 3. Law enforcement vehicular pursuit reform.

(a) A law enforcement officer shall not use a motor vehicle to engage in a pursuit of a suspect motor vehicle, unless the law enforcement officer reasonably believes:

(1) The fleeing suspect has committed or has attempted to commit an immediate crime of violence;

(2) The vehicular pursuit is immediately necessary to avoid death or serious bodily injury to a person other than the operator of the suspect motor vehicle; and

(3) The pursuit is not likely to cause death or serious bodily injury to any person.

(b) In determining whether a law enforcement officer reasonably believed that a vehicular pursuit was immediately necessary and unlikely to cause death or serious bodily harm, a factfinder shall consider:

(1) Whether the identity of the suspect is known and can be apprehended at a later time;

(2) The likelihood of the public being endangered in the area of the pursuit, including the type of area, the time of day, the amount of vehicular and pedestrian traffic such as school zones, and the speed of the pursuit relative to these factors;

(3) Whether there are other people inside the suspect motor vehicle;

(4) The availability of other resources such as helicopters;

(5) Whether the distance between the pursuing officers and the fleeing vehicle is so great that further pursuit would be futile or require the pursuit to continue for an unreasonable time or distance;

(6) Whether visual contact is lost and the pursued vehicle's location is no longer definitely known;

(7) Whether the officer's pursuit vehicle sustains damage or a mechanical failure that renders it unsafe to operate;

(8) Whether the officer was directed to terminate the pursuit by the pursuit supervisor or a higher ranking supervisor;

(9) The law enforcement officer’s training and experience;

(10) Whether the operator of the motor vehicle:

(A) Appeared to possess, either on their person or in a location where it is readily available, a dangerous weapon; and

(B) Was afforded an opportunity to comply with an order to surrender any suspected dangerous weapons;

(11) Whether the law enforcement officer engaged in de-escalation measures;

(12) Whether any conduct by the law enforcement officer increased the risk of harm; and

(13) Whether the law enforcement officer made all reasonable efforts to prevent harm, including abandoning efforts to apprehend the suspect.

(c) A law enforcement officer shall not engage in the following conduct under any circumstances:

(1) Boxing in;

(2) Vehicle intercepts;

(3) Caravanning;

(4) Paralleling;

(5) Pursuit Intervention Technique;

(6) Ramming;

(7) Use of tire deflation devices;

(8) Attempting to force a motor vehicle into another object or off the roadway;

(9) Discharging a firearm at or from a moving motor vehicle;

(10) Placing themselves in a position to be in front of an on-coming vehicle in a manner that is likely to cause death or serious bodily injury; or

(11) Using roadblocks.

(d) It is unlawful for a law enforcement officer to knowingly violate this section.

Sec. 4. Applicability.

This act shall apply 90 days following the date it takes effect.

Sec. 5. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 6. Effective Date

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December

24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(2)), and publication in the District of Columbia Register.

ATTACHMENT G

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, May 24, 2021

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Thursday, May 20, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "School Police Incident Oversight and Accountability Amendment Act of 2021", B24-0254

INTRODUCED BY: Councilmembers Henderson, Pinto, McDuffie, Lewis George, and R. White

The Chairman is referring this legislation sequentially to the Committee on Judiciary and Public Safety and Committee of the Whole.

Attachment
cc: General Counsel
Budget Director
Legislative Services

Statement of Introduction
School Police Incident Oversight and Accountability Amendment Act of 2021
Councilmember Christina Henderson
May 20, 2021

Today, along with Councilmembers Janeese Lewis George, Robert C. White Jr., Kenyan R. McDuffie, and Brooke Pinto, I am introducing the School Police Incident Oversight and Accountability Amendment Act of 2021. This legislation will improve transparency with respect to law enforcement activity occurring on school grounds.

Students of color and with disabilities are disproportionately affected by school discipline compared to their White counterparts. Nationally, a 2020 ACLU report found that students of color are more likely to go to a school with a law enforcement officer, more likely to be referred to law enforcement, and more likely to be arrested at school.

In the District of Columbia, we have some high-level data illuminating these disparities. According to the 2017 Civil Rights Data Collection Report by the U.S. Department of Education, Black students in the District of Columbia make up 71% of students but account for nearly 91% of school-based arrests. Latinx students make up the other 9%. The survey also found that 27% of students receiving referrals to law enforcement were students with disabilities. Furthermore, the Black Swan Academy found that 60% of girls arrested in DC are under the age of 15, with Black girls in DC 30 times more likely to be arrested than White youth of any gender identity.

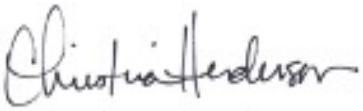
In response to data requests during 2020 and 2021 performance oversight hearings, the Metropolitan Police Department (MPD) released some limited data with respect to student arrests on school grounds. For school year 2018-2019, there were 178 such arrests. For the 2019-2020 school year, as of March 13, 2020 (the last day of in-person instruction), there had been 98 arrests in schools. MPD offered some aggregated data points sorted by race, school location and age for 2019-2020. However, this type of data is not made publicly available on a consistent basis, nor does it include complete and disaggregated demographic data that would permit a fuller evaluation of equity in MPD's school-based activity.

In order to increase transparency and oversight in this area, data on school policing must be collected and made publicly accessible in a manner that allows for analysis by race, gender, age, and disability status. This is consistent with recommendations made by the Police Reform Commission.

This bill will help improve accountability for youth arrests by requiring local education agencies to maintain data on school-based disciplinary actions involving law enforcement. The Metropolitan Police Department would be required to report school-involved incidents bi-annually, publicly and disaggregated by race, gender, age, and disability.

I look forward to working with my Council colleagues and other stakeholders to advance and pass this legislation which will help restore public trust and create an environment that enforces accountability and transparency between students, schools and the Metropolitan Police Department.

Councilmember Kenyan R. McDuffie



Councilmember Christina Henderson

Councilmember Janeese Lewis George

Councilmember Brooke Pinto

Councilmember Robert C. White, Jr.

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Attendance Accountability Act of 2013 to require local education agencies to maintain additional data with respect to school-based disciplinary actions involving law enforcement, to amend the Revised Statutes of the District of Columbia to require the Metropolitan Police Department to maintain records for school-involved arrests by race, gender, age, and disability, and to require MPD to biannually publicly report certain data from school-involved incidents.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "School Police Incident Oversight and Accountability Amendment Act of 2021".

Sec. 2. The Attendance Accountability Amendment Act of 2013 effective September 19, 2013 (D.C. Law 20-17; D.C. Official Code § 38-236.01 *et Seq.*) is amended as follows:

(a) Section 201 (D.C. Official Code § 38-236.01) is amended by inserting a new paragraph (10A) as follows:

"(10A) "Law enforcement" means:

"(A) An officer or member of the Metropolitan Police Department of the District of Columbia or of any other police force operating in the District of Columbia;

"(B) An investigative officer or agent of the United States;

"(C) An on-duty, civilian employee of the Metropolitan Police Department;

"(D) An on-duty, licensed special police officer;

"(E) An on-duty, licensed campus police officer;

"(F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; or

"(G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division.".

(b) Section 209(a)(2) (D.C. Official Code § 38-236.09) is amended as follows:

(1) Subparagraph (G) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(2) New subparagraphs (G1), (G2), and (G3) are added to read as follows:

"(G1) The reason for involving law enforcement;

"(G2) The type and count of weapons, contraband or controlled substances recovered;

"(G3) Law enforcement involvement in any school action or activity; and".

(3) Subparagraph (H) is amended to read as follows:

"(H) A description of the conduct that led to or reasoning behind each suspension, involuntary dismissal, emergency removal, disciplinary unenrollment, voluntary withdrawal or transfer, referral to law enforcement, involvement of law enforcement for any reason, school-based arrest, recovery of weapons, recovery of contraband, recovery of controlled dangerous substance, and, for students with disabilities, change in placement; and".

Sec 3. Section 386 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-113.01) is amended as follows:

(a) A new subsection (a)(4E) is added to read as follows:

"(4E) Disaggregated by school, records of school-based events involving a member or members of the Metropolitan Police Department who stop, detain, or arrest individuals on school grounds including:

"(A) The number of school-based events for which an officer was involved, sorted by school;

"(B) The number of school-related arrests;

"(C) The type and count of weapons, contraband, or controlled substances recovered from any school-based event, whether or not an arrest occurred;

"(D) The reason for involving the law enforcement officer called by the school staff; and

"(E) Demographic data of any person involved in a disciplinary incident, stop or arrest on school grounds, including:

"(i) Race;

"(ii) Gender;

"(iii) Age; and

"(iv) Disability status."

(b) A new subsection (c) is inserted as follows:

"(c) The Metropolitan Police Department shall publicly release aggregated data collected in accordance with subsection (a)(4E) of this section and make the data available biannually on its website.".

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02 (c)(3)).

Sec. 5. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

ATTACHMENT H

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, July 12, 2021

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Monday, July 12, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Strengthening Oversight and Accountability of Police Amendment Act of 2021", B24-0356

INTRODUCED BY: Chairman Mendelson

The Chairman is referring this legislation sequentially to the Committee on Judiciary and Public Safety and Committee of the Whole.

Attachment
cc: General Counsel
Budget Director
Legislative Services

Chairman Phil Mendelson

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the District of Columbia Auditor Subpoena and Oath Authority Act of 2004 to create the position of Deputy Auditor for Public Safety within the Office of the District of Columbia Auditor; to establish minimum qualifications for the Deputy Auditor; to prescribe the duties, responsibilities, and powers of the Deputy Auditor; to amend the Office of Citizen Complaint Review Establishment Act of 1998 to rename the Police Complaints Board the Police Accountability Commission; to change the membership of the Commission; to expand the authority of the Commission to review policies, procedures, and trainings, and to provide input on the job description and qualifications of a Chief of Police; to rename the Office of Police Complaints to the Office of Police Accountability; to expand the authority Office's Executive Director to encompass complaints against special police, to receive anonymous complaints, and to continue administrative investigations of officers while the U.S. Attorney's Office determines whether to pursue prosecution against an officer; to amend the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to provide stipends to members of the Police Accountability Commission; to amend the Freedom of Information Act of 1976 so that disciplinary records of officers with MPD and the D.C. Housing Authority Police Department can no longer be withheld from the public; to require the Chief of Police to submit department policies, procedures, and updates to training to the Police Accountability Commission for comment; and to require MPD to create a publicly accessible database for disciplinary records of officers.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Strengthening Oversight and Accountability of Police Amendment Act of 2021".

Sec. 2. The District of Columbia Auditor Subpoena and Oath Authority Act of 2004, effective April 22, 2004 (D.C. Law 15-146; D.C. Official Code § 1301.171 et seq.) is amended as follows:

(a) A new section (5) is added to read as follows:

"Sec. 5. Establishment and Qualifications of a Deputy Auditor for Public Safety.

"(a) There is established within the Office of the District of Columbia Auditor a Deputy Auditor for Public Safety.

"(b) The Deputy Auditor for Public Safety shall be appointed by the Auditor. The Auditor shall create a search committee composed of relevant stakeholders, including the Chair of the Public Safety Committee of the Council, the Chief of Police, the Executive Director of the Office of Police Accountability, and the Director of the Department of Corrections. The Auditor shall consider the recommendations of the search committee in making his or her selection.

"(c) In addition to other qualifications the Auditor deems necessary, the Deputy Auditor for Public Safety shall:

"(1) Be an attorney with substantial experience in criminal, civil rights, and/or labor law, or corporate and/or governmental investigations, or an individual with at least 5 years of experience in law enforcement and/or corrections oversight; and

"(2) Have knowledge of law enforcement and/or corrections policies and practices, particularly regarding internal investigations for misconduct and use of force.

"(d) The Deputy Auditor for Public Safety may only be removed by the Auditor for cause.".

(b) A new section 6 is added to read as follows:

"Sec. 6. Duties and Responsibilities of the Deputy Auditor for Public Safety.

"(a) The Deputy Auditor for Public Safety shall have the authority and responsibility to:

"(1) Review the handling of serious of use of force incidents as defined in MPD General order 901-07 or any subsequent orders, serious property or vehicle damage, first amendment demonstrations, or other issues by officers of the Metropolitan Police Department, the D.C. Housing Authority Police Department, or a District-licensed security company. This may include auditing, monitoring, or other review of administrative investigations to assess the quality, thoroughness, and integrity of the investigations, specific findings of investigations, and after-action reports;

"(2) Conduct semi-annual reviews of Office of Police Accountability's handling of misconduct complaints and cases to assess and certify the timeliness, quality and integrity of those investigations and findings;

"(3) Review, analyze, and make findings and recommendations on any policy, practice, or program within the Metropolitan Police Department, the District of Columbia Housing Authority Police Department, the Department of Corrections, or a District-licensed security company;

"(4) Monitor the implementation of any findings or recommendations made by the Office of the Auditor, the Executive Director of the Office of Police Accountability or the Police Accountability Commission; and

"(5) Collaborate with the Police Accountability Commission, Office of Police Accountability, and the Metropolitan Police Department in improving system transparency, including improving public disclosure procedures or mechanisms of the Metropolitan Police Department, and providing for timely information about the status of reviews, audits, or investigations.

"(d) The Deputy Auditor for Public Safety shall notify an agency of any upcoming reviews and analyses under subsection (a) of this section.

"(e) The Deputy Auditor for Public Safety shall solicit comments from the District of Columbia Police Accountability Commission for reviews and analyses related to the Metropolitan Police Department or the District of Columbia Housing Authority Police Department under subsection (a) of this section.

"(f) Analyses, findings, recommendations, and any relevant supplemental materials shall be delivered to the Mayor and Council and made publicly available after the receipt of final comments from the agency.

"(g) The Deputy Auditor for Public Safety shall conduct regular outreach to District residents to share information with the public about its mission, policies, and operations, and to provide updates reviews or investigations where applicable.

"(h) Beginning on December 31, 2023 and by December 31 every year thereafter, the Deputy Auditor for Public Safety shall deliver a report to the Mayor and the Council that includes his or her activities in the prior year.".

(c) A new section 7 is added to read as follows:

"Sec. 7. Powers of the Deputy Auditor for Public Safety.

"(a)(1) The Deputy Auditor for Public Safety shall have access, as is necessary to conduct his or her work, to all books, accounts, records, reports, findings and all other papers, things, or property belonging to or in use by the Metropolitan Police Department, the District of Columbia Housing Authority Police Department, the Department of Corrections, or any District-licensed security company.

"(2) The Deputy Auditor for Public Safety shall maintain confidentiality of persons named in any documents transferred from the Metropolitan Police Department, the District of Columbia Housing Authority Police Department, the Department of Corrections, or a District-licensed security company pursuant to this subsection to the extent required by District law.

"(b)(1) Upon receipt of any findings and recommendations made by the Deputy Auditor for Public Safety, the Metropolitan Police Department, the District of Columbia Housing Authority Police Department, or the Department of Corrections shall have 30 days to provide a written response that includes a description of any corrective action the agency intends to make, and the basis for rejecting any finding or recommendation in whole or in part.

(2) The agency may request an extension in writing to Deputy Auditor for Public Safety of up to 15 additional days as deemed necessary.".

Sec. 3. The Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1101 *et seq*.), is amended as follows:

(a) Section 4 (D.C. Official Code § 5–1103) is amended as follows:

(1) Paragraph (1) is struck.

(2) Paragraph (2) is designated as paragraph (1).

(3) A new paragraph (2) is added to read as follows:

(2) "Commission" means the District of Columbia Police Accountability Commission.

(4) Paragraph (4) is amended by striking the phrase "Complaints." and replacing it with the phrase "Accountability.".

(b) The title of Section 5 (D.C. Official Code § 5–1104) is amended by striking the phrase "Police Complaints Board" and replacing it with the phrase "Police Accountability Commission.".

(c) Section 5 (D.C. Official Code § 5–1104) is amended to read as follows:

"(a) There is established a District of Columbia Police Accountability Commission ("Commission"). The Commission shall be composed of nine voting members and one ex-officio member. The Commission shall include:

"(1) At least three members between the ages 15 and 24 residing in neighborhoods with higher-than-average levels of police stops and arrests;

"(3) Two persons from immigrant communities, or representatives of service providers or advocacy organizations who serve immigrant persons;

"(4) Two persons from the LGBTQIA community, or representatives of service providers or advocacy organizations who serve LGBTQIA people;

"(5) Two persons with disabilities, or representatives of service providers or advocacy organizations who serve persons with disabilities in District; and

"(7) A member of the Metropolitan Police Department selected by the Chief serving as an ex-officio member.

"(b) All members of the Commission shall be residents of the District.

"(c) Members of the Commission shall be appointed by the Mayor, subject to confirmation by the Council. The Mayor shall submit a nomination to the Council for a 90-day period of review, excluding days of Council recess. If the Council does not approve the nomination by resolution within this 90-day review period, the nomination shall be deemed disapproved.

"(d) Commission members shall serve a term of 3 years from the date of appointment or until a successor has been appointed. A Commissioner may be reappointed and serve two consecutive terms. The Mayor shall designate the Chairperson of the Commission and may remove a member of the Commission from office for cause. A person appointed to the Commission to fill a vacancy occurring prior to the expiration of a term shall serve for the remainder of the term or until a successor has been appointed.

"(e) Commission members shall be entitled to a stipend pursuant to D.C. Official Code § 1-611.08(c-2)(6).

"(f) The Commission shall:

"(1) Conduct periodic reviews of the citizen complaint review process, and make recommendations, where appropriate, to the Mayor, the Council, the Chief of the Metropolitan Police Department, and the Director of the District of Columbia Housing Authority;

"(2) Review, solicit community feedback, and provide comments on non-administrative Metropolitan Police Department policies, procedures, and updates to training, prior to those policies, procedures, and trainings being finalized and binding upon employees of the MPD. The Commission shall have 45 days from the date the Chief of Police submits the policy, procedure, or updated training curriculum to provide comments;

"(3) Provide comments and input on the job description and qualifications of a Chief of Police of the Metropolitan Police Department;

"(4) Share information with the Deputy Auditor for Public Safety as is deemed necessary or required by law or formal agreements;

"(5) Collaborate with the Deputy Auditor for Public Safety and the Metropolitan Police Department in improving system transparency, including improving public disclosure procedures or mechanisms of the Metropolitan Police Department, and providing for timely information about the status of investigations and their outcomes.

"(g) The Executive Director, acting on behalf of the Commission, shall have unfettered, timely and complete access to information and supporting documentation from the MPD, HAPD, and any District-licensed security company to which the subject special officer, specifically related to the Commission's duties.

"(h) Within 60 days of the end of each fiscal year, the Commission shall transmit to the entities named in subsection (f)(1) of this section an annual report of the operations of the Commission and the Office of Police Accountability.

"(i) The Commission is authorized to apply for and receive grants to fund its program activities in accordance with laws and regulations relating to grant management.".

(d) The title of Section 6 (D.C. Official Code § 5–1105) is amended by striking the phrase "Complaints" and replacing it with the phrase "Accountability.".

(e) Section 6 (D.C. Official Code § 5–1105) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "Complaints" and replacing it with the phrase "Accountability.".

(2) Subsection (b) is amended striking the phrase "Board" and replacing it with phrase "Commission" wherever it is found.

(f) Section 7(c) (D.C. Official Code § 5–1106(c)) is amended by striking the phrase "Board" and inserting phrase "Commission" wherever it is found.

(g) Section 7(d) (D.C. Official Code § 5–1106(d)) is amended by striking the phrase "Board" and inserting phrase "Commission" wherever it is found.

(h) Section 8 (D.C. Official Code § 5–1107) is amended to read as follows:

"(a)(1) The MPD and the Office shall have the authority to receive or audit a citizen complaint against a member or members of the MPD for alleged abuse or misconduct.

"(2) If MPD receives a citizen complaint under subsection (a) of this section, the MPD shall transmit the citizen complaint to the Office within 3 business days after receipt.

"(b) The Office shall have the authority to receive or audit a citizen complaint against a member or members of the District of Columbia Housing Authority Police Department (HAPD) or special police licensed by the District.

"(c)(1) The Office shall have the sole authority to dismiss, conciliate, mediate, adjudicate, or refer for further action to the MPD or the HAPD a citizen complaint received under subsection (a) or (b) of this section.

"(2) If during the investigation of a civilian complaint, the Office finds evidence of abuse or misconduct not in included in the original complaint, the Office may include these allegations in the original complaint.

"(c) In addition to investigating authority granted under subsections (a) and (b) of this section, the Office shall have the authority to:

"(1) Conduct administrative investigations and make findings on all serious use of force incidents, as defined in MPD General order 901-07 or any subsequent orders, by MPD, HAPD officers or special police licensed by the District; and

"(2) Conduct administrative investigations and make findings on all MPD or HAPD in-custody deaths.

"(d) Any individual having personal knowledge of alleged police misconduct may file a complaint with the Office on behalf of a victim.

"(e) To be timely, a complaint must be received by the Office within 90 days from the date of the incident that is the subject of the complaint. The Executive Director may extend the deadline for good cause.

"(f) Each complaint shall be reduced to writing. Complaints may be submitted anonymously.

"(g) The Executive Director shall screen each complaint and may request additional information from the complainant. Within 7 working days of the receipt of the complaint, or within 7 working days of the receipt of additional information requested from the complainant, the Executive Director shall take one of the following actions:

"(1) Dismiss the complaint, with the concurrence of three Commission members;

"(2) Refer the complaint to the United States Attorney for the District of Columbia for possible criminal prosecution;

"(3) Attempt to conciliate the complaint;

"(4) Refer the complaint to mediation;

"(5) Refer the complaint for investigation; or

"(6) Refer the subject police officer or officers to complete appropriate policy training by the MPD or the HAPD.

"(h) The Executive Director shall notify in writing the complainant, the subject police officer or officers, and the Deputy Auditor for Public Safety of the action taken under subsection (g) of this section. If the complaint is dismissed, the notice shall be accompanied by a brief statement of the reasons for the dismissal, and the Executive Director shall notify the complainant that the complaint may be brought to the attention of the Police Chief who may direct that the complaint be investigated, and that appropriate action be taken.

"(i) MPD and HAPD shall notify the Executive Director when a subject police officer or officers completes policy training pursuant to subsection (g)(6) of this section.

"(j) The Executive Director, acting on behalf of the Commission, shall have unfettered, timely and complete access to documentation from the MPD, HAPD, and any District-licensed security company to which the subject special officer belongs for any of the duties of this section.

"(k) This subchapter shall also apply to any federal law enforcement agency that, pursuant to Chapter 3 of this title, has a cooperative agreement with the MPD that requires coverage by the Office; provided, that the Chief of the respective law enforcement department or agency shall perform the duties of the MPD Chief of Police for the members of their respective departments.

"(l) By February 1 of each year, the Office shall provide a report to the Council on the effectiveness of the Metropolitan Police Department's Body-Worn Camera Program, including an analysis of use of force incidents.

"(m) Beginning December 31, 2023 and every December 31 thereafter, the Office shall provide a report to the Mayor and Council regarding civilian complaints accepted pursuant to subsections (a) and (b) of this section. The report shall include:

"(1) The number, type and disposition of citizen and internally-generated complaints received, investigated, sustained, or otherwise resolved, and the race, national origin, gender, and age of the complainant and the subject officers;

"(2) The proposed discipline, appeals, and the actual discipline imposed on an officer as a result of any sustained complaint;

"(3) All use of force incidents, serious use of force incidents retaliation or serious use of force as defined in MPD General order 901-07 or any subsequent orders, and serious physical injury incidents; and

"(4) The number of cases the Office closed in the prior year by disposition type;

"(5) The number of days it takes to close a complaint, from the date of receipt of the complaint, by disposition type;

"(6) Reasons why cases are closed as dismissed on the merits, by disposition type and merit categorization.".

(i) Section 10(d) (D.C. Official Code § 5–1109(d)) is amended to read as follows:

"(d)(1) After a case is referred to the United States Attorney but a decision to prosecute is pending, the Executive Director shall endeavor to complete all possible investigative processes within his or her authority.

"(2) The Executive Director may complete an administrative investigation, including conducting interviews of subject officers, in cases where the public interest weighs against delaying the completion of the administrative investigation until after the United States Attorney decides whether to prosecute. The Executive Director shall only be able to complete an

administrative investigation under this subsection after receiving authorization from the Commission through a majority a vote and consultation with the prosecutor.".

(j) Section 12 (D.C. Official Code § 5–1111) is amended as follows:

(1) Subsection (i) is amended to read as follows:

"(i)(1) If the complaint examiner determines that one or more allegations in the complaint is sustained, the Executive Director shall transmit the entire complaint file, including the merits determination of the complaint examiner, to the Police Chief for appropriate action."

"(2) Within 45 days of receipt of the complaint file, the Police Chief shall provide written comment to the Executive Director confirming or rejecting the Office's recommended disciplinary action for the sustained allegations. If the Police Chief rejects a recommended disciplinary action, the comment shall explain the justification for the rejection.

(2) A new subsection (j) is added to read as follows:

"(j) If the complaint examiner determines that no allegation in the complaint is sustained, the Executive Director shall dismiss the complaint and notify the parties and the Police Chief in writing of such dismissal with a copy of the merits determination.".

(k) Section 13 (D.C. Official Code § 5–1112) amended by adding a new subsection (f-1) to read as follows:

"(f-1) In addition to providing notice under subsection (f), the Police Chief shall provide written comment to the Executive Director and the Deputy Auditor for Public Safety confirming or rejecting the Office's recommended disciplinary action for the sustained

allegations. If the Police Chief rejects a recommended disciplinary action, the comment shall explain the justification for the rejection.”.

(l) Section 16 (D.C. Official Code § 5–1115) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "Board" and inserting the phrase “Commission” in its place.

(2) Subsection (b) is amended by striking the phrase "Board" and inserting the phrase “Commission” in its place.

Sec. 4. Section 1108(c-2) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-611.08(c-2)) is amended by added a new paragraph (6) to read as follows:

“(6) Each Commissioner of the Police Accountability Commission shall be entitled to a stipend of $5,000 per year for their service on the Commission; the Chairperson shall be entitled to $7,000 per year. Each member also shall be entitled to reimbursement of actual travel and other expenses reasonably related to attendance at commission meetings the performance of official duties.”.”

Sec. 5. Section 204 of The Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-534) is amended as follows:

(1) Subsection (a)(3) is amended by striking the phrase “Office of Police Complaints” and inserting the phrase “Office of Police Accountability” in its place.

(2) Subsection (a)(3)(A)(iii) is amended by striking the phrase “Office of Police Complaints” and inserting the phrase “Office of Police Accountability” in its place.

(3) Subsection (a)(12) is amended by striking “;” and inserting “or for records described in subsection (d-1) of this section;”

(4) A new subsection (d-1) is added to read as follows:

"(d-1)(1) The provisions of this section shall not apply to disciplinary records of officers with the Metropolitan Police Department or the District of Columbia Housing Authority Police Department (HAPD).

"(2) For purposes of this subsection, the term "disciplinary records" means any record created in the furtherance of a disciplinary proceeding against an MPD or HAPD officer, including:

"(A) The complaints, allegations, and charges against an officer;

"(B) The name of the officer complained of or charged;

"(C) The transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

"(D) The disposition of any disciplinary proceeding; and

"(E) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the officer.

"(3) When providing records pursuant to subsection (d-1)(1), the responding agency may redact:

"(A) Technical infractions. "Technical infraction" means a minor rule violation, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, and (b) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

"(B) Items involving the medical history of the officer or complainant, not including any records obtained during the course of an investigation such officer's misconduct that are relevant to the disposition of the investigation;

"(C) The home addresses, personal telephone numbers, personal cell phone numbers, or personal email addresses of any officer or complainant;

"(D) Any social security numbers; or

"(E) Disclosure of the use of any employee assistance program, mental health service, or substance abuse treatment service by an officer or complainant unless such use is mandated by a disciplinary proceeding that may be otherwise disclosed pursuant to this subsection.".

Sec. 6. Chief of Police and MPD Policies and Procedures.

(a)(1) The Chief of Police shall submit non-administrative policies and procedures, and changes in training curriculum, to the Police Accountability Commission ("Commission") for comment. The Commission shall have 45 days to review and provide comments to the Chief before said policies, procedures, and trainings are finalized and binding upon employees of the MPD. The Chief shall consider the comments of the Commission prior to issuing final policies and procedures.

(2) If the Chief rejects proposed changes to the policy, procedure or training suggested by the Commission, he or she shall provide a written comment to the Commission within 30 days of receiving the Commission's comments. The comment shall contain a justification for the rejection.

(b) Where the Chief determines it necessary to issue binding policies and procedures before submitting them to the Commission, he or she shall submit the interim policies or procedures to the Commission pursuant to (a).

Sec. 7. Officer Disciplinary Records Database.

By December 23, 2023, the Metropolitan Police Department shall publish a database that contains the following information:

(a) Rank and shield history of each sworn officer;

(b) Department commendations, recognition or awards of each sworn officer;

(c) Trainings, including in-service, promotional, and other modules, that each sworn officer have received; and

(d) Disciplinary history and records of each sworn officer, consistent with D.C. Official Code § 2-534(d-1)(1)-(d-1)(3).

Sec. 8. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Cade § 1-301.47a).

Sec. 9. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973, (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

ATTACHMENT I

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : Monday, November 29, 2021

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Office of the Secretary on Wednesday, November 17, 2021. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021", B24-0515

INTRODUCED BY: Chairman Mendelson, at the request of Mayor

The Chairman is referring this legislation to the Committee on Judiciary and Public Safety.

Attachment
cc: General Counsel
Budget Director
Legislative Services

MURIEL BOWSER
MAYOR

November 17, 2021

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue, NW, Suite 504
Washington, DC 20004

Dear Chairman Mendelson:

Enclosed for the consideration of the Council of the District of Columbia is the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021." The bill amends the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982 to remove the requirement that cadets graduate from District of Columbia high schools in order to qualify for the Metropolitan Police Department's Cadet Corps.

The Cadet Program helps ensure young adults develop the leadership and analytical skills required to meet the challenges of law enforcement. Cadets work part-time for MPD while receiving a scholarship enabling them to earn up to 60-college credit hours at the University of the District of Columbia Community College. By expanding the program, more young adults will benefit from access to employment opportunities and secondary education. Many individuals may not have graduated from a District of Columbia high school but are otherwise connected to the District and could serve the community well. This includes young adults who have spent most of their lives in the District but may have recently moved to and graduated in another state, or who attended school in a neighboring jurisdiction, but may have a parent or grandparent living in the District with whom they spend time regularly.

The Police Cadet Corps is designed to prepare candidates for entrance into the MPD Officer Recruit Program and ensure that a steady stream of District of Columbia young adults is actively recruited as future police officers. By expanding access to the Cadet Program, those individuals who might otherwise look for opportunities in neighboring jurisdictions may instead return to the District, allowing MPD to continue increasing the proportion of its officers who are invested in and understand the community they serve.

Sincerely,

Muriel Bowser

Enclosures

Chairman Phil Mendelson
at the request of the Mayor

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982 to remove the requirement that cadets graduate from District of Columbia high schools in order to qualify for the Metropolitan Police Department's cadet program.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021".

Sec. 2. Section 2(a) of the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982, effective March 9, 1983 (D.C. Law 4-172; D.C. Official Code § 5-109.01(a)), is amended to read as follows:

"(a) The Chief of the Metropolitan Police Department shall establish a police officer cadet program, which shall include senior year high school students and high school graduates under 25 years of age residing in the District of Columbia for the purpose of instructing, training, and exposing interested persons to the operations of the Metropolitan Police Department and the duties, tasks, and responsibilities of serving as a police officer with the Metropolitan Police Department.".

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor, a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Government of the District of Columbia
Office of the Chief Financial Officer

Fitzroy Lee
Acting Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Phil Mendelson** **Chairman, Council of the District of Columbia**
FROM:	**Fitzroy Lee** **Acting Chief Financial Officer** Fitzroy Lee
DATE:	**November 9, 2021**
SUBJECT:	**Fiscal Impact Statement – Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021**
REFERENCE:	**Draft Introduction as provided to the Office of Revenue Analysis on November 5, 2021**

Conclusion

Funds are sufficient in the fiscal year 2022 through fiscal year 2025 budget and financial plan to implement the bill.

Background

The Metropolitan Police Department (MPD) Cadet Program is a specialized program for under 25-year-old Washingtonians to serve part-time as uniformed, civilian employees. MPD Cadets spend part of their time working specific job assignments for MPD while also working toward their college degree. To be eligible to enroll in the MPD Cadet Program, individuals must be seniors in a District high school or graduates of a District high school. The bill removes[1] the requirement that the high school of a Cadet's enrollment or graduation be located in the District to expand the pool of eligible applicants to the program.

Financial Plan Impact

[1] By amending Section 2(a) of the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982, effective March 9, 1983 (D.C. Law 4-172; D.C. Official Code § 5-109.01(a)).

Funds are sufficient in the fiscal year 2022 through fiscal year 2025 budget and financial plan to implement the bill. There is no cost to expand the pool of applicants eligible to apply to the MPD Cadet Program. The fiscal year 2022 budget includes funding to support 150 MPD Cadets.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

LEGAL COUNSEL DIVISION

MEMORANDUM

TO: **Ronan Gulstone**
Director
Office of Policy and Legislative Affairs

FROM: **Brian K. Flowers**
Deputy Attorney General
Legal Counsel Division

DATE: **November 10, 2021**

SUBJECT: **Legal Sufficiency Review of Draft Legislation, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021" (AD-21-654)**

This is to Certify that this Office has reviewed the above-referenced proposed legislation and has found it to be legally sufficient. If you have questions regarding this certification, please do not hesitate to contact me at 724-5524.

Brian K. Flowers

Brian K. Flowers

ATTACHMENT J

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020"

B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION AMENDMENT ACT OF 2020"

AND

B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

Thursday, October 15, 2020, 9:00 a.m. – 6:00 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html
https://www.facebook.com/CMcharlesallen/

On Thursday, October 15, 2020, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to consider Bill 23-0723, the "Rioting Modernization Amendment Act of 2020", Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", and Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020". The hearing will be conducted virtually via Zoom from 9:00 a.m. to 6:00 p.m. Pre-registered public witnesses will testify from 9:00 a.m. to 3:00 p.m., and government witnesses will testify from 3:00 p.m. to 6:00 p.m.

The stated purpose of B23-0723, the "Rioting Modernization Amendment Act of 2020", is to amend An Act relating to crime and criminal procedure in the District of Columbia to provide definitions for certain terms related to the offense of rioting, to clarify the conduct that constitutes rioting, to revise the penalties for convictions, and to establish a right to a jury trial for prosecutions.

The stated purpose of B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", is to amend the First Amendment Rights and Police Standards Act of 2003 to prohibit the use of chemical irritants at First Amendment assemblies.

The stated purpose of B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020", is to provide for comprehensive policing and justice reform for District residents and visitors, and for other purposes. Specifically, the bill:

- Prohibits the use of neck restraints by law enforcement and special police officers;
- Requires the Mayor to publicly release the names and body-worn camera recordings of any officer who committed an officer-involved death or serious use of force, unless the subject or their next of kin objects to its release;
- Amends the statutes of various District boards related to policing, including by:
    - Expanding the membership of the Police Complaints Board – the governing body for the Office of Police Complaints ("OCP") – and allowing OCP's Executive Director to investigate evidence of abuse or misuse of police powers, even if it was not specifically alleged by the complainant;
    - Expanding the Use of Force Review Board's voting members to include OPC's Executive Director, three civilian members appointed by the Mayor, and two members appointed by the Council; and
    - Reconstituting the Police Officers Standards and Training Board ("POST Board"), the District board that establishes minimum application and appointment criteria for Metropolitan Police Department ("MPD") officers and reviews MPD's initial training and continuing education programs;
- Requires that police officers, for searches where an officer's justification for the search is based only on the person's consent, explain that the person is being asked to consent and that they can refuse the search;
- Expands MPD's continuing education requirements to include new topics such as racism and white supremacy, limiting the use of force, and employing de-escalation tactics;
- Requires the uniforms and helmets of MPD officers policing First Amendment assemblies to identify the officers as local law enforcement;
- Repeals two outdated criminal offenses: (1) the District's law criminalizing mask wearing for certain purposes and (2) the offense of failure to arrest when any crime is committed in an officer's presence;
- Codifies the situations in which deadly force can be used and elaborates on the standard for judges and juries to use when reviewing cases that involve claims of excessive force;
- Extends the right to jury trials to certain offenses where the victim is a law enforcement officer;
- Proposes a number of reforms to MPD's disciplinary procedures, including:
    - Specifying that discipline is no longer negotiable during collective bargaining;
    - Extending the time during which MPD must bring a corrective or adverse action for misconduct in cases involving serious use of force or indicating potential criminal conduct by a sworn member or civilian employee;
    - Allowing the Chief of Police to increase the penalty recommended by the Police Trial Board to be imposed on an officer for misconduct; and

    - Prohibiting MPD from hiring as sworn members anyone who committed serious misconduct, was terminated from another law enforcement agency, or resigned from a law enforcement agency to avoid potential disciplinary action;
- Restricts the ability of District law enforcement agencies to acquire or request certain military equipment;
- Restricts MPD's use of riot gear in response to First Amendment assemblies to situations in which there is an immediate risk of significant bodily injury to officers, and prohibits the use of chemical irritants or less-lethal projectiles to disperse a First Amendment assembly;
- Establishes a Police Reform Commission;
- Amends the WMATA Compact to require that WMATA (1) prohibit the use of quotas to evaluate, reward, or discipline officers, and (2) establish a Police Complaints Board; and
- Enfranchises all eligible District residents incarcerated for felony convictions.

The Committee invites the public to provide oral and/or written testimony. Public witnesses seeking to provide oral testimony at the Committee's hearing must thoroughly review the following instructions:

- Anyone wishing to provide oral testimony must email the Committee at judiciary@dccouncil.us with their name, telephone number, organizational affiliation, and title (if any), by the **close of business on Wednesday, October 7**.
- The Committee will approve witnesses' registrations based on the total time allotted for public testimony. The Committee will also determine the order of witnesses' testimony.
- **Witnesses who are approved by the Committee to testify will be emailed Zoom registration instructions for the hearing, which they must complete in order to be placed on the final witness list and access their unique Zoom link**.
- Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals (and any subsequent representatives of the same organizations) will be allowed a maximum of three minutes.
- Witnesses are not permitted to yield their time to, or substitute their testimony for, the testimony of another individual or organization.
- If possible, witnesses should submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.
- Witnesses who anticipate needing language interpretation are requested to inform the Committee as soon as possible, but no later than five business days before the hearing. The Committee will make every effort to fulfill timely requests; however, requests received fewer than five business days before the hearing may not be fulfilled.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be emailed to the Committee at judiciary@dccouncil.us **no later than the close of business on Friday, October 23.**

ATTACHMENT K

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020"

B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION AMENDMENT ACT OF 2020"

AND

B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

Thursday, October 15, 2020, 9:00 a.m. – 6:00 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

i. Public Witnesses

Panel 1

1. John Ayala, Mid-Atlantic Operations Director, D.C. Chapter, Alliance of Guardian Angels

2. Monica Hopkins-Maxwell, Executive Director, American Civil Liberties Union of the District of Columbia
3. Ruth Lindberg, Manager, Health Impact Project, The Pew Charitable Trusts
4. Premal Dharia, Public Witness
5. Thomas Susman, President, D.C. Open Government Coalition
6. Mana Azarmi, Policy Counsel, Center for Democracy and Technology
7. Grayson Clary, Stanton National Security Fellow, Reporters Committee for Freedom of the Press
8. Jonathan Blanks, Visiting Fellow in Criminal Justice, Foundation for Research on Equal Opportunity
9. Akhi Johnson, Deputy Director, Reshaping Prosecution Program, Vera Institute of Justice
10. Richard Gilbert, Chair, Legislative Committee, District of Columbia Association of Criminal Defense Lawyers

Panel 2

11. Yvette Alexander, Public Policy Chair, Metropolitan Washington D.C. Chapter, Coalition of 100 Black Women
12. James Berry, Chair, MPD Citizens Advisory Council
13. Robert Pittman, Chair, 1D Citizens Advisory Council
14. Brenda Lee Richardson, Public Witness
15. Georgine Wallace, Community Facilitator, PSA 103/105
16. Debbie Smith-Steiner, Public Witness
17. Gregg Pemberton, Chair, D.C. Police Union
18. Patrick Burke, Executive Director, D.C. Police Foundation

Panel 3

19. Anthony Lorenzo Green, Commissioner, ANC 7C04
20. Salim Adofo, Commissioner, ANC 8C07
21. Bobbi Strang, President, Gay and Lesbian Activists Alliance
22. Mara Verheyden-Hilliard, Executive Director, Partnership for Civil Justice Fund
23. Nick Robinson, Legal Advisor, U.S. Program, International Center for Not-for-Profit Law

Panel 4

24. Patrice Sulton, Director, D.C. Justice Lab
25. Beverly Smith, Volunteer, D.C. Justice Lab
26. Virginia Spatz, Volunteer, D.C. Justice Lab
27. Diontre Davis, Volunteer, D.C. Justice Lab
28. Sabrin Qadi, Volunteer, D.C. Justice Lab
29. Jordan Crunkleton, Volunteer, D.C. Justice Lab
30. Emily Friedman, Volunteer, D.C. Justice Lab
31. Katrina Jackson, Student Director, D.C. Justice Lab
32. Alexis Mayer, Student Director, D.C. Justice Lab
33. Victoria McCullough, Volunteer, D.C. Justice Lab
34. Brandon Spreckels, Volunteer, D.C. Justice Lab
35. Iris Benson-Sulzer, Volunteer, D.C. Justice Lab
36. Marlene Aiyejinmi, Volunteer, D.C. Justice Lab

Panel 5

37. Cynthia Lee, Edward F. Howrey Professor of Law, The George Washington University Law School
38. Jestelle Hanrahan, Public Witness
39. Rachel Gale, Public Witness
40. Jonathan Carter, Public Witness
41. Steve Boughton, Public Witness
42. Lane Kauder, Public Witness
43. Josephine Ross, Professor of Law, Howard University School of Law
44. Kaylah Alexander, Public Witness
45. Leah Wilson, Member, Students Taking Action Against National Discrimination

Panel 6

46. Kymone Freeman, Co-Founder, We Act Radio
47. Qubilah Huddleston, Education Policy Analyst, D.C. Fiscal Policy Institute
48. Makia Green, Organizer, D.C. Working Families Party
49. Franklyn Malone, CEO/Founder, The 100 Fathers, Inc./Co-Chair, D.C. Fatherhood Coalition
50. April Goggans, Core Organizer, Black Lives Matter D.C.
51. Dawn Dalton, Deputy Director, D.C. Coalition Against Domestic Violence

52. Elisabeth Olds, SAVRAA Independent Expert Consultant

Panel 7

53. Naomi Adaniya, Public Witness
54. Claudia Barragan, Public Witness
55. Larry Lewis, Public Witness
56. Tam Haye, Public Witness
57. Gavin Nelson, Public Witness
58. Samantha Davis, Founder/Executive Director, The Black Swan Academy
59. Eduardo Ferrer, Policy Director, Juvenile Justice Initiative, Georgetown Law
60. Yafet Girmay, Vice Chair of International Affairs, Washington DC Chapter, National Black United Front
61. Michael Payne, Interim Advocacy Director, Physicians for Human Rights
62. Dr. Ranit Mishori, Senior Medical Advisor, Physicians for Human Rights

Panel 8

63. Lauren Spokane, Board Member, Jews United for Justice
64. Hannah Garelick, Community Organizer, Jews United for Justice
65. Rebecca AbuRakia-Einhorn, Member, Jews United for Justice
66. Logan Bayroff, Member, Jews United for Justice
67. Alana Eichner, Member, Jews United for Justice
68. Rebecca Ennen, Member, Jews United for Justice
69. Hannah Weilbacher, Member, Jews United for Justice

Panel 9

70. Rick Ammirato, Executive Director, D.C. BID Council
71. Joe Sternlieb, CEO/President, Georgetown Business Improvement District
72. Bill Mefford, Executive Director, The Festival Center
73. Alexander Pope, III, President/CEO, The Pope Companies
74. Megan Macaraeg, Interim Executive Director, Many Languages One Voice
75. Marques Banks, Equal Justice Works Fellow, Washington Lawyers' Committee for Civil Rights and Urban Affairs
76. Rebecca Burney, Attorney & Youth Advocacy Coordinator, Rights4Girls

77. Harlan Yu, Executive Director, Upturn
78. Samuel Bonar, Co-Director, Delicious Democracy
79. Rebecca Shaeffer, Legal Director, Fair Trials
80. Gavin Laughland, Member, SURJ DC

Panel 10

81. Ntebo Mokuena, Public Witness
82. Raymond Blanks, Public Witness
83. Peter Krupa, Public Witness
84. Mary Beth Tinker, Public Witness
85. Benjamin Merrick, Public Witness
86. Christopher Bangs, Public Witness
87. Imara Crooms, Public Witness
88. Kate Taylor Mighty, Public Witness
89. Alison Boland-Reeves, Public Witness
90. Laura Petersen, Public Witness
91. Katherine Crowder, Public Witness

Panel 11

92. Harper Jean Tobin, Public Witness
93. Katlyn Cotton, Public Witness
94. Sean Young, Public Witness
95. Gautham Venugopalan, Public Witness
96. Olufemi Taiwo, Public Witness
97. Eric Lewitus, Public Witness
98. Kenithia Alston, Public Witness
99. Wade McMullen, Public Witness
100. Joseph Van Wye, Public Witness
101. Rob Hart, Public Witness

ii. Government Witnesses

1. Dr. Roger A. Mitchell, Jr., Interim Deputy Mayor for Public Safety and Justice
2. Chief Peter Newsham, Metropolitan Police Department

3. Michael Tobin, Executive Director, Office of Police Complaints
4. Niquelle Allen, Director, Office of Open Government, Board of Ethics and Government Accountability
5. Richard Schmechel, Executive Director, Criminal Code Reform Commission
6. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for D.C.
7. Elana Suttenberg, Special Counsel to the U.S. Attorney for Legislative Affairs, United States Attorney's Office for the District of Columbia

IV. ADJOURNMENT

ATTACHMENT L

Statement on behalf of the
American Civil Liberties Union of the District of Columbia
before the
DC Council Committee on the Judiciary and Public Safety
Hearing on
Bill 23-882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020,"
by
Monica Hopkins, Executive Director
October 15, 2020

My name is Monica Hopkins and I am the Executive Director of the American Civil Liberties Union of the District of Columbia (ACLU-DC). I present the following testimony on behalf of our 13,500 members and residents of the District. The ACLU-DC is committed to working to dismantle systemic racism, improve police accountability, safeguard fundamental liberties, and advocate for sensible, evidence-based solutions to public safety and criminal justice policies.

Introduced by the Council on July 31, 2020, the stated purpose of Bill 23-882 is to provide for comprehensive policing and justice reform for District residents and visitors. The Council also passed a version of this legislation this June.[1] We already know that police reforms on their own are not the solution, but this is an important step and the council has an opportunity here to be visionary and transform what both policing and public safety look like in the District. Our recommendations are informed by what we have heard from our clients, community members, and from best practices in other jurisdictions, but the recommendations in our testimony are not an exhaustive list. More than anything we urge the Council to really listen to and incorporate the input and solutions offered by those who are most directly impacted by policing in the District.

The ACLU-DC has identified three key areas of necessary reform under which we have organized our recommendations for amendments to Bill 23-882.

I. Placing limitations on existing police powers, practices, and policies that regularly violate the rights of civilians interacting with police.

II. Strengthening of transparency, oversight, and accountability measures to ensure proper implementation of police reforms and meaningful consequences for officers when they do violate civilians' rights.

III. Decentering policing and criminalization in favor of a public safety system that invests significant resources into the community and focuses on non-police responses to enforcing laws.

[1] B23-0825 - Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020. Available at https://lims.dccouncil.us/Legislation/B23-0825.

I. Enact Necessary Limitations on Police Powers and Practices

Bill 23-882 includes several provisions that place important limitations on current police practices. However, there remain many harmful practices that are not addressed by the current draft of the legislation. We outline some of the most harmful law enforcement practices that must be banned or severely limited below.

1. Stop and Frisk/Terry stops

Analysis of the most recent stop-and-frisk data released by the Metropolitan Police Department (MPD) revealed that Black people make up 72 percent of those stopped in the District despite, making up 46 percent of the D.C. population.[2] Of the people under 18 who were stopped, Black youths made up 89 percent and were stopped at 10 times the rate of their white peers. The analysis further showed that only 0.8 percent of all stops, and only 2 percent of non-traffic stops, led to the seizure of any weapon, including guns. MPD's stop practices are highly ineffective, ultimately amount to racial profiling, and potentially violate the constitutional rights of Black people in the District on a daily basis. We urge the council to adopt policies that not only reduce over-policing of the District's Black and Brown residents, but also increase accountability for officers who abuse their powers.

One step the Council could take is to prohibit MPD officers from making stops based on certain common pretextual grounds. This includes things like presence in a "high crime neighborhood," nervousness around police officers, "furtive gestures or movements" or running, a bulge in a person's clothing, and time of day.

Additionally, the Council could increase the discipline for officers who make unlawful stops. One avenue for achieving this would be empowering the Office of Police Complaints (OPC) to collect data from federal and Superior Court each time evidence is suppressed or an officer's testimony is rejected as not credible. The Council may even consider requiring the Superior Court clerk to transmit this information directly to OPC. OPC could then use this information to create a list, similar to the Lewis List but public, that would basically track officer credibility. The Council could go a step further by requiring that MPD consider this list in making promotional decisions involving officers.

2. Ban the use of no-knock warrants

No-knock warrants issued by judges allow police to enter homes without announcing themselves, typically in an effort to obtain evidence that could be otherwise be quickly destroyed or disposed of. These searches are an exception to the usual Fourth Amendment rule barring unreasonable

[2] The report analyzed MPD data collected between July 22, 2019 and December 31, 2019, yielding data on over 62,000 stops, which amounts to approximately one stop every four minutes during the five-month period.
American Civil Liberties Union of the District of Columbia. "Racial disparities in stops by the D.C. metropolitan police department: Review of five months of data." June 16, 2020. Available at https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.

searches and seizures. The history of no-knock warrants in the District dates back to the racist anti-crime policies of the Nixon administration, when the District did not have home rule.[3] Since then, the use of no-knock warrants has increased nationally,[4] as they have been a staple of the failed war on drugs, which turned communities into war zones.

Every year, police execute about 20,000 no-knock searches across the U.S.[5,6] From 2010 through 2016, at least 94 people (81 civilians and 13 law enforcement officers) died in no-knock raids; many others were seriously injured.[7,8] While police departments have defended such procedures based on the need to prevent destruction of evidence and concern about officer safety, in reality, the execution of such warrants poses significant dangers to the lives of innocent civilians and police alike. Time after time, these raids lead to property damage, gruesome injuries, trauma, and most alarming, tragic and completely preventable deaths, as evidenced by the recent murder of Breonna Taylor at the hands of police in Louisville, Kentucky.

The no-knock warrant exception is a part of the District's criminal code[9] and the practice is permitted by case law. Several jurisdictions, including Louisville, KY, Memphis, TN, and the Virginia state senate, have recently passed Breonna's Laws and other legislation banning the practice.[10,11] The Council should look to those pieces of legislation and follow suit.

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[3] Balko, R. "Senator Ervin, "No-knock" warrants, and the fight to stop cops from smashing into homes the way burglars do." American Civil Liberties Union, July 10, 2013. Available at https://www.aclu.org/blog/national-security/senator-ervin-no-knock-warrants-and-fight-stop-cops-smashing-homes-way.

[4] Data shows that municipal police and sheriffs' departments used no-knock or quick-knock warrants about 1,500 times in the early 1980s, but that number rose to about 40,000 times per year by 2000. Norwood, C. "The war on drugs gave rise to 'no-knock' warrants. Breonna Taylor's death could end them." PBS NewsHour, June 12, 2020. Available at https://www.pbs.org/newshour/politics/the-war-on-drugs-gave-rise-to-no-knock-warrants-breonna-taylors-death-could-end-them.

[5] Biron, C.L. "'Your home is your castle' - unless police mount a 'no-knock' raid." Reuters, June 18, 2020. Available at https://www.reuters.com/article/us-usa-race-noknock-trfn/your-home-is-your-castle-unless-police-mount-a-no-knock-raid-idUSKBN23P39D.

[6] A 2010 estimate placed this number between 60,000 - 70,000 no-knock or quick-knock raids were conducted by local police annually. Balko, supra note at 3.

[7] Sack, K. "Door-busting drug raids leave a trail of blood." The New York Times, March 18, 2020. Available at https://www.nytimes.com/interactive/2017/03/18/us/forced-entry-warrant-drug-raid.html?smid=pl-share&mtrref=en.wikipedia.org&assetType=REGIWALL.

[8] Because there are no federal laws that require law enforcement agencies to report data on no-knock incidents, national and city-wide data are not widely collected and reported. Therefore, it is difficult to know exactly the frequency of no-knock warrants, the circumstances under which they occur, and the results of their execution.

[9] No knock warrants are mentioned in the D.C. Code. See D.C. Code s. 23-524(a), references 3109 of Title 18, which courts have interpreted to permit no knock entries where knocking would be futile, where there is a risk of destruction of evidence, or a risk of harm to the officer. See *United States v. Patrick*, 959 F.2d 991, 999 (D.C. Cir. 1992), abrogated on other grounds by United States v. Webb, 255 F.3d 890, 894 (D.C. Cir. 2001)

[10] Gupta, H.A., & Hauser, C. "New Breonna Taylor law will ban no-knock warrants in Louisville, Ky." The New York Times, June 13, 2020. Available at https://www.nytimes.com/2020/06/12/us/breonna-taylor-law-passed.html.

[11] Louisville Metro Council. "Ordinance No. 069 – Breonna's Law." Louisvilleky.gov. Passed June 11, 2020. Available at https://louisvilleky.gov/sites/default/files/metro_council/ord_069_2020.pdf.

3. Ban the use of jump-outs

For years, D.C. residents, advocacy and activist groups, and the ACLU-DC have been raising the alarm over the practice of jump-outs by MPD officers in predominantly Black and Brown neighborhoods.[12] MPD and Police Chief Peter Newsham deny that MPD uses these paramilitary tactics, but countless reports from community members demonstrate otherwise. Most recently, the National Police Foundation's (NPF) report on MPD's Narcotics and Special Investigations Division (NSID) confirmed that MPD not only engages in jump-outs, but that the Department itself plans jumpouts.[13] Another remnant of the disastrous War on Drugs era, jump-outs are an abusive and dangerous practice that should be banned altogether. Jump-outs sow fear and distrust of the police and escalate the possibility of violent outcomes; making it more dangerous for police and communities that they seek to serve.

4. Ban the use of additional restraint tactics beyond neck restraints

Though Bill 23-882 does ban the use of neck restraints and imposes penalties for officers who violate this provision or fail to intervene when other officers employ this deadly tactic,[14] the bill does not ban other dangerous restraint tactics that police use. The Council should expand this provision to ban additional tactics that could be used by officers to similarly cause asphyxiation, or lead to serious injury or death in other ways, such as placing knees into people's backs,[15] placing a person in the prone position for long periods of time, or even placing a baton in someone's mouth.[16]

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[12] Sadanandan, S. "Living under the cloud of stop-and-frisk." The Washington Post, August 23, 2013. Available at https://www.washingtonpost.com/opinions/living-under-the-cloud-of-stop-and-frisk/2013/08/23/a83c7914-0b52-11e3-8974-f97ab3b3c677_story.html.

[13] National Police Foundation. "Metropolitan police department narcotics and specialized investigations division – A limited assessment of data and compliance from August 1, 2019 - January 31, 2020." September 23, 2020. Available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf.

[14] B23-0882 – Comprehensive Policing and Justice Reform Amendment Act of 2020. See Subtitle A, Section 4 on p. 4: *"(a) It shall be unlawful for: "(1) Any law enforcement officer or special police officer ("officer") to apply a neck restraint; and (2) Any officer who applies a neck restraint and any officer who is able to observe another officer's application of a neck restraint to fail to: "(A) Immediately render, or cause to be rendered, first aid on the person on whom the neck restraint was applied; or "(B) Immediately request emergency medical services for the person on whom the neck restraint was applied. "(b) Any officer who violates the provisions of subsection (a) of this section shall be fined no more than the amount set forth in section 101 of the Criminal Fine Proportionality Amendment Act of 2012, effective June 11, 2013 (D.C. Law 19-317; D.C. Official Code § 22-3571.01), or incarcerated for no more than 10 years, or both."*

[15] Wagner, P. "Alonzo Smith's in-custody death ruled a homicide." Fox 5 Washington DC, December 15, 2015. Available at https://www.fox5dc.com/news/alonzo-smiths-in-custody-death-ruled-a-homicide.

[16] The Joliet (IL) Police Department is currently facing a wrongful death lawsuit for the death of Eric Lurry, a 37-year-old Black man who died after Joliet police violently "searched" his body in the back of a squad car during a drug arrest in January. Later leaked footage from the incident showed officers shoving a baton in Lurry's mouth and pinching his nose shut for one minute and 38 seconds. See Iannelli, J. "In a small Illinois city, a black man died after officers shoved a baton in his mouth. Black officers say they've suffered at the hands of the department, too." The Appeal, September 25, 2020. Available at https://theappeal.org/joliet-police-lawsuits/.

5. Strengthen use of force provisions to include use of non-deadly force

The "use of force" provision[17] in the second emergency and temporary act that the Council passed removes language that was in the original emergency legislation proposed by Councilmember Allen on limitations for non-deadly use of force. We believe that such limitations are important to include in legislation and urge the Council to reinstate them. Incidents involving MPD officers' use of force has increased significantly in the past several years, with force used disproportionately against black people (with the most frequent officer-subject pairing being white officers using force against Black subjects)[18]. There is an alarming pattern and practice of use of force, both deadly and non-deadly, that needs to be addressed. Additionally, we are concerned that the change in the definition of "deadly force" from "any force that is likely or intended to *create a substantial risk of* serious bodily injury or death" in the original proposed emergency legislation to "any force that is likely or intended to *cause* serious bodily injury or death" in the permanent legislation before the Council may have the effect of weakening this provision by having it apply to fewer circumstances. This may not be the intent of the Council and we ask that it be reviewed to assess its impact and if it does in fact weaken the law, that the Council return to the original definition.

6. Ban the use of military weapons and harmful surveillance tools

The military-industrial complex has been brought to the door steps of U.S. households through federal funding and military weapons transfers[19]—empowering police to terrorize civilians, particularly Black, Brown, and immigrant communities. The militarization of policing, with heavy artillery and surveillance technologies, encourages officers to adopt a "warrior" mentality and think of the people they are supposed to serve as enemies and continues the deterioration of trust in law enforcement.

The ACLU-DC supports Bill 23-882's provisions restricting District's law enforcement agencies from acquiring and using military weaponry as listed in the legislation, including requiring agencies to publish notices of requests or acquisition of any property from the federal government within 14 days of the request or acquisition and to return any such equipment that they've already acquired within 180 days of the enactment of the law.[20] However, we recommend that the Council require periodic audits by an independent agency outside of law enforcement (such as the D.C. Auditor) to ensure compliance, and that the Council enact penalties for failure of law enforcement agencies to

[17] Supra note at 14. See Subtitle N. Use of Force Reforms, Section 19, p. 21.

[18] OPC's Report analyzing 2019 data of use of force by the MPD indicated that reported use of force incidents increased by 84% between 2015 and 2019. The report also found that Black community members made up 91% of the total subjects MPD reported using force on in 2019, while white community members made up 6% of the total subjects in 2019. See Police Complaints Board. "Report on use of force by the Washington, D.C. Metropolitan Police Department 2019. D.C. Office of Police Complaints. Released October 14, 2020. Available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/UOF%20Report%202019_FINAL.pdf.

[19] Kostro, S.S., & Riba, G. "Equipping law enforcement agencies with military and tactical equipment." Center for Strategic and International Studies, September 3, 2014. Available at https://www.csis.org/analysis/equipping-law-enforcement-agencies-military-and-tactical-equipment.

[20] Supra note at 14. See Subtitle O. Restrictions on the Purchase and Use of Military Weaponry, p. 23.

comply. Without such conditions, this provision is largely unenforceable. Additionally, we recommend that the restriction be expanded to ban District law enforcement from acquiring or purchasing such weapons from private companies in addition to the federal government.[21] Finally, the provision should also ban District law enforcement agencies from entering into non-disclosure agreements with federal agencies or private companies that prevent public transparency or oversight of their acquisition of these harmful tools.

We also support the Bill's provision prohibiting the use of chemical weapons and rubber bullets at first amendment rallies but urge the Council to expand this restriction beyond first amendment rallies.[22] Police should not be using these harmful weapons on District residents at any time. We understand the Council is also considering another bill, the "Internationally Banned Chemical Weapon Prohibition Amendment of 2020," (Bill 23-771), which amends the First Amendment Rights and Police Standards Act of 2004 to prohibit the use of chemical irritants at first amendment assemblies by MPD and includes a provision that the Mayor shall request all federal law enforcement officials also refrain from using chemical irritants at first amendment assemblies in the District.[23] We support this bill and suggest that it be folded into the police reform legislation.

Besides tactical and chemical weapons, police also use a number of surveillance tools that harm communities. The unchecked use of surveillance technologies by government agencies and law enforcement threatens everyone in our communities. We hope the Council addresses this issue in the permanent legislation by including a provision that bans the use of facial recognition technologies. These technologies are particularly threatening to people who are already overpoliced and face significant discrimination: Black and Brown residents, immigrant communities, sex workers, and Muslim communities, among others.[24]

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[21] The military-industrial complex thrives from the militarization of policing, as it has created a huge market for defense contractors and private companies to profiteer from state violence enacted on predominantly Black and Brown communities. The atrociousness of this toxic relationship is most clearly observed in moments of civil unrest. People exercising their First Amendment right to assemble by taking to the streets to demand justice for yet another civilian slain by an officer are typically met with military-grade weapons and other tools touted by weapons manufacturers as "less lethal." See Rahall, K. "The green to blue pipeline: Defense contractors and the police industrial complex." Seattle University School of Law Digital Commons, January 1, 2015. Available at https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1726&context=faculty. See also Feigenbaum, A. "The profitable marriage of military and police tech." Al Jazeera America, September 5, 2014. Available at http://america.aljazeera.com/opinions/2014/9/police-militarizationswattechnology.html.

[22] Supra note 14. See Subtitle P. Limitations on the Use of Internationally Banned Chemical Weapons, Riot Gear, and Less-Lethal Projectiles, p. 23.

[23] B23-0771 - Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020. Available at https://lims.dccouncil.us/downloads/LIMS/45092/Introduction/B23-0771-Introduction.pdf.

[24] Besides being an invasive tool with potential to violate people's First Amendment Rights to privacy, facial recognition technology is notoriously error-prone, and has led to many false arrests. See the case of Robert Julian-Borchak Williams, a Farmington Hills, MI man who was arrested on a false warrant on accord of a facial recognition misidentification. Hill, K. "Wrongfully accused by an algorithm." The New York Times, June 24, 2020. Available at https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.
Studies show that facial recognition is the most inaccurate when attempting to identify people of color. See Harwell, D. "Federal study confirms racial bias of many facial-recognition systems, casts doubt on their expanding use." The Washington Post, December 19, 2019. Available at https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

II. Strengthen transparency, oversight, and accountability measures

The ACLU-DC has testified many times[25] about the significant obstacles to enforcement and proper implementation of laws and policies that the D.C. Council has enacted to address racial profiling, over-policing, excessive use of force, and other violations of civilians' civil rights and civil liberties at the hands of law enforcement in the District. Many reforms have fallen short of resulting in meaningful changes in police practices due to poor oversight, lack of public access to information, and few meaningful consequences for officers when they do violate civilians' rights.

The recently released National Police Foundation report on MPD's practices is yet another reminder of the Department's complete indifference to analysis of its own tactics, efficacy, and procedures.[26] The fact that MPD's data reporting and conflicting General Orders delayed and made difficult the NPF's report emphasizes that we cannot rely on general orders and internal policies when MPD routinely flouts its own policies.[27] We therefore recommend the following amendments to Bill 23-882 to strengthen accountability measures.

1. Improve access to Body-Worn Camera Program and strengthen access to public records
   We support the provision of Bill 23-882 that requires public release of body-worn camera footage and names of officers following incidents of officer-involved death or the serious use of force following consent of victims or surviving next of kin. However, as the July 31st release of body-worn camera footage by MPD revealed, the full intent of the Council in passing this legislation was not achieved.[28] This was also apparent in the release of footage following the killing of Deon Kay by Officer Alexander Alvarez. In complying with the letter, but not the spirit of the law, MPD released only the body-worn camera footage of the officers most directly implicated in the actual killing of the victims, but not those of other officers on the scene. To provide the public with the clearest picture of what took place, which is one key purpose of this provision, the law should require public release of body-worn camera footage of all officers on the scene during the incident.

   Additionally, the ACLU-DC has several recommendations for strengthening the oversight and transparency role of body-worn cameras in this legislation. Last October, we testified about necessary changes to the District's policies and practices regarding the body-worn camera

[25] Most recently in our FY21 Budget Testimony.
[26] Supra note at 11.
[27] A recurring issue with MPD has been lack of consistent data for analyses. The National Police Foundation had to narrow the period of analysis for its report due to limitations in the data available and provided by MPD. Data from prior periods were not available in formats that were consistent with the most recent data, therefore the Foundation was unable use a longer period of time to understand activities and complaints involving NSID-assigned personnel. Consequently, the analysis is limited in its ability to describe NSID activity, their outcomes, and how the unit has changed over time. Id note at 23.
[28] On July 31, 2020, Mayor Bowser authorized MPD to release body-worn camera footage in the officer-involved deaths of Marqueese Alston, Jeffrey Price, and D'Quan Young, in response to the temporary Comprehensive Police Reform and Justice legislation passed in by the Council in July. Footage from these incidents and others that have been released since are available at https://mpdc.dc.gov/page/community-briefing-videos-officer-involved-deaths-and-serious-use-force.

program.[29] We are pleased that some of our recommendations were incorporated into Bill 23-882, but we urge the Council to consider amending the legislation to address the following concerns:

- There are situations that are of significant public interest but do not necessarily involve an officer shooting or serious use of force for which there should be a presumption of release of BWC footage. Currently, release of BWC footage after such situations is left to the discretion of the Mayor, but this discretion is often not exercised or exercised inconsistently even when there is a clear public interest in the footage. Body-worn camera footage for incidents of significant public interest can be released to the public with appropriate privacy redactions to protect civilians in the videos and would go a long way in demonstrating a sincere commitment to transparency. The D.C. Council should appoint an independent arbiter (other than the Mayor or Police Chief) to determine when BWC footage is of "significant public interest."
- In its report on the Body-Worn Camera Program Amendment Act of 2015, the Judiciary Committee noted that when "anyone could witness an incident with the naked eye," the resulting "recordings should be public in their unredacted form unless otherwise required by law."[30] MPD consistently refuses to release body-worn camera footage of events occurring on the public streets using the excuse that it is protecting privacy. MPD also sometimes releases these videos, but they are heavily redacted and the excuse of redacting images of people on public streets from the footage slows response times and increases costs. The question of when privacy redactions are necessary should also be reexamined and defined clearly in legislation.
- Body cameras cannot advance accountability when —despite video-recorded evidence of police wrongdoing—officers can continue to abuse their power with little consequence.[31] There are currently no clear meaningful disciplinary consequences for failure to comply with the law. [32] Bill 23-882 should include meaningful penalties that go beyond referrals to

[29] See "ACLU-DC statement at public oversight roundtable on "five years of the metropolitan police department's body-worn camera program: Reflections and next steps." October 12, 2019. Available at https://www.acludc.org/en/legislation/aclu-dc-statement-public-oversight-roundtable-five-years-metropolitan-police-departments.

[30] D.C. Council Comm. on the Judiciary, Report on Bill 21-0351, at 16 (2015) available at http://lims.dccouncil.us/Download/34469/B21-0351-CommitteeReport1.pdf

[31] MPD General Orders on body-worn camera use require that "members, including primary, secondary, and assisting members, shall start their BWC recordings as soon as a call is initiated via radio or communication from OUC on their mobile data computer (MDC), or at the beginning of any self-initiated police action." Page 7 of MPD General Order, Body Worn Camera Program, available at https://go.mpdconline.com/GO/GO_302_13.pdf)

[32] The Office of Police Complaints does not currently have statutory authority to impose discipline on MPD officers. However, when an allegation of misconduct is sustained by a complaint examiner or upheld by a final review panel, MPD is statutorily required to impose discipline. "MPD defines education-based development as "an alternative to discipline." MPD is using education-based development instead of discipline at an increasing rate: it was used in only two of 85 cases requiring discipline between FY09 and FY16, but in 11 of 14 cases in FY17, and four of the 10 FY18 cases for which discipline had been imposed by the end of the fiscal year. There were still 10 FY18 cases that were sustained by a complaint examiner for which discipline had not yet been imposed by the end of the fiscal year." Page 24 https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/AR18_Final.pdf

additional trainings for officers who repeatedly fail to activate their body-worn cameras ahead of an interaction or who repeatedly turn their cameras off in the middle of a police incident.[33]

- Additionally, the Council intended D.C. agencies to waive fees when furnishing the information would primarily benefit the general public,[34] and yet, leaving fee waivers at the discretion of the agency has allowed MPD to adopt what we believe to be a standard practice of denying fee waiver requests to anyone except media members and individuals depicted in the recording, an approach that denies the public access to critical information. The Council should update D.C.'s Freedom of Information Act to address this, and the Council should also investigate why MPD's redaction fees are so high.

2. Strengthen and move the disciplinary process completely outside MPD and expand the role of the Office of Police Complaints

   The ACLU-DC supports the provisions in Bill 23-882 that give the Office of Police Complaints (OPC) the discretion to open investigations into police misconduct that are not complainant-driven and which expand the Police Complaints Board to nine members and remove law enforcement seat from the board.[35] We also support the provision of Bill 23-882 which removes disciplinary procedures from the negotiating table in collective bargaining.[36] However, in recognizing that union contracts alone do not shield officers from being held accountable, we have serious concerns about all disciplinary decisions resting within the Department, not only because superiors are not likely to discipline members of their team who break rules, but also because it nearly guarantees arbitrary action. This change does not go far enough in ensuring true accountability because ultimately, it still leaves police to police themselves, which decades of experience has indicated simply does not work.

   The bill should therefore be amended to completely move the disciplinary process out of MPD. We propose that the role of the OPC be significantly expanded to give it the authority not only to investigate complaints into police misconduct, as it currently does, but to actually impose and enforce discipline when there has been a determination of wrongdoing. We also recommend that the authority of the OPC be expanded to allow the agency to receive and investigate anonymous complaints. This would address the concerns raised by community members before the Council that fear of retaliation by MPD officers keeps them from filing complaints.

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[33] In 20% of the cases it investigated in FY18, at least one office failed to properly use their BWC, by: (1) turning it on late, (2) turning off early, (3) not turning it on at all, or (4) obstructing the camera. And in 19% of the cases it investigated, at least one officer failed to notify the subjects that they were being recorded. Page 14, https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/AR18_Final.pdf

[34] D.C. Code § 2-532(b) provides that "Documents may be furnished without charge or at a reduced charge where a public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."

[35] Supra note at 14. See Subtitle C. Office of Police Complaints Reforms, p. 10.

[36] Id. See Subtitle L. Police Accountability and Collective Bargaining Agreements, Section 116, p. 20.

We support the Council's decision to expand OPC's authority but the bill contains an sizable loophole that must be closed. Currently, OPC can only investigate misconduct expressly raised by complainants. That means, if someone complains about an act of excessive force but doesn't mention that the officer performed an illegal search as well, OPC is powerless to act on the search—even if an investigator sees it happen through body-worn camera footage. Subtitle C of the bill attempts to address this problem by allowing OPC to act if it discovers "evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint." But the bill proceeds to limit this provision, stating in proposed subsection (g-1)(2) that this power "shall include circumstances in which the subject police officer failed to" intervene in or report misconduct. This language could easily be interpreted to mean that Subtitle C *only* applies in the circumstances listed. So construed, the bill would only vest OPC with the power to conduct sua sponte investigations if it uncovers evidence of an officer failing to intervene in or report on misconduct; the Office would remain unable to take independent action when its staff catches officers using improper force, making unlawful arrests, or otherwise infringing on core rights that the complainant didn't mention in the complaint. We doubt the Council intended such an odd result. To ensure the scope of OPC's new powers is clear, the Council should remove proposed subsection (g-1)(2) from Subtitle C of the bill.

When officers repeatedly violate the law and policies of MPD in ways that violate civilians' rights, there are repeated calls for additional training which are insufficient to hold officers truly accountable. There also must be a reexamination of the consequences for repeat violations.

In addition to expanding the role of OPC, we recommend that the put in place other mechanisms that strengthen and allow greater accountability in disciplinary procedures. The Council could follow the example of jurisdictions like New York[37] and Oregon[38] by including provisions that expand retention, public access, and use of police disciplinary records, and make disciplinary decisions more enforceable.[39] Lack of access to police disciplinary history makes it nearly impossible to use prior records of misconduct to hold officers accountable.[40]

3. Expand and make enforceable limitations on consent searches:

The ACLU-DC supports the intention of Subtitle F of Bill 23-882 to strengthen procedural justice in cases where a police officer's search of a person or their vehicle, home, or property is based only

[37] On June 12, New York passed legislation repealing section 50-a of New York civil rights law, which prevented disciplinary and personnel records of police, fire, and corrections departments from being made public. Now disciplinary records are subject to FOIA requests. The New York Senate. "Senate Bill S8496." Signed by Governor Andrew Cuomo on June 12, 2020. Available at https://www.nysenate.gov/legislation/bills/2019/s8496. See New York Consolidated Laws, Civil Rights. Available at http://www.supnik.com/ny51.htm.

[38] Oregon House Bill 4207 directs the Department of Public Safety Standards and Training to establish a statewide public online database of suspensions and revocations of certifications of police officers. See Oregon State Legislature. "House Bill 4207." Oregon Legislative Information System. Available at https://olis.oregonlegislature.gov/liz/2020S1/Measures/Overview/HB4207.

[39] Oregon Senate Bill 1604 attempts to make it easier for Oregon police agencies to discipline officers without having discipline overturned or reduced through binding arbitration. See Oregon State Legislature. "House Bill 1604." Oregon Legislative Information System. Available at https://olis.oregonlegislature.gov/liz/2020S1/Measures/Overview/SB1604.

[40] Id at 35. Bill 4207 also requires a law enforcement agency to review an officer's personnel file from the previous agency for which they worked before that officer can be hired.

on the person's consent to the search (e.g., there is no warrant and no other exception to the warrant requirement applies). Also known as a "consent" search, this requires officers to explain to the individual whom (or whose property) they hope to search that the person is being asked to consent and that they can refuse the search, and to obtain "affirmative consent." We also support the presumption that a search is nonconsensual if the evidence of consent is not captured on a body-worn camera or provided in writing. However, the requirement for officers to obtain this consent on BWC should be more explicit in the legislation—namely that officers must ask for this consent and obtain it audibly on their BWC.

Additionally, there remain significant barriers to ensuring that such a provision is enforceable and that officers are held accountable for violations, the first being this provision lacks a private cause of action. We urge the Council to remove that limitation on line 356 of the Bill. Another barrier is the access to BWC footage and officer failures to comply with BWC rules as mentioned. Officers should be required to carry cards that identify their names and badge numbers and include the consent question clearly in writing along with the number for the Office of Police Complaints for civilians with whom they conduct these consent searches. The legislation should be explicit that any evidence resulting from such a search will then be inadmissible in court.

There is an argument to made about whether searches by law enforcement are ever truly "consensual." The power imbalance between an officer and a civilian often forces individuals to inadvertently waive their rights. Even reasonable adults are susceptible to coercion under such circumstances. As we see frequently with the waiving of Miranda rights, youth often fall victim to such susceptibility.[41] While we recognize the Council's attempt to address the issue of consent with regards to youth, we agree with others that the legislation does not go far enough to protect young people from this type of coercion.
Young people are both impressionable and fearful of—even conditioned to obey—authority figures. This is especially true for Black and Brown youth, whose perception of law enforcement is typically not positive, due to their experiences with being harassed and overpoliced. Given history and evidence from developmental research, which show that the adolescent brain is not fully developed to give adolescents the capability to make well-reasoned decisions, especially under intense stress or fear, it is unreasonable to expect youth to waive their rights and provide affirmative consent. We therefore support an outright ban on consent searches for youth.

4. <u>End Qualified Immunity and Qualified Privilege</u>
One of the greatest barriers to police accountability nationwide and in the District is the inability of civilians who are harmed by police officers' actions to hold them accountable in court.

A major obstacle is the doctrine of qualified immunity, a legal defense that shields police officers from liability for even egregious misconduct. Under this doctrine, even if officers violate the Constitution, courts cannot hold them liable unless binding precedent previously held very similar

[41] See Justia opinion summary on *J. D. B. v. North Carolina*, 564 U.S. 261 (2011). Available at https://supreme.justia.com/cases/federal/us/564/261/.

conduct unlawful.[42] Ending qualified immunity for law enforcement has rightfully become a central focus of demands for police accountability nationwide because of how it has emboldened police officers to use excessive force and otherwise violate the constitutional rights of civilians without fear of repercussions.[43] In a recent opinion granting a Mississippi officer qualified immunity, U.S. District Court Judge Carlton W. Reeves lamented the harms of the qualified immunity doctrine, tracing the origins of the doctrine to the Reconstruction era. Following a list of cases where qualified immunity impeded police accountability, Judge Reeves expressed the complicity of courts in practically turning the doctrine into "absolute immunity."[44]

While the fight to end qualified immunity continues through the courts, D.C. can and should pass a law providing that anyone who suffers a constitutional violation has a cause of action to challenge it, and that qualified immunity will not serve as a defense. Colorado has recently adopted such legislation,[45] and the Virginia House has too.[46] Under Colorado's recently-passed statute, victims of police misconduct will be permitted to bring a lawsuit against officers to enforce the Colorado Constitution, and officers will not be allowed to shield themselves with the doctrine of qualified immunity which has served to protect officers from accountability and deny families justice. D.C. should look to these examples, and pass similar legislation that would allow community members to hold police responsible when they violate laws, policies, and community trust.

Qualified privilege is a legal rule that protects police officers from tort liability under the D.C. common law. Under this doctrine, officers who reasonably believe that their actions are legal can get away with using unconstitutional amounts of excessive force or arresting people without

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[42] For example, the Sixth Circuit held that qualified immunity protected officers who sicced a dog on a man sitting down with his hands up because it couldn't find a decision expressly saying that that act was illegal. The Court held that prior decisions holding it unlawful to sic a dog on a man lying down in surrender, were not close enough. See *Baxter v. Bracey & Harris* Supreme Court petition. https://www.supremecourt.gov/DocketPDF/18/18-1287/95661/20190408145246695_Baxter%20v%20Bracey%20Petition%20for%20Writ%20of%20Certiorary.pdf

[43] Fuchs, H. "Qualified immunity protection for police emerges as flash point amid protests." The New York Times, June 23, 2020. Available at https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html.

[44] *Jamison v. McClendon,* No. 3:16-CV-595-CWR-LRA, 2020 WL 4497723 (S.D. Miss. Aug 4, 2020). See also Jouvenal, J. "Judge's blistering opinion says courts have placed police beyond accountability." August 6, 2020. Available at https://www.washingtonpost.com/crime-law/2020/08/06/judges-blistering-opinion-says-courts-have-placed-police-beyond-accountability/.

[45] In June of this year, the Colorado State Assembly passed the only police reform bill in the country, so far, that effectively ends qualified immunity for officers. Senate Bill 20-217 gives victims of police misconduct the right to file a civil lawsuit against an officer who is found to have violated their rights. Beginning July 1, 2023, officers can be held personally liable for five percent or up to $25,000 (whichever is less) of the judgement or settlement unless the amount is uncollectible (in which case the employer must pay the full judgment or settlement). See Colorado State Assembly. "Senate Bill 217 – Enhance Law Enforcement Integrity." Passed June 19, 2020. Available at https://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf.

[46] Unfortunately, the Virginia Senate failed to pass HB-5013. Virginia General Assembly. "HB 5013 Civil action for deprivation of rights; duties and liabilities of certain employers." Virginia LIS, passed by indefinitely in the Judiciary Committee September 10, 2020. Available at https://lis.virginia.gov/cgi-bin/legp604.exe?ses=202&typ=bil&val=hb5013.

probable cause.[47] There's an easy fix to qualified privilege: the Council can abolish it! This change would not impose liability on officers who make legal arrests or use legal amounts of force, because then no one's rights have been violated. Instead, the proposed change would mean that when officers exceed their powers—even due to confusion—their victims can still hold them accountable.

5. Create a private cause of action for violations of the First Amendment Assemblies Act

We also urge the Council to add a right-to-sue provision to the First Amendment Assemblies Act, D.C. Code §§ 5–331.03 to 5-331.17 (the "FAAA"). That statute, enacted by the Council in 2005, provides significant protection to the rights of peaceful demonstrators in D.C. But when MPD doesn't follow the rules, people can suffer real injuries—for example, when MPD improperly uses chemical weapons, or assaults and arrests people who didn't leave an area because the police didn't give an audible dispersal order as the FAAA requires.[48]

6. Increase oversight of acquisition and use of surveillance technology by law enforcement

As previously stated, law enforcement agencies often use surveillance tools to police communities. Currently, MPD and other District agencies are able to acquire and use powerful surveillance technologies without any oversight from the D.C. Council or community, because the District has no laws that require such oversight. This means significant decisions about surveillance occur in secret, without meaningful discussion about the ramifications and costs for D.C. residents. Current laws have not been able to keep up with the evolution of these technologies[49], which threaten civil rights and civil liberties of all DC residents. But communities that are already overpoliced—including Black and Brown communities, low-income communities, Muslim communities, immigrant communities, LGBTQ communities, and political activist groups—face the greatest threats to their civil rights. The Community Oversight of Surveillance-D.C. coalition (COS-DC), of which the ACLU-DC is a member, has been working on legislation to bring very necessary oversight. We urge the Council to adopt this legislation, or at minimum, commit to holding a hearing on the issue.[50]

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[47] *See, e.g.*, *Jenkins v. District of Columbia*, 222 A.3d 884, 900 (D.C. 2020) (applying rule to excessive force claim); *Minch v. District of Columbia*, 952 A.2d 929, 938 (D.C. 2008) (applying rule to false arrest claim).

[48] ACLU-DC saw both of these types of violations, and others, during MPD's response to the 2017 Inauguration Day demonstrations. And we are again pursuing reports of similar FAAA violations by MPD during the civil rights demonstrations this summer. People who are harmed because of such violation should be able to obtain compensation for their injuries. See "Civil rights groups sue Trump, Barr for tear-gassing protesters outside white house." ACLU-DC, June 4, 2020. Available at https://www.acludc.org/en/news/civil-rights-groups-sue-trump-barr-tear-gassing-protesters-outside-white-house.

[49] Modern surveillance technologies can collect sensitive information about our private lives without our knowledge or consent. Technologies such as drones, license plate readers, video cameras, and online monitoring software can easily be misused to discriminate, invade privacy, and chill First Amendment freedoms. Databases generated by these technologies are vulnerable to breach and other exploitation efforts, including by agencies like ICE.

[50] The COS-DC legislation provides a viable path for the D.C. Council and public to engage with decisions about proper use of modern surveillance technology. The legislation does not ban surveillance technologies, but rather ensures that decisions about their use are made with thoughtful consideration and buy-in from the public and elected lawmakers, and that the operation of approved technologies will be subject to rules that safeguard residents' rights and provide transparency.

III. Remove policing and criminalization from public safety response

As we testified earlier this summer at the budget oversight hearing for the Metropolitan Police Department, in order to have real transformational change, the District must divest from policing and reimagine a system of public safety that decenters criminalization and policing in favor of one that invests significant resources into the community and focuses on non-police responses to enforcing laws. Some of our recommendations for doing this include:

1. Remove police officers from schools

   The ACLU-DC is a strong supporter of the Police-Free Schools campaign being spearheaded by the Black Swan Academy.

   Police presence in our schools does not make young people safer, but instead causes further trauma when normal adolescent behavior or trauma responses are criminalized.[51] 92 percent of school-based arrests are of Black students. Black girls in D.C are 30 times more likely to be arrested than white youth of any gender identity. 60% of girls arrested in D.C are under the age of 15, and many are disciplined and referred to police for their trauma responses to experiencing sexual violence in their lives.[52] Our youth need our support, not to be pushed away from education and down a path of criminalization. We urge the Council to eliminate the MPD School Safety Division and remove police officers from DCPS public and charter schools.

2. Limit police enforcement of traffic stops

   We also urge the Council to follow the example of jurisdictions like Berkeley, CA, which passed legislation transferring traffic enforcement away from the police.[53] We recommend that most traffic enforcement be shifted to a non-police agency like the Department of Motor Vehicles. Police should not be tasked with enforcing laws that can be enforced by other agencies.[54]

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[51] Past data analyzed by the ACLU shows that schools with police reported 3.5 times as many arrests of children as schools without police, and have higher rates of suspensions and expulsions. These harms disproportionately impact Black and Brown students (particularly Black girls), students with disabilities, and LGBTQ students.
Whitaker, et al. "Cops and no counselors: How the lack of school mental health staff is harming students." American Civil Liberties Union. Available at https://www.aclu.org/report/cops-and-no-counselors.

[52] Vafa, et al. "Beyond the walls: A look at girls in dc's juvenile justice system." Rights4Girls & Georgetown Juvenile Justice Initiative, 21-22, March 2018. Available at https://rights4girls.org/wp-content/uploads/r4g/2018/03/BeyondTheWalls-Final.pdf.

[53] The legislation created a new Department of transportation tasked with transportation planning and traffic enforcement—intended to reduce and eliminate race-based pretextual traffic stops. See City of Berkeley Office of the Mayor. "Proposed Omnibus Motion on Public Safety Items (Items 18a-e)." Starts on page 2. Available at https://www.cityofberkeley.info/Clerk/City_Council/2020/07_Jul/Documents/2020-07-14_Item_18_Omnibus_Recommendation_-_Supp.aspx.

[54] From July 22 to December 31, 2019, MPD officers made 42,532 "traffic" stops. Of all stops categorized as "ticket only," Only seven, or 0.016%, led to an assault on a police officer charge. Only 122 stops in this category, or 0.29%, involved a gun offense or was for a violent crime. We recognize that arrests may not be a perfect proxy for threats to officers. However, the fact that only 0.30% of traffic stops resulted in arrests for assaulting an officer, gun/ammunition possession, or a violent crime suggests that traffic stops are not as dangerous as MPD contends.

3. Create a robust non-police crisis response system

   As we continue to reckon with state-sponsored violence in our communities, we must all think deeper about building a world that reimagines what public safety looks like. It is critical that we shift away from the paradigm that public safety centers around policing, and instead address public safety from a public health perspective.

   It is clear that we cannot continue to ignore the startling connection between crisis prevention-based 911 calls and police brutality. However, 911 has become the only option for people looking for non-violent and non-carceral alternatives. Regardless of the role people feel that police serve in public safety, the facts are they often arrive at the scene armed with deadly weapons and a lack of mental health training, with devastating results. We must invest in a system of crisis response that centers the real needs of the community—following the leadership of and listening to the communities most violently impacted by a lack of options, to those already engaged in crisis prevention in this city, and to those providing direct services. D.C. should look to program models CAHOOTS, based in Eugene, OR.[55]

4. Significantly expand the role of violence interruption and trauma-informed approaches

   The tragic shooting and death of Deon Kay is not only the ultimate example of the ineffectiveness of MPD's approach to violence intervention (namely through its gun recovery program), but is also the logical conclusion of a policy that not only meets violence with violence, but actually escalates and incites it — especially in our Black communities. Kay, who had turned 18 less than a month prior to the incident, was connected to various DC agencies, which means there were various nonviolent avenues for engagement that would have spared his life.

   The District must make greater effort to fully realize the vision of the NEAR Act,[56] which the created violence prevention and interruption programs. District's budget still equates policing with public safety and funds MPD at the expense of other critical programs. We needs to move away from relying on police to solve problems that can be addressed through other means and should invest more in those critical violence prevention and interruption programs. It is imperative that the Council expands the role of violence interrupters in the community and invest more in non-police trauma-informed approaches to intervention.

5. Rehaul the District's Criminal Code to decrease penalties and decriminalize offenses

[55] CAHOOTS (Crisis Assistance Helping Out On The Streets) is a program of the White Bird Clinic in Eugene-Springfield, OR, that provides 24/7 mobile crisis intervention. The programs provides immediate stabilization in case of urgent medical need or psychological crisis, assessment, information, referral, advocacy & (in some cases) transportation to the next step in treatment. In Eugene, teams are dispatched through the Eugene police-fire-ambulance communications center, while in the Springfield urban growth boundary, they are dispatched through the Springfield non-emergency number. Each team consists of a medic (either a nurse or an EMT) & a crisis worker (who has at least several years of experience in the mental health field). https://whitebirdclinic.org/cahoots/..

[56] B21-0360 - Neighborhood Engagement Achieves Results Act of 2015. Available at https://lims.dccouncil.us/Legislation/B21-0360.

As we know, D.C. is not immune to the tough on crime policies that have proliferated the country over the last 40-50 years. Like other cities, the District expanded harsh penalties for acts that should be addressed with a public health approach. It is our understanding that CCRC has substantial recommendations that are forthcoming in the Spring and we look forward to working with the Council as it considers the commission's recommendations.

6. Automatic License Plate Readers

The use of automatic license plate readers (ALPR) raises serious concerns and have the potential to violate people's First Amendment right to privacy and Fourth Amendment[57] right prohibiting unreasonable searches, as indicated by OPC's report.[58] With regards to First Amendment violations, ALPRs can track people's movements and determine where someone is at a particular time on a particular day. Data stored from ALRPs overtime, and later aggregated, can be used to track people's associations, and patterns of behavior. There is also the issue of transparency because we do not know how and with whom law enforcement shares data collected by ALPRs.

IV. Other Recommendations

As it is currently written, Subtitle D of the legislation, which establishes a "Use of Force Review Board" only authorizes the Board to shall review uses of force. The Council should expand the Board's role to include such duties as making reports, making recommendations, or even imposing discipline. In addition, the Council should consider empowering the Board to subpoena records and the power to compel testimony.[59]

V. Conclusion

George Floyd, Breonna Taylor, Marqueese Alston, Jeffery Price, D'Quan Young, Raphael Briscoe, Terrence Sterling. It is important to remember the tipping point that got us to this moment, but also important to remember that the ACLU-DC, coalition partners, community members have been demanding change for years. This Council has a rare moment in time when real, visionary, transformational change is possible. The ACLU-DC supports this proposed legislation but urges the Council not to squander the opportunity to go much further.

We look forward to working closely with the Council, with community partners, and with the recently formed police reform commission to incorporate these and other changes.

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[57] See *Neal v. Fairfax County Police Dep't*, 94 Va. Cir. 485, 486 (2016).

[58] Police Complaints Board. "PCB policy report #20-2: automated license plate readers." D.C. Office of Police Complaints. Available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/ALPR.FINAL_.pdf.

[59] Supra note 14. See Subtitle D. Use of Force Review Board Membership Expansion, p. 11.

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Testimony of Ruth Lindberg
Manager, Health Impact Project
The Pew Charitable Trusts

Council of the District of Columbia
Committee on the Judiciary and Public Safety
October 15, 2020

Dear Chairperson Charles Allen and members of the Council of the District of Columbia's Committee on the Judiciary and Public Safety. My name is Ruth Lindberg and I am a manager with The Pew Charitable Trusts' Heath Impact Project. Pew is an independent nonprofit organization that applies a rigorous, analytical approach to improve public policy, inform the public, and invigorate civic life. My work involves assisting local, state, and national organizations to include health considerations in policy decisions across multiple sectors, such as housing, education, and criminal justice. Thank you for inviting me to testify today on Bill 23-0882, the Comprehensive Policing and Justice Reform Amendment Act of 2020.

My colleagues and I completed a health note of this bill, which I submitted with my written testimony and that you also received through correspondence from the Council's Office of the Budget Director. A health note is a brief, objective, and nonpartisan summary of how proposed legislation could affect health. The aim of health notes is to provide evidence to inform decision-making: they are not intended to support or oppose legislation.

For the past three years, the Health Impact Project has been testing this approach in jurisdictions across the United States to help lawmakers learn the potential health implications of proposed legislation and policies. In May, we received a technical assistance request from Chairman Mendelson inviting us to coordinate with the Office of the Budget Director to conduct health notes on legislation being reviewed during Council Period 23.

This health note examined the available evidence regarding potential health effects of seven components of the bill. Our analysis identified several aspects with a strong evidence base, as well as other components that have some research or that are not well researched in terms of their effects on health. Today I will focus on three findings from our analysis.

First, this bill has important implications for health equity—the guiding principle that disparities in health outcomes caused by factors such as race, income, or geography should be addressed and prevented, providing opportunities for all people to be as healthy as possible. In the U.S., lifetime risk of being killed by police is greatest for Black men and women, American Indian/Alaska Native men and women, and Latino men as compared to their White counterparts. Among the 1,242 reported use of force incidents by the Metropolitan Police Department of the District of Columbia in 2018, over half resulted in a reported injury to the subject. Although 48% of District residents are Black, 90% of all uses of force in 2018 involved Black citizens, and only 14% of subjects were reportedly armed.

Second, we found strong evidence supporting the relationship between several components of the bill and individual and community health. For example, our analysis found that chemical and projectile weapons, such as tear gas or rubber bullets, in crowd-control settings can cause significant injuries, permanent disabilities, and death. To the extent that the bill results in a decreased use of these weapons, it could reduce the risk of negative health outcomes. Additionally, there is strong evidence that fatalities resulting from the actions of law enforcement officers and serious use of force incidents can negatively affect mental health of family members, communities, and officers, with Black communities disproportionately affected. Exposure to videos of these fatalities and serious use of force incidents can be traumatic for family and friends of the decedent and for the community at large, with implications for mental health and stress-related physiological responses. Although consultation with experts in trauma and grief prior to the release of the footage could help individuals who see the videos cope and manage these effects, many videos are released via news outlets and social media rather than by police departments.

Finally, we found evidence that health effects could vary depending on how policies are implemented. For example, there is some evidence that the adoption of strict policies on use of force tends to reduce police officers' use of physical coercion. This could have potential benefits for health by decreasing the risk of injury during encounters between police and the public. However, the benefits of these policies for health depends on how they are implemented and enforced, and the development of appropriate accountability structures. And while a fair amount of evidence shows short-term benefits of specific types of implicit bias training for law enforcement officers, the research highlights the importance of quality curricula and instruction and ongoing training.

Thank you so much for your time.

Sincerely,

Ruth Lindberg
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The Pew Charitable Trusts
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HEALTH NOTE: Comprehensive Policing and Justice Reform Amendment Act of 2020
Bill 23-0882
Council of the District of Columbia, Council Period 23

Introduced by:
Councilmembers Allen, Cheh, Grosso, Nadeau, Silverman, R. White, Bonds, Gray, McDuffie, Pinto, Todd, T. White, and Chairman Mendelson

Bill Summary:[1]
Establishes comprehensive policing and justice reform for District residents and visitors.

Health Note Analysts:
Health Impact Project, The Pew Charitable Trusts

Additional Information:
Direct inquiries to 202-540-6012; healthimpactproject@pewtrusts.org; https://www.pewtrusts.org/en/projects/health-impact-project [2]

What is the goal of this health note?

Decisions made in sectors outside of public health and health care, such as in education, housing, and employment, can affect health and well-being. Health notes are intended to provide objective, nonpartisan information to help legislators understand the connections between these various sectors and health. This document provides summaries of evidence analyzed by the Health Impact Project at The Pew Charitable Trusts while creating a health note for Council of the District of Columbia Bill 23-0882. Health notes are not intended to make definitive or causal predictions about how a proposed bill will affect health and well-being of constituents. Rather, legislators can use a health note as one additional source of information to consider during policymaking. The analysis does not consider the fiscal impacts of this bill.

How and why was this bill selected?

With the help of the Council of the District of Columbia's Office of the Budget Director, the Health Impact Project identified this bill as one of several important policy issues being considered by the Council during Council Period 23. The health note screening criteria were used to confirm the bill was appropriate for analysis. (See Methodology on page 8.) The project selected Bill 23-0882 for analysis because of its potential to affect the health and safety of residents who interface with law enforcement as well as the officers themselves. There is a strong evidence base linking violent encounters with police and effects on individual and community health.[1]

SUMMARY OF HEALTH NOTE FINDINGS

There are approximately 18,000 local, county, state, and federal law enforcement agencies in the United States, staffed by more than 697,000 officers.[2] In 2018, an estimated 85,000 people were treated in emergency departments for nonfatal injuries from encounters with law enforcement officers.[3] Lifetime risk of being killed by police is greatest for Black men and women, American Indian/Alaska Native men and women, and Latino men as compared to their White counterparts.[4] In response to these and other concerning statistics, policymakers are exploring ways to improve interactions between law enforcement agencies and the public, reduce the risk of encounters that result in injury or death, and strengthen accountability. This review presents evidence, gathered through an expedited review of literature published in the past five years and earlier seminal research, on the potential effects of B23-0882 on determinants of health and health outcomes.

B23-0882 aims to "provide comprehensive policing and justice reform for District residents and visitors."[5] This health note reviews the available evidence regarding potential health effects of seven components of the bill:

- Prohibiting the use of neck restraints.
- Improving access to body-worn camera (BWC) video recordings of fatalities resulting from the actions of law enforcement officers or serious use of force.
- Expanding continuing education.
- Use of force reforms.
- Restricting the purchase and use of military weaponry.

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[1] Summary as described by the Council of the District of Columbia, https://lims.dccouncil.us/Legislation/B23-0882. The Health Impact Project conducted this health note based on the bill as introduced.
[2] The Health Impact Project is committed to conducting non-partisan research and analysis.

- Limiting the use of internationally banned chemical weapons, riot gear, and less-lethal projectiles.
- Enfranchising all eligible District residents incarcerated for felony convictions.

Below is a summary of key findings:

- The health effects from implementing policies to prohibit the use of neck restraints by law enforcement officers are **not well researched**. Studies have shown, however, that certain types of neck restraints can cause injury or death.[6] If implemented, the District of Columbia could evaluate the policy's effects on the health of residents and law enforcement officers.
- There is **strong evidence** that fatalities resulting from the actions of law enforcement officers and serious use of force incidents can negatively affect mental health of family members, communities, and officers, with Black communities disproportionately affected.[7] Exposure to videos of fatalities resulting from the actions of law enforcement officers can be traumatic for family and friends of the decedent and for the community at large, with implications for mental health and stress-related physiological responses.[8] Given the effects of these videos on mental health outcomes, consultation with experts in trauma and grief prior to the release of the footage could help viewers cope and manage these effects. However, exposure to videos of fatalities resulting from the actions of law enforcement officers and serious use of force incidents often occur through news and social media outlets, which police agencies cannot control.
- A primary goal of expanding the release of BWC video recordings is to increase transparency and accountability.[9] This review did not identify any studies specifically examining the relationship between changes in police accountability or transparency and health. Although the evidence regarding the effects of body worn cameras (BWCs) on officers' use of force, policing activities, and citizens' complaints is **mixed**, one national survey found that most respondents believed BWCs would increase police transparency and improve police-citizen relations.[10]
- There is a **fair amount of evidence** of short-term benefits of specific types of implicit bias training for law enforcement officers; however, the longer-term effects are **not well researched**.[11] Implicit biases can manifest in unequal treatment of individuals belonging to different demographic groups.[12] Experts suggest the importance of quality curricula and instruction, and reinforcing initial training as components of a jurisdiction's police reform efforts.[13]
- There is a **fair amount of evidence** that the adoption of strict policies on use of force tend to reduce police officers' use of physical coercion, with potential benefits for health by decreasing the risk of injury during encounters between police and the public.[14] The impacts of these policies on officer behavior vary based on implementation, adherence, accountability, and training.
- There is **strong evidence** that the use of chemical and projectile weapons, such as tear gas or rubber bullets, in crowd-control settings can cause significant injuries, permanent disabilities, and death.[15] To the extent that the bill results in a decreased use of these weapons, it could reduce the risk of negative health outcomes.
- Research for this analysis did not identify any studies specifically examining health effects from restoring people's right to vote. However, there is **strong evidence** that civic engagement, which includes voting, is positively associated with health, and there is **a fair amount of evidence** specifically documenting the association between voting and health outcomes including physical and mental health, health behaviors, and well-being.[16] One study also suggested a potential relationship between voting and lower rates of recidivism.[17]

METHODS SUMMARY

To complete this health note, Health Impact Project staff conducted an expedited literature review using a systematic approach to minimize bias and identify recently published studies to answer each of the identified research questions. In this note, "health impacts" refer to effects on determinants of health, such

as education, employment, and housing, as well as effects on health outcomes, such as injury, asthma, chronic disease, and mental health. The strength of the evidence is qualitatively described and categorized as: not well researched, mixed evidence, a fair amount of evidence, strong evidence, or very strong evidence. It was beyond the scope of analysis to consider the fiscal impacts of this bill or the effects any funds dedicated to implementing the bill may have on other programs or initiatives in the state. To the extent that this bill requires funds to be shifted away from other purposes or would result in other initiatives not being funded, policymakers may want to consider additional research to understand the relative effect of devoting funds for this bill relative to another purpose. A detailed description of the methods is provided in Methodology Appendix on page 8.

WHY DO THESE FINDINGS MATTER FOR THE DISTRICT OF COLUMBIA?

In 2018, there were 1,242 reported use of force incidents by the Metropolitan Police Department of the District of Columbia (MPD), an increase of 83% since 2015.[18] Fifty-five percent of these resulted in a reported injury to the subject. Although 48% of District residents are Black, 90% of all uses of force in 2018 involved Black citizens, and 14% of subjects were reportedly armed.[19]

WHAT ARE THE POTENTIAL HEALTH EFFECTS OF B23-0882?

Effects of prohibiting the use of neck restraints

- Research for this analysis did not identify any studies specifically examining the health effects of prohibiting the use of neck restraints by law enforcement officers. The research also did not identify any estimates of how frequently these restraints are used in police encounters.
- The intent of a vascular neck restraint is to cause temporary unconsciousness by restricting blood flow to the brain.[20] Restraints that compress the carotid arteries and jugular veins in the neck can result in severe hemorrhage or permanent injury, particularly if improperly applied or if the subject has an underlying health condition that makes the restraint more dangerous.[21] Striking the carotid sinus, also found in the neck, can even cause a fatal heart attack.[22] Therefore, to the extent that the bill results in a decreased use of these restraints, it could reduce the risk of negative health outcomes.

Effects of improving access to body-worn camera video recordings

- In addition to the devastating consequence of loss of life, fatalities resulting from the actions of law enforcement officers and serious use of force incidents can harm the health of family members, communities, and officers. For example, research on the effects of these incidents on Black communities shows that witnessing excessive use of violence and exposure to videos of fatalities resulting from the actions of law enforcement officers can be traumatic for family and friends of the decedent and for the community at large, with implications for mental health and stress-related physiological responses.[23] These fatalities and injuries can also result in financial strain for households stemming from time away from paid work to grieve, funeral costs, and lost income due to disabilities or among family members of a decedent, with negative effects on health through, for example, changes in food or housing security.[24] And several longitudinal studies have documented the negative health effects for police officers from experiencing a traumatic incident at work, including higher likelihood of post-traumatic stress disorder.[25]
- Research for this analysis did not identify any studies examining the effects of policies to ensure BWC videos of fatalities resulting from the actions of law enforcement officers or serious use of force are released using best practices in trauma and grief. Given the evidence of triggering effects of these videos on mental health outcomes, consultation with experts in trauma and grief prior to

the release of the footage could help viewers cope and manage these effects. However, exposure to videos of these fatalities and serious use of force incidents often occur through traditional and social media, which police agencies cannot control. Evidence exists supporting the influence of media consumption on attitudes toward police legitimacy regarding use of force.[26] Studies also support the strong influence of social media and news organizations on public perceptions.[27]

- Expanding the release of BWC video recordings aims to increase transparency and accountability, decrease use of force and change officer and civilian behavior, as well as expedite resolution of complaints and lawsuits.[28] Evidence on BWCs' impact on police use of force, citizen complaints, policing activity, and judicial outcomes is mixed.
    - Several systematic reviews have reported on these topics, with some studies finding reductions in use of force and resident complaints, and, in neighborhoods of concentrated disadvantage, decreases in low-level citations—which can lead to debt or imprisonment if the subject is unable to pay—and "self-initiating" activities such as pedestrian and vehicle checks.[29] For example, one randomized control trial found that BWCs reduced complaints from outside of the police department by 65%; another non-randomized study found a reduction of 62%.[30] Other research, including a randomized control trial involving 2,224 MPD officers, found no discernable effects of implementation of BWCs on police use of force, citizen complaints, or policing activity.[31]
    - A 2015 national cross-sectional survey found that most respondents felt BWCs would help increase police transparency (91%), reduce excessive use of force (80%), improve police-citizen relationships (66%), and increase citizen trust in police (60%).[32] An average of only 36% of respondents thought that BWCs could decrease racial tension between the police and minority communities.[33] Black respondents communicated less optimism in terms of BWCs' potential effects on transparency and citizens' relationships with and trust in the police. Despite their awareness of the technology's limitations, 85% of all respondents were supportive of requiring BWCs.[34]
    - The evidence concerning the effects of BWC footage on observers' judgements of interactions between police and the public is also mixed. [35]
        - A 2019 experiment examined the effects of BWCs on mock jurors' judgments in a case in which a community member (defendant) was charged with resisting arrest, but where the officer's use of force in conducting the arrest was controversial. When participants viewed BWC footage of the arrest, compared with when footage was transcribed or absent, they were less likely to vote the defendant guilty of resisting arrest, and also rated the officer's use of force less justifiable, and the officer more at fault and less credible.[36]
        - Conversely, a 2018 study used an experimental approach with nearly 400 publicly available police videos to compare variations in observers' judgement when witnessing the same police-public encounter via BWC or dashboard camera footage. The findings suggested that jurors and the general public may be less likely to judge a body camera wearer's actions as intended to produce a specific outcome, such as injury or death, compared with dashboard camera videos.[37] Researchers hypothesize that this could occur because the observer sees and takes on the perspective of the person wearing the BWC.[38]
        - Furthermore, a 2019 study involving 627 participants found that BWC footage can lead people to perceive officers more favorably than when they view the same encounter from a camera perspective that includes both the officer and civilian.[39]

Effects of mandating and expanding continuing education

- Researchers hypothesize that law enforcement officers' perception of Black citizens as "dangerous" is associated with disproportionate rates of force used against Black citizens; in other words, implicit biases could influence officer behavior, with potential risks to health for non-White Americans.[40] Studies have found that White officers are more coercive than Black officers towards Black individuals.[41]
- To address these disparities, implicit bias training has become more common in police departments across the U.S due to recommendations from the President's Task Force on 21st Century Policing, with the average training lasting about 5 hours. Although these trainings can show short-term reductions in implicit biases against racial and ethnic minorities, the evidence regarding long-term effects is inconclusive and suggests the importance of continuous training.[42]
    - Several reviews have identified promising practices in reducing implicit bias, at least in the short term. One meta-analysis examining 494 studies on change in implicit bias found that the most successful interventions "associate sets of concepts, invoke goals or motivations, or tax mental resources ... whereas procedures that induced threat, affirmation, or specific moods/emotions changed implicit bias the least." However, the authors found no evidence that changes to implicit bias result in behavior changes.[43]
    - A systematic review of 30 studies examining implicit bias interventions found that the most effective interventions involved intentional strategies to overcome biases, exposure to individuals from other races and ethnicities who counter common stereotypes, empathizing with the outgroup, building new associations, and provoking emotion.[44]
    - One randomized control trial that framed changing implicit biases as breaking a bad habit gave participants in the treatment group a set of strategies to choose from to combat their own implicit biases and asked them to report on their use over the course of two months. The study found a sustained reduction in Implicit Association Test scores among the treatment group over the duration of the test period, as well as greater self-reported awareness and concern about discrimination.[45]

Effects of use of force reforms

- One study found that having strict policies on use of force tended to reduce police officers' use of physical coercion.[46] Given that more than half of the use of force incidents in D.C. resulted in injury in 2018, strategies that could reduce use of force could reduce the risk of injury during encounters between police and the public.[47]
- The effectiveness of these policies depends on implementation, adherence, accountability, and training. Although research is limited, there are increasing indications that de-escalation training may be one effective strategy to reduce the use of force.[48] One study that analyzed the New Orleans Police Department's efforts to comply with a federal consent decree found that changing policy and regulation was not sufficient to ensure compliance within the police department. They found that the following model for implementing organizational and cultural change was most effective: "frequently measure what you want to change; produce actionable, clear results; and hold leadership accountable for performance."[49]

Effects of limiting use of chemical weapons, riot gear, and projectiles and restricting the purchase and use of military weapons

- This review examined the evidence around each of the following components separately: limiting or restricting the use of chemical weapons, riot gear, projectiles, and military weapons. It did not yield any studies that examined health effects resulting from policies that restrict the use of military weapons, chemical weapons, or projectiles. However, a strong body of research shows that

projectiles and exposure to chemical weapons, such as tear gas and pepper spray, can cause a range of negative health effects:

- Kinetic impact projectiles, such as rubber and plastic bullets, can cause significant negative health effects including: penetrative injuries; trauma to the head, neck, and torso; lacerations; long-term neurological effects; and death.[50] A systematic review of injuries, permanent disabilities, and deaths from projectiles in crowd-control settings worldwide over a 27-year period found that 71% of the total injuries were severe, and that 15.5% of survivors suffered permanent disabilities.
- Tear gas can cause skin irritation, eye pain, excessive secretion of tears, blepharospasm (uncontrollable eyelid movements, such as twitching), coughing, and chest tightness, among other effects.[51] Studies have also shown that exposure to high concentrations of tear gas can result in severe respiratory symptoms, cardiovascular and gastrointestinal effects, severe eye trauma, and permanent disabilities.[52]
- A systematic review that examined injuries, permanent disabilities, and deaths from chemical irritants worldwide over a 25-year period found that, among nearly 6,000 people who were exposed to irritants such as tear gas and pepper spray, 87% suffered injuries or died as a result of the exposure.[53] Of these injuries, 8.7% were severe, 17% were moderate, and 74.3% were minor.
- Stun grenades, also known as flashbang grenades, are usually considered a non-lethal device used to distract occupants of a building before law enforcement officers enter. However, a ProPublica investigation found that 50 Americans, including police officers, have been seriously injured or killed by stun grenades between 2000 and 2014.[54]

- Evidence from two systematic reviews suggests that chemical weapons and projectiles can be used inappropriately in crowd-control settings.[55] For example, a systematic review concluded that deployment of kinetic impact projectiles, such as rubber and plastic bullets, may occur in crowds at distances much closer than deemed "safe."[56]
- Research also suggests that Special Weapons and Tactics (SWAT) units are increasingly using military style weaponry to search people's homes rather than their original purpose to handle hostage and active shooter situations.[57] A report by the American Civil Liberties Union that analyzed 800 SWAT deployments conducted by 20 law enforcement agencies across the U.S. from 2011 to 2012 found that 79% percent of the events involved executing a search warrant at a person's home, and 60% involved drug searches.[58] Only 7% of the SWAT deployments examined involved hostage, barricade, or active shooter situations.[59] Their analysis also found that at least 54% of the people targeted for searched executed by SWAT teams were either Black or Latinx.[60]
- Research for this health note did not yield any studies specifically examining the health effects of riot gear or of limiting the use of riot gear.

Effects of restoring the right to vote

- Research for this analysis did not identify any studies specifically examining health effects from restoring people's right to vote. However, research among the general population shows that voting and other forms of civic engagement are positively associated with health outcomes including physical and mental health, health behaviors, and well-being.[61]
- One study of 1,000 youth followed longitudinally examined political participation in the 1996 election and subsequent criminal behavior. This study suggested a potential relationship between voting and lower rates of recidivism. Specifically, those who vote were less likely to be arrested and incarcerated, and less likely to report committing certain crimes such as violent offenses.[62] The study also showed consistently lower rates of subsequent arrest, incarceration, and self-reported criminal behavior among voters as compared to nonvoters, though the relationship between voting and subsequent arrest did not appear to depend on criminal history.[63]

WHICH POPULATIONS ARE MOST LIKELY TO BE AFFECTED BY THIS BILL?

Research shows that Black Americans are more likely than Whites to experience an injury related to a police intervention and to be killed by police officers.[64] One estimate suggested that Black residents accounted for 86% of arrestees in Washington, D.C. between 2013 and 2017, but represented 47% of the population.[65] Although there is limited research on the relationship between negative police encounters and health outcomes, the available evidence shows that Black and Latino men who report more frequent police encounters report higher rates of trauma and anxiety and that, among Black men, experiencing frequent, discriminatory law enforcement encounters is associated with higher depressive symptom scores.[66]

Coercive policing and negative police encounters tend to be geographically concentrated in predominately Black and Latino neighborhoods.[67] One study showed that the level of racial residential segregation was a strong and positive correlate of the Black and White disparity in fatal police shooting rates.[68] A growing body of evidence shows the negative effects of frequent interactions with police or living in over-policed neighborhoods on mental health, resulting in trauma and anxiety symptoms.[69] One study found a significant negative association between having been stopped and subjected to a physical search by the police and self-reported thriving, similar to thriving rates reported by those who have been incarcerated multiple times.[70] These findings demonstrate how even lower-intensity interactions with the criminal justice system can be significantly associated with lower self-reported conditions of well-being.[71] Insofar as the provisions of this bill result in a reduction of use of force or over-policing in D.C. communities of color, families of color — particularly Black and Latino young men — could experience mental health benefits.

The use of chemical weapons could have negative health impacts for medically vulnerable populations. Research suggests that children, seniors, and individuals with underlying respiratory, skin, and cardiovascular illnesses are at greater risk for negative health effects from exposure to chemical weapons such as tear gas.[72]

HOW LARGE MIGHT THE IMPACT BE?

Where possible, the Health Impact Project describes how large the impact may be based on the bill language and literature, such as describing the size, extent, and population distribution of an effect. In 2018 in D.C., two citizens were fatally injured by police officers and the Use of Force Review Board determined that 10 allegations, or 37%, of all excessive force allegations, were supported by the evidence.[73] Under the emergency police reform legislation, the D.C. Board of Elections has mailed ballots to 2,400 residents serving prison sentences for felony convictions.[74]

It was beyond the scope of this analysis to consider the fiscal impacts of this bill or the effects any funds dedicated to implementing the bill may have on other programs or initiatives in the District. To the extent that this bill requires funds to be shifted away from other purposes or would result in other initiatives not being funded, policymakers may want to consider additional research to understand the relative effect of devoting funds for this policy relative to another purpose.

APPENDIX: METHODOLOGY

Once the bill was selected, a research team from the Health Impact Project hypothesized connections, or pathways, between the bill, heath determinants, and health outcomes. These hypothesized pathways were developed using research team expertise and a preliminary review of the literature. The selected bill components were mapped to steps on these pathways and the team developed research questions and a list of keywords to search. The research team reached consensus on the final conceptual model, research questions, contextual background questions, keywords, and keyword combinations. The conceptual model, research questions, search terms, list of literature sources, and draft health note were peer-reviewed by two external subject matter experts. The experts also reviewed a draft of the health note. A copy of the conceptual model is available upon request.

The Health Impact Project developed and prioritized 15 research questions related to the bill components examined:

- To what extent does prohibiting police use of neck restraints affect use of force?
- To what extent does access to BWCs affect police use of force?
- To what extent does access to BWCs affect the number of citations or arrests?
- To what extent does consideration of trauma and grief effects in advance of release of BWCs affect health outcomes?
- To what extent does access to BWCs affect health outcomes?
- To what extent does restricting use of military weapons affect health outcomes?
- To what extent does restricting use of riot gear affect health outcomes?
- To what extent does restricting use of chemical weapons affect health outcomes?
- To what extent does restricting use of less-lethal projectiles affect health outcomes?
- To what extent does police training on bias, racism, and white supremacy affect use of force in interactions between the police and racial and ethnic minorities?
- To what extent does allowing incarcerated individuals to vote affect their self-reported physical and mental health?
- To what extent does allowing incarcerated individuals to vote affect their feeling of disenfranchisement?
- To what extent does allowing incarcerated individuals to vote strengthen their social ties and connections to the broader society?
- To what extent do police reform efforts affect chronic stress among racial and ethnic minorities?
- To what extent is police/community cooperation improved when use of force is reduced?

The research team next conducted an expedited literature review using a systematic approach to minimize bias and answer each of the identified research questions.[c] The team limited the search to systematic reviews and meta-analyses of studies first, since they provide analyses of multiple studies or address multiple research questions. If no appropriate systematic reviews or meta-analyses were found for a specific question, the team searched for nonsystematic research reviews, original articles, and research reports from U.S. agencies and nonpartisan organizations. The team limited the search to electronically available sources published between September 2015 and September 2020.

[c] Expedited reviews streamline traditional literature review methods to synthesize evidence within a shortened timeframe. Prior research has demonstrated that conclusions of a rapid review versus a full systematic review did not vary greatly. M.M. Haby et al., "What Are the Best Methodologies for Rapid Reviews of the Research Evidence for Evidence-Informed Decision Making in Health Policy and Practice: A Rapid Review," *Health Research Policy and Systems* 14, no. 1 (2016): 83, https://doi.org/10.1186/s12961-016-0155-7.

The research team searched PubMed and EBSCO databases along with the following leading journals in public health, as well as sector-specific journals suggested by subject matter experts for this analysis (e.g., criminology and policing) to explore each research question: American Journal of Public Health, Social Science & Medicine, Health Affairs, Criminology, The Police Journal, Policing: A Journal of Policy and Practice, and Police Quarterly.[d] For all searches, the team used the following search terms: police, prohibit neck restraints, use of force, police body cameras, citations, arrests, accountability, trauma, grief, police body camera footage, restrict military weapons or chemical weapons or projectiles, incarceration, voting, connect*, social, police training, racism, police transparency, community trust, health, injury, and disability. The team also searched ACLU, Brookings Institution, Center for Policing Equity, U.S. Department of Justice, Urban Institute, and The Sentencing Project for additional research and resources outside of the peer-reviewed literature.

After following the above protocol, the team screened 476 titles and abstracts,[e] identified 98 abstracts for potential inclusion, and reviewed the full text corresponding to each of these abstracts. After applying the inclusion criteria, 44 articles were excluded. Five additional sources were incorporated based on feedback from the expert reviewers, and 25 additional sources were identified upon review of the included articles. A final sample of 30 articles, including 2 meta-analyses and 4 systematic reviews, was used to create the health note. In addition, the team used 32 references to provide contextual information.

Of the studies included, the Health Impact Project qualitatively described and categorized the strength of the evidence as: not well researched, a fair amount of evidence, strong evidence, or very strong evidence. The evidence categories were adapted from a similar approach from Washington state.[75]

Very strong evidence: the literature review yielded robust evidence supporting a causal relationship with few if any contradictory findings. The evidence indicates that the scientific community largely accepts the existence of the relationship.
Strong evidence: the literature review yielded a large body of evidence on the association, but the body of evidence contained some contradictory findings or studies that did not incorporate the most robust study designs or execution or had a higher than average risk of bias; or some combination of those factors.
A fair amount of evidence: the literature review yielded several studies supporting the association, but a large body of evidence was not established; or the review yielded a large body of evidence but findings were inconsistent with only a slightly larger percent of the studies supporting the association; or the research did not incorporate the most robust study designs or execution or had a higher than average risk of bias.
Mixed evidence: the literature review yielded several studies with contradictory findings regarding the association.
Not well researched: the literature review yielded few if any studies, or yielded studies that were poorly designed or executed or had high risk of bias.

[d] American Journal of Public Health, Social Science & Medicine, and Health Affairs were selected using results from a statistical analysis completed to determine the leading health research journals between 1990 and 2014 and in consultation with policing and criminal justice experts. Merigó, José M., and Alicia Núñez. "Influential Journals in Health Research: A Bibliometric Study." Globalization and Health 12.1 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4994291/.
[e] Many of the searches produced duplicate articles. The number of sources screened does not account for duplication across searches in different databases.

EXPERT REVIEWERS

This document benefited from the insights and expertise of Dr. Sheldon Greenberg, Deputy Director of the National Criminal Justice Technology Research, Test & Evaluation Center at the Johns Hopkins University School of Education and Dr. William Terrill, Associate Dean of the Watts College of Public Service and Community Solutions and Professor in the School of Criminology and Criminal Justice at Arizona State University. Although they reviewed the note and found the approach to be sound, neither they nor their organizations necessarily endorse its findings or conclusions.

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Testimony of the
D.C. Open Government Coalition

by

Thomas M. Susman
President

before the
Committee on the Judiciary and Public Safety
Council of the District of Columbia

Hearings on
B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

October 15, 2020

Chairman Allen and members of the Committee, I am Thomas Susman, president of the D.C. Open Government Coalition and a resident of Ward 4. I appreciate the opportunity to testify today on behalf of the Coalition and to offer our comments and suggestions regarding public access to police body-worn camera (BWC) videos, which is addressed in title I, subtitle B, of your "Comprehensive Policing and Justice Reform Amendment Act of 2020."

Our Coalition played an active role in discussions leading to the Council's public access requirements in the 2015 BWC legislation and rules, and members of our Board have testified and submitted statements to the Council on this issue on previous occasions.

D.C.'s policy of treating BWC video under the Freedom of Information Act's standards of public access and privacy protection was a step forward, though in practice the results have not been encouraging. The proposed legislation provides an opportunity to clarify and expand upon some elements that may be unique to BWC videos that will provide greater certainty and improve efficiency in affording public access.

I will not go into the benefits of having BWC video accessible to the public. They can be summed up in a few words: accountability, exoneration, credibility, and public trust. Accountability includes the public's and affected individuals' ability to monitor and assess the conduct of police officers, as well as helping to shape the conduct of officers in the field, especially regarding potential use of force and

discriminatory policing practices against District residents. And some research has concluded that more police officers are exonerated than found culpable of misconduct charges through BWC videos

The Comprehensive legislation (B23-0882) contains a number of important provisions designed to improve access to BWC video recordings. It requires the Mayor to release within 5 days the name and BWC recordings of officers involved in a death or serious use of force; requires preservation of BWC recordings relating to a Council Committee on the Judiciary and Public Safety investigation or request and provision to the Committee of unredacted recordings within 5 days of a request; and creates a process for input to the Mayor from the subject or next of kin who do not consent to release of a BWC recording.

DCOGC welcomes the new requirement that the Mayor ***shall*** release BWC video within 5 business days in cases of officer-involved death or serious use of force. This requirement should be expanded to include video footage from all officers on the scene. The immediate discussion of the September 2nd shooting of Deon Kay was only possible because it happened just a few weeks after the Council required prompt video release. We testified at last year's BWC oversight roundtable about the community's need for wider access to other BWC video and the Mayor's failure to exercise her discretionary authority to meet that need.

Additionally, allowing early access to viewing video footage by victims' families is good policy, but this should not equate to a "victims' veto"; even after a bereaved family has viewed a BWC video, the public interest in access is not diminished.

While application of the DC FOIA to public requests for access to BWC videos should suffice in providing standards and procedures for public disclosure, that has not been the experience of requesters from both the media and the community. We thus propose the addition of language to the legislation that addresses four issues:

- First, the bill should more precisely define what constitutes a personal privacy interest sufficient to warrant redaction when videos are released.
- Second, the bill should include cost-reduction steps such as exploring in-house redaction and setting limits on fees that can be charged for release of BWC videos pursuant to a FOIA request.
- Third, the bill should clarify the "investigation" exemption that can now be asserted without explanation or justification yet causes delays.
- And fourth, the bill should require that in cases of mandatory release (the most serious incidents) all officers' video should be released.

We highlight five ways that the camera program could better serve public information. And for future consideration we remind the Council of the need to open police complaint and discipline investigations, since these are now closed by restrictive legal interpretations in the executive branch that can only be corrected by statute.

I. The bill should define the private data to be safeguarded

Privacy protection needs definition so that it does not defeat access by raising costs and delays (discussed below) and making released video unintelligible. All these presently result from MPD over-redaction, done according to opaque rules. The bill should change this.

Coalition Board Member Fritz Mulhauser testified last year on DCOGC's efforts to discover the standards for redaction of BWC videos before public release. He explained our efforts through two FOIA requests and an appeal to get records showing the MPD redaction standards that guide contractors' work, and its legal basis, but with limited success. His testimony stated:

> *We received one undated sheet of paper [attachment omitted]. Some of the several dozen listed items to be redacted are obvious and raise no questions, such as details of suspects, witnesses or confidential sources. These would be omitted from paper records at least as long as investigation or legal action is under way. But others have highly questionable legal basis:*
>
> - *faces of anyone not involved,*
> - *face (plus ID and badge) of any officer,*
> - *any house number or name of residences,*
> - *any vehicle license plates, and*
> - *any audio with references to such items.*

Police officers are public servants who wield governmental power and are paid by taxpayer dollars. The idea that their identities should be shrouded when in public performing their duties is absurd, as litigation established years ago when courts told police they could not stop citizens from videotaping them at work in public. *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011). And, while the privacy of certain individuals and in certain venues should be safeguarded, people and cars and house numbers that are videoed in public spaces are, by definition, already in the public domain and should not be subject to redaction.

Common categories of video footage to be accorded privacy protection through redaction include:

- Death or serious injury;
- Nudity;
- Minors under the age of 16;
- Detention for mental health or drug treatment purposes;
- Personally identifiable information, which should be clearly defined;
- Footage taken inside a private dwelling without express consent of the resident;
- Identity of a sex crime or domestic violence victim; and
- Confidential informants and witnesses.

Redaction or withholding of footage when an officer enters a private dwelling can be protected, but the bill should specifically prohibit redaction of officers' faces or badges, of bystanders in public places, of persons who interact with officers but are not arrested or charged, and of audio in public places.

II. The bill should control the costs of public access

According to the MPD, the D.C. FOIA requires redaction of many private details before releasing BWC video, and MPD employs contractors to blur faces and other identifying information. Requesters are charged $23 for each minute of the contractors' work, and charges estimated in response to past requests run from thousands to millions of dollars.

The cost is related to MPD's overly broad definition of privacy-protected details that should be masked, as discussed above. Our coalition has asked MPD for documents explaining the basis for these sky-high costs, but none have been forthcoming.

The Director of D.C.'s Office of Open Government, in testimony a year ago before the Council, recommended that "MPD should release to the public in the form of policy or regulation, redaction guidance that explains the cost of the act of redaction in actual work hours (cost per hour)." We agree. OOG Director Niquelle Allen also discussed in that testimony and in our recent webinar the advancing art and science of video redaction that may be at a stage that it can be done in-house at much lower cost than through private for-profit contractors. The Council needs to send a message to the executive to follow through on the steps needed to make access affordable.

Clarifying that significantly less redaction is required for BWC video footage that is released to the public, as is recommended above, will also result in significantly lower costs of access. For example, the Baltimore Police Department ordinarily redacts nothing and charges $30 for BWC videos filmed in public places.

III. The bill should set limits on the investigation exemption

The FOIA exemption for "investigatory records compiled for law-enforcement purposes" delays access, since in D.C. serious misconduct is investigated first for possible criminal charges by federal prosecutors and then for possible internal discipline by MPD investigators. The long delays in these steps are well known here, as discussed in the Bromwich 2016 report (finding median time for a US Attorney investigation to be a full year). Legislators elsewhere have addressed investigative delays thoughtfully, requiring time-limited secrecy be justified in public writings, renewable only upon further explanation. Sec. 2 of California SB 1421 at (b)(7) is an example of how to handle this.

IV. The bill should require release of all BWC video relevant to any incident

The mayor has interpreted the required release to include only video from the officer involved in the shooting or other use of serious force. This unduly restrictive and typically makes it hard for the public to understand what happened. The bill should add language to require release of all relevant video.

Additionally, there is no need to limit public access to BWC videos to officer-involved shootings or serious use of force. These videos are public records like any other in the District and should be subject to disclosure under the DC Freedom of Information Act.

V. The bill should strengthen public understanding of policing by requiring additional public information about the BWC program

In our statement to the Council last year, the Coalition spelled out five suggestions proposed by the D.C. Open Government Coalition for ways BWC video could serve transparency beyond being available upon request. They remain valuable ideas today and cold readily be incorporated into the pending bill:

- **Improve public reporting by adding analysis of BWC video and statistics**. The required reports are brief and late. Only eight data points are required (hours of BWC video collected; how many times BWC equipment failed and why; number and results of internal investigations of complaints for failure to turn BWC on; number of times BWC video used in internal affairs investigations; number of times BWC video used to investigate public complaints; number of BWCs assigned to different police units; number, result and cost of FOIA requests; and number of BWC videos by type of event recorded). D.C. Code § 5-116.33(a). Early reports were timely but of the five due for 2017-2019, four have been late by as much as 10 months.

The most recent is for the first half of 2019. Though they include important data, none are explored further. For example, what is being done about the widespread failure to activate the cameras (shown in the high rate of sustained complaints of such failures--78 percent of 1,514 complaints at one point in the past)? Nor is there any account of the results of the 20,754 videos used in internal investigations and the 3,779 used by the Office of Police Complaints. The public reasonably expects MPD to use BWC video to improve policing and the law does not stop MPD from exploring the data in more depth in order to report how that is going.

- **Use mayoral override more often to release BWC video that can educate the public**. The law allows the mayor to release video "in matters of significant public interest." 24 DCMR § 3900.10. A notable occasion when disclosure would have fostered public understanding was the case of controversial police actions in Deanwood in June 2018 (the "Nook's barbershop" incidents), where police used force on a summer sidewalk that seemed wildly unnecessary to many. Amid huge community outcry, the mayor claimed BWC video showed important details not seen on cell phone video—but then rejected community requests to see those BWC details. In response to a Coalition request for records documenting any disclosures of BWC videos, the mayor's FOIA officer said there were no responsive records. The law allows consultation with prosecutors and police about such releases but in response to the Coalition's request for records of such communications (and possible vetoes) the mayor's office declined to produce internal communications.

- **Provide data on video viewing by subjects**. Subjects have the right to view BWC video of themselves, 24 DCMR § 3902.5. No public data is available to show whether that right is being exercised or even offered.

- **Improve police YouTube release channel**. Released videos were for a time posted some years ago. See https://www.youtube.com/channel/UCSVpCusv_bqfKHyOj21jZqQ (six incidents, 129 total videos). A pilot test of more proactive release could show if reviving this is useful to the public.

- **Continue evaluation of the BWC program and expand outside use of data**. MPD has offered no public analysis of its own, nor suggested how it may be following the law that directs that it "shall engage academic institutions and organizations to analyze the BWC program," 24 DCMR § 3902.7. The phased rollout of equipment and training allowed an elegant but disappointing comparative study of citizen complaints and use of force in 2015-17 by officers on patrol with and without cameras. The MPD and The Lab (a study team within the Office of the City Administrator) prepared that report. BWC video, as a huge sample of police conduct in the field, is also a rich source for other kinds of studies beyond direct evaluation of camera effects. See, for example, a revealing Stanford review of transcripts of what was said by officer and driver in thousands of traffic stops in Oakland, California. It documented what everyone suspected but couldn't prove -- large differences in respect shown by the officer based on the driver's race.

For future legislation: Access to police complaint and discipline investigation files

DCOGC believes that MPD complaint and discipline investigation records should be publicly available: The Council should by statute clarify that the public interest in accountability justifies access to complaint and discipline investigation files. This step was taken by California and New York legislatures and should be taken here. The head of the D.C. Office of Police Complaints agreed in a

recent press interview, stating "It would add a lot to community trust if the community was aware what kind of discipline was being handed out to MPD officers."

Conclusion

When the District invested millions of dollars in the BWC program a few years ago, the public had high expectations that BWC video footage would benefit both the public and the MPD and bring about greater accountability, more assured exoneration of officers experiencing conflicts with the public, credibility of the workings of the justice system, and public trust in our government. The high expectations for the use of BWCs have not been realized. While BWC videos have proved indispensable to establishing facts in judicial proceedings, public access remains limited, and MPD continues to be silent on its own uses and protocols.

In the attached memorandum summarizing "State and Local Policies Regarding Public Access to Policy Body-Worn Camera Videos," DCOGC and our outside counsel Ropes & Gray LLP have gathered and summarized relevant legislation from other states and comparable cities. We believe that this information will be helpful to the Council and in other jurisdictions considering how to legislate in this area.

Enactment of the "Comprehensive Policing and Justice Reform Amendment Act of 2020" provides an opportunity for the District – both its residents and the police department – to realize more fully the benefits of police body-worn cameras.

ATTACHMENT: "State and Local Policies Regarding Public Access to Police Body-Worn Camera Videos" (Sept. 2020)

* * * *

The Open Government Coalition is a citizens' group established in 2009 to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gains access to government records (including data) and proceedings, and to educate the public and government officials about the principles and benefits of open government in a democratic society.

On September 29, 2020. The D.C. Open Government Coalition sponsored a webinar focusing on the use of BWCs in the District and the need for legislative reform focused on disclosure policies and practices. A video of that program can be viewed at: https://vimeo.com/464587376.

State and Local Policies Regarding Public Access to Police Body-Worn Camera Videos

Executive Summary
September 2020

The issue of whether police should wear body cameras recording their actions and public access to the video footage became an increasingly active area of public debate following the tragic shooting of Michael Brown in Ferguson, Missouri, as well as the videotaped chokehold death of Eric Garner in New York City, and has only increased in prominence after similar footage, such as videos showing the suffocation of George Floyd in Minneapolis, has become all too common.

The D.C. Open Government Coalition has an interest in enhancing the public's access to government information and ensuring the transparency of government operations. Accordingly, the Coalition, in conjunction with Ropes & Gray LLP, has been tracking laws and proposals governing police body-worn camera (BWC) recordings in 50 states and 15 major cities since 2015. The information contained in this executive summary is current as of September 25, 2020, and was obtained through a combination of outreach to state and local governments and research into legislative and media sources.

The Coalition is hopeful that its work will be helpful to state and local legislators seeking to understand the choices their peers across the country have made and spurring those legislators to action. More importantly, the Coalition hopes that this work will energize transparency advocates across the country to understand not just what the law is, but what it could be. By providing this resource, the Coalition intends to further its ultimate goal of advancing open government in the District of Columbia and throughout the nation.

Elements of Body Camera Proposals

At the outset of this analysis, the Coalition focused on four areas relevant to the handling and availability of police BWC recordings:

- Collection of police BWC footage;
- Retention of police BWC footage;
- Applicability of existing Freedom of Information Act (FOIA) laws and exemptions; and
- Related police dashcam footage rules.

Footnotes throughout the discussion below provide examples of states that have adopted the policies discussed.

State Policies

Overview

- A majority of states—at least 34—have passed some form of legislation addressing police BWC footage.[1] The general trend appears to be towards more comprehensive policies regarding use and collection of BWC recordings and increased public disclosure, including, in some cases, automatic public disclosure of footage of "critical" incidents involving use of force by a police officer.
- Only a handful of states have not proposed any police body cam legislation at the state level in recent years.[2]
- Other states have introduced legislation addressing police BWC videos, which either is under consideration[3] or has been debated and rejected or indefinitely stalled in the legislative process.[4]
    - A trend among some states in the past five years has been to create a task force or commission to study and make recommendations regarding the use of BWCs in the state.[5] This often leads to adoption of a model BWC policy for the state, but does not always lead to meaningful reform in that state.
    - Some states have introduced legislation that would specifically exclude body and/or dashboard camera footage from the state's open records law[6], while others have considered (or adopted) comprehensive legislation covering collection, retention, and public access to footage, either on a standalone basis or as part of broader police accountability or body cam legislation.
    - Budgetary concerns continue to be cited as a reason for lack of adoption of BWCs. In some states, BWC laws have included funding provisions, and these laws often include requirements for law enforcement agencies to adopt policies that meet minimum requirements to obtain funding for BWCs.[7]

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[1] CA, CO, CT, FL, GA, ID, IL, IN, KS, KY, LA, MA*, MD, MI, MN, NB, NJ*, NM, NV, NY, NH, NC, ND, OH, OK, OR, PA, SC, TX, UT, VA, VT, WA, and WI. *In MA and NJ, legislation has passed both houses of the state legislature but has not yet been finalized.

[2] AK, AZ, DE, MT, and WV.

[3] IL and ME.

[4] HI, IA, MS, RI, SD, and TN.

[5] Colorado legislation created a commission tasked with studying and recommending policies on the use of body cameras. The report was released in 2016, but in accordance with the statutory mandate, it did not consider issues related to public access to body camera footage. Colorado adopted comprehensive BWC legislation in 202 that will go into effect in 2023. In 2019, Connecticut legislation created a task force to study police transparency and accountability. In 2020, Maryland created a Law Enforcement Body Camera Task Force to create recommendations on economical storage and retention of police body camera footage by December 1, 2020.

[6] For example, a new bill introduced in Alabama in March 2020 (HB 373) excludes body and dashboard camera footage from the definition of public record and specifies very limited circumstances in which the public could have access to footage. South Carolina has adopted legislation that excludes body camera footage from the state's public records law.

[7] For example, SC. Although South Carolina's law was passed in 2015, it has not yet been fully funded, and adoption of BWCs in the state has been slow as a result.

Collection

Well over half of the states have at least proposed legislation regarding the collection of police BWC footage. There is a range of enacted rules on this issue:

- On one end of the spectrum, some states have enacted laws that delegate the drafting of collection policies (or model collection policies) to a third party. This would generally be a law enforcement agency that is likely to craft policies more favorable to law enforcement interests than civil liberty considerations.[8]
- Although some states have proposed legislation that broadly requires police to record in nearly all circumstances, the vast majority of states that set forth collection guidelines take a more moderate approach, requiring recording but enumerating exceptions where recording can be stopped, such as allowing that cameras may be turned off when:
    - The officer is inside a patrol car;
    - A victim or witness requests the camera be turned off;
    - The officer is interacting with a confidential informant;
    - The officer is engaging in community caretaking functions; or
    - A resident of a home requests the camera be turned off when an officer enters the home under non-exigent circumstances.

Retention

Over half of the states have proposed legislation regarding the retention of police BWC footage. As with collection, there is a wide range of approaches:

- Several states have enacted or proposed rules that delegate to local police the authority to craft retention requirements, which tend to result in police-friendly provisions.[9]
- Most states, however, have enacted laws that set specific retention timelines for BWC footage.[10] Recordings are retained for periods ranging from seven to 180 days, with between 30 and 90 days as the most frequent periods.
    - Most states allow for a longer retention period of up to two or three years for special circumstances, including when:
        - A complaint has been filed associated with the recording;
        - An officer discharged a firearm or used excessive force;
        - Death or great bodily harm resulted from the officer's conduct;

[8] FL, IL, MD, NB, NM, NV, NC, OR, PA, SC, UT, VA, and WA. These policies typically have to meet minimum standards set by statute. In South Carolina, a law enforcement agency's policy must be approved by the state Law Enforcement Training Council if the agency receives grant money to implement the use of body cameras. In Virginia, policies must be subject to public review and comment before being adopted.

[9] MD, NY, OH, UT, and VT. In Maryland, a state commission is expected to issue recommendations regarding economical storage and retention of BWC footage by the end of 2020.

[10] CA, FL, GA, ID, IL, IN, MA, MI, MN, NB, NH, NJ, NM, NV, OK, OR, SC, TX, WA, and WI. In MA and NJ, legislation has passed both houses of the state legislature but has not yet been finalized.

- The recording led to detention or arrest;
- The officer is the subject of an investigation;
- The recording has evidentiary value; or
- The officer requests that the video be retained for the longer period.

- Some states expressly prohibit destruction of a recording after receipt of a public records request.[11]

FOIA Applicability

There are mixed practices among states on the whether body camera footage is covered under existing FOIA laws (and their exemptions) or whether the footage requires a specifically enumerated exception. Some states have proposed[12] or adopted[13] legislation that specifically excludes body camera footage from the state's FOIA law.

- Several states have issued either blanket prohibitions on accessing police BWC footage under FOIA or conditional prohibitions barring access unless certain factors, such as firearm discharge or use of force, are present.[14] Some states only allow a victim or other person depicted in the footage to have access.[15]
- Some states have adopted or proposed statutory provisions that explicitly seek to include body camera footage within the purview of state open record laws, either generally or through specific FOIA provisions applicable to body camera footage (which may or may not be more burdensome for requestors than the state's general FOIA request process).[16]
- Most states that have addressed the FOIA exemption question have suggested that police body camera footage may not be released in instances where privacy concerns enter the picture, or where footage would interfere with an active investigation.[17] Where privacy concerns are present, some states allow the subject to waive the privacy interest and consent to disclosure.[18]
- Recently, an increasing number of states have adopted policies regarding automatic public disclosure of BWC videos. Automatic public disclosure typically applies to footage of incidents involving an officer discharging a firearm or using force that results in death or serious bodily injury or when a member of the public files a complaint.[19] Some states require release of the video to family members or representatives of the subject of police use of force prior to public release.[20]

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[11] ID and WI.
[12] AL.
[13] PA and SC.
[14] IL, NH, OR, and UT
[15] IL, IN, NC, SC, and WY.
[16] CA, FL, OH, PA, VT, and WI.
[17] CT, FL, GA, IL, IN, KS, KY, LA, MI, MN, NB, ND, NY, TN, TX, UT, VT, WA, and WI . Under New Jersey's proposed legislation, BWC video may be exempt from public disclosure upon request of the subject or the subject's parent/guardian or next of kin.
[18] CO.
[19] CA and CO.
[20] CO.

- States have proposed a number of specific circumstances where body cam footage would be exempt from disclosure, such as where footage:
    - Relates to law enforcement investigations; or
    - Displays:
        - Death or serious injury;
        - Nudity;
        - Minors under the age of 16;
        - Detention for mental health or drug treatment purposes;
        - Personally identifiable information;
        - The identity of a sex crime or domestic violence victim; or
        - Confidential informants.

Dashcam Policies

States treat the retention and release of police daschcam videos differently, with some states opting for much narrower public access than others.[21] However, most dashcam footage policies, by contrast to proposed BWC policies, treat dashcam footage as covered by general FOIA exemptions.[22] In Rhode Island and Virginia, dashcam videos are expressly excluded from the state's public records law. While states appear more comfortable with the public accessing records of dashcams than they are at the present time with public access to the broader range of footage that is collected by police BWCs, policies continue to diverge.

City Policies

While crafting open-record and right-to-know laws has largely been handled on the state level, decisions regarding whether or not to purchase body cameras—and if so, in what quantity—as well as implementation policies, are vested in various city and county legislative bodies. Of the 15 major U.S. cities the Coalition surveyed, all have at some point implemented a pilot program to test different BWC offerings and develop workable policies for wider implementation or adopted policies and procedures regarding use of body cameras.[23]

All cities have issued guidelines regarding the collection and retention of body camera footage that are, particularly in comparison with many state laws, quite transparency-friendly. Cities typically require retention for a period of 90 days and can require retention for much longer depending on the nature of the recording. While disclosure of certain recordings is generally prohibited, including recordings (1) where there is a reasonable expectation of privacy, (2) where a confidential informant or undercover officer's identity might be revealed, and (3)

[21] For example, North Carolina explicitly covers "a visual, audio, or visual and audio recording captured by a . . . dashboard camera" under its restrictive law. Oklahoma also has specifically addressed dashcam videos in its public records statute.
[22] WI and WY.
[23] Atlanta, Boston, Chicago, Dallas, Detroit, Houston, Los Angeles, Miami, Minneapolis, New York, Philadelphia, Phoenix, San Diego, San Francisco, and Seattle.

during personal conversation, collection is generally mandated by city guidelines in a wide range of situations, including:

- Enforcement stops;
- Arrival when on call for any service;
- Pursuits (both vehicular and non-vehicular);
- Arrival at crime scenes;
- Execution of warrants or "knock and talk" operations;
- Consensual searches;
- Planned or anticipated arrests;
- Inventorying of seized property;
- Field sobriety tests; and
- Whenever the officer's training and experience causes him or her to believe the incident needs to be recorded to enhance reports, preserve evidence, or aid in subsequent court testimony.

Many of the cities surveyed also have adopted policies regarding automatic public release of body camera footage in certain circumstances. For example

- The Los Angeles Police Commission in 2018 directed the LAPD to release all relevant video of officer-involved shootings from body camera, dashcam, bystander or other cameras within 45 days of the shooting. At the time it was cited as the largest department in the nation to proactively release such video. The policy also requires the release of footage any time an officer uses force that results in hospitalization and allows the police chief and commission to release video of other high profile incidents on a case-by-case basis.
- The Dallas Police Department in 2020 established a policy to release footage of police shootings or use of force that results in serious injury or death and deaths in custody within 72 hours of the injury or death. The next of kin and certain government and police officials are entitled to review the footage before it is released.

Decisions occurring at the local level are significant for three reasons. First, many municipal proposals and policies are being developed and enacted at a much faster pace than their state counterparts. Second, the interplay between local and state officials on this issue has created an environment where some cities have attempted to craft a model policy to anticipate and guide statewide debate. Finally, local-level policies appear to be more transparency-oriented than the majority of state-level laws. While these state-level laws are likely to control the conversation going forward—particularly as most cities defer to the state level policy on exempting police body camera footage from public access—local-level policies provide the beginnings of a way forward for advocates of transparency and accountability.

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The D.C. Open Government Coalition invites public feedback and comments about this report. Please feel free to contact us at info@dcogc.org.

D.C. Open Government Coalition
Public Access to Police Body Camera Recordings
Last updated September 24, 2020

	Legislation or Bill(s)	Collection of Video	Retention of Video
Alabama	No statute or proposal relevant to body cameras at the state level. A new bill introduced in March 2020 (HB 373) would deem body and dashboard camera footage not to be a public record and list very limited circumstances in which the public can request access to it.	None	None

Alaska	No statute or proposal relevant to body cameras at the state level. Body cameras are not required in Alaska.	None	None

Arizona	No current statute or proposal relevant to public access to body camera footage at the state level. The governor's fiscal year 2021 budget proposes spending approximately $5 million to provide body cameras to all sworn officers in the Arizona Department of Public Safety.	None	Subject to general retention requirements under Arizona state archives law (no special requirements for body camera footage).

Arkansas	No statute or proposal relevant to body cameras at the state level.	None	None

California	In 2018, California passed two pieces of legislation relating to public access to police body camera recordings, which have been codified at Cal. Penal Code §§ 832.7-832.8 and Cal. Gov't. Code § 6254.	Reforms at the state level in California have largely focused on retention and release of recordings. Individual police departments have adopted policies regarding use of body cameras by officers.	Nonevidentiary body camera footage must be retained for at least 60 days, after which it may be erased, destroyed or recycled. Agencies are free to keep data for more than 60 days. Evidentiary body camera footage must be retained for at least two years if any of the following circumstances is present: (i) the recorded invident involved use of force by an officer or an officer-involved shooting, (ii) the recorded incident led to the detention or arrest of an individual, or (iii) the recording is relevant to a formal or informal complaint against law enforcement. If the recording contains evidence that may be relevant to a criminal prosecution, it should be retained for any time in addition to that that may be relevant to the prosecution. Records or logs of access and deletion of data from body cameras must be maintained permanently. Cal. Penal Code § 832.

Colorado	HB 15-285 created a commission tasked with studying and recommending policies on the use of body cameras. The report was released in February 2016 (https://cdpsdocs.state.co.us/ors/docs/reports/2016_BWCs-Rpt.pdf). It focused on six specific issues, mostly related to policies governing use of cameras. Public access to body camera footage was not included in the report. Colorado SB20-217 (passed in June 2020) will require all Colorado state and local police officers to wear body-worn cameras beginning July 1, 2023.	SB20-217 will require law enforcement officers to activate the camera when enforcing the law or responding to any possible violations of the law.	Subject to general retention requirements under Colorado state archives law (no special requirements for body camera footage).

Connecticut	Public Act 19-90 (signed into law in 2019) establishes a task force to study police transparency and accountability and makes certain body camera or dashcam recordings disclosable to the public within 96 hours after the incident.	Conn. Gen. Stat. § 29-6d(g) disallows recordings of officers outside the scope of an officer's duties, of undercover officers or informants, or of individuals in hospitals (other than suspects).	Subject to general retention requirements under Connecticut law.

Delaware	House Concurrent Resolution 46 encouraged relevant organizations (Delaware Police Chiefs' Council, Office of the Attorney General, the Department of Safety and Homeland Security, the Delaware Fraternal Order of the Police, and the Delaware State Troopers Association) to adopt a uniform policy regarding body-worn cameras for law enforcement agencies. DE state police instituted a body-worn camera pilot project in 2016. In March 2016, the Delaware Police Chiefs' Council issued a model body worn cameras policy (https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2018/03/Model-Policy-Body-Worn-Cameras.pdf). There is no statewide requirement to use body cameras.	The model policy states that officers must turn on cameras "when an arrest or detention is likely; when the use of force is likely; or any other incident where the safety of people and property in Delaware is promoted." It also states that body cameras should not be used during "encounters with undercover officers or confidential informants, and instances where a victim or witness could request the camera be turned off."	The model policy requires that body camera data be retained for "such time as is necessary for training, investigation or prosecution" and that data be "securely stored in an agency-approved storage location."

Florida	Fla. Stat. § 943.1718 requires police departments that elect to use body cameras to adopt policies and procedures governing their use. It does not require any agency to equip its officers with body cameras.	Individual departments are required to establish policies and procedures that address, among other things, use of body cameras, the right of an officer to view footage before making a statement and general guidelines for the proper storage, retention and release of audio and video recordings from body cameras.	Law enforcement agencies are to retain body camera recordings for at least 90 days (Fla. Stat § 119.071(2)(l)(5)).
Georgia	GA Code § 50-18-96 provides retention requirements and exceptions. Body cameras are not required in Georgia.	None	Footage to be retained for at least 180 days, and generally for at least 30 months if the recording is part of a criminal investigation, shows a vehicular accident, shows the detainment or arrest of an individual, or shows use of force by an officer (GA Code § 50-18-96).
Hawaii	Several bills have been proposed and defeated, but policies on collection and retention of videos have been implemented across the state at the municipal level.	None	None

Idaho	Idaho Code § 31-871 covers, among other things, requirements for retention of digital records created by a law enforcement agency in the performance of its duties that consist of a recording of visual or audible components or both.	None	Requires all video and audio records created by law enforcement to be retained for 200 days if the record has "evidentiary value" and for 60 days if the record has no evidentiary value. A recording has evidentiary value if it depicts the use of force by a government agent, an arrest or events leading up to an arrest, the commission of a crime, an event
Illinois	50 Ill. Comp. Stat. 706/10 does not require law enforcement to use body cameras, but requires the Illinois Law Enforcement Training Standards Board to create guidelines for local departments that use body cameras to create written policies regarding their use. The act includes mandatory standards for collection, retention, and FOIA accessibility. Proposed HB 2517 would require that all law enforcement agencies use body cameras. It has been in committee since March 2019.	Cameras must be turned on when the officer is on duty and must be capable of recording for 10 hours or more Cameras may be turned off when: (1) the officer is inside a patrol car with a dashcam, (2) a victim or witness requests the camera be turned off, (3) the officer is interacting with a confidential informant, (4) the officer is engaged in community caretaking functions Dashcams purchased with grant money must be turned on during the officer's entire shift, and have microphones to record the officer outside of the car.	Recordings must be retained for 90 days If the footage is flagged, it must be retained for two years. Footage is flagged when: (1) a complaint has been filed, (2) an officer discharged a firearm, (3) death or great bodily harm occurred, (4) the recording led to detention or arrest, (5) the officer is subject to an investigation, (6) the recording has evidentiary value, (7) the officer requests the video be flagged. Footage from dashcams purchased with grant money must be retained for two years, and be made available upon request to the subject of the recording.

Indiana	Ind. Code 5-14-3-5.1 to -5.3 (2016) regulates public access to and retention of law enforcement recordings. It was reported that some police departments stopped using body cameras after the legislation was enacted, blaming, among other things, the cost and burden of complying with storage, retention and redaction requirements. There is no statewide requirement to use body cameras in Indiana.	None	State-level agencies must retain "unaltered, un-obscured law enforcement" recordings for 280 days. Other public agencies must retain footage for at least 190 days. Footage must be retained for 2 years if someone has requested the recording or a complaint has been filed regarding the law enforcement actions in the video. It must be retained until any civil or criminal proceeding regarding recorded events is complete.
Iowa	No active bills on requiring police body cams, or public access to their footage. In 2017, proposed legislation would have added provisions regarding body camera recordings to Iowa's public records law. H.F. 77 (2017).	None	None

Kansas	Kan. Stat. 45-254 makes body and dashcam footage subject to the state's Open Records Act, but does not require officers to wear cameras or retain footage.	None	None

Kentucky	Ky. Rev. Stat. 61.168 lays out special rules for disclosure of body camera footage (dashboard mounted cameras are specifically excluded from the rules), but generally subjects recordings to the state Open Records Act and delegates policymaking on retention to the Kentucky Department of Libraries and Archives. Pending 2020 HB 219 would make it a class D felony for an officer to interfere with a body camera recording with the intent to obstruct justice. There is no statewide requirement to use body cameras.	None	None

Louisiana	La. Stat. Ann. 44:3 exempts body camera footage from disclosure where the footage is found by the custodian to violate an individual's reasonable expectation of privacy. There is no general statewide mandate regarding use of body cameras.	None	None
Maine	No statute or proposal relevant to body cameras at the state level. There is a pending bill to create a working group to study body cameras (SP 198). The bill currently is in committee.	None	None

Maryland	Md. Code Pub. Safety § 3-511 required the Police Training Commission to create minimum standards for collection, retention, and disclosure of police body camera footage. Per the Body-worn Camera Policy, agencies must issue a written policy prior to implementing a body-worn camera program and it must meet or exceed the minimum standards. Pursuant to HB 739 (2020), a Law Enforcement Body Camera Task Force was created and tasked with issuing recommendations on economical storage and retention of police body camera footage by December 1, 2020. Pending 2020 HB 128 would require Maryland State Police to adopt guidelines and issue body cameras.	created minimum standards for when recordings are mandatory, prohibited, or discretionary, when consent is required for recording, and when a recording may be ended. Generally officers must begin recording at the initiation of a call for service or an encouter with a member of the public that is investigative or enforcement in nature or when any encounter becomes confrontational after the initial contact. Officers must stop recording if a victim, witness or other individual requests it; during routine administrative activities or during non-work related personal activity. Once a recording has started, the office may not stop recording until the encounter has fully concluded; the officer leaves the scene and anticipates no further involvement in the event; or when a victim, witness or other individual wishes to make a statement but refuses to be recorded or requests that the camera be turned off. See Body-worn Camera	Recommendations expected to be released by December 1, 2020.

Massachusetts	Sweeping police reform legislation (S. 2820), including provisions regarding body cameras, has been passed by the Massachusetts house and senate and currently is in conference.	The S 2820 taskforce would adopt regulations for basic statewide standards for training law enforcement officers in the use of body cameras. The taskforce would specify the types of encounters and interactions that must be recorded and what notice, if any, must be given to those being recorded. The taskforce would also determine when a body camera should be activated and when to discontinue recording.	S 2820 would require recordings to be deleted within no less than 180 days but no more than 30 months if the recording is not related to a court proceeding or criminal investigation. Recordings that are related to a court proceeding or criminal investigation would be retained for the same period of time that evidence is retained in the normal course of the court's business for a record related to a court proceeding.
Michigan	Legislation regarding disclosure and retention of body camera recordings was enacted in Michigan in 2017. The law requires law enforcement agencies that use body cameras to develop written policies regarding their use. The Michigan State Police have adopted a policy regarding body camera and in-car video recording systems (available at https://www.michigan.gov/documents/msp/OO_39_Body_Worn_Camera_and_In-Car_Video_Recording_Systems_579030_7.pdf). There is no statewide requirement to use body cameras.	use body cameras to use them for all dispatched or self-initiated police action and in all contact with citizens in performance of official duties, with limited exceptions. Officers are not required to record encounters with undercover officers or confidential informants; during routine duties that traditionally do not require enforcement action (e.g., community service events); when a citizen asks the officer to stop recording (e.g., a witness will not give a recorded statement); or when a situation develops rapidly and the officer is not able to safely turn on the camera. It was reported in June 2020 that	The body camera disclosure and retention law requires that (i) all body camera recordings be retained for not less than 30 days; (ii) body camera recordings that are the subject of an ongoing criminal or internal investigation, or ongoing criminal prosecution or civil action, be retained until the ongoing investigation or legal proceeding is completed; and (iii) body camera recordings relevant to a formal complaint against the officer or agency be retained for not less than 3 years.

Minnesota	Minnesota Statute 13.825 governs public access to body camera usage for departments that use body cameras. There is no statewide requirement to use body cameras. See https://www.mnchiefs.org/body-camera-resources.	None	Recording data that is not related to a criminal investigation must generally be retained for 90 days, unless: (a) the data documents (i) the discharge of a firearm by an officer, or (ii) use of substantial bodily harm by an officer, which in either case the data must be retained for at least one year; (b) a formal complaint is made against an officer related to the incident, in which case the data must be retained for at least one year; or (c) the subject of the data submits a written request, in which case the subject may request that the law enforcement agency retain the data for up to 180 days. A government entity may retain a recording for as long as reasonably necessary, if related to the incident and for possible evidentiary use.

Mississippi	Several bills have been proposed in state legislature but none have passed.	No state-wide body camera legislation has been enacted in Mississippi.	None

Missouri	Proposed HB 2645 would establish a Task Force on Body-Worn Cameras to examine the use of body cameras by law enforcement in the state, and require delivery of a report on the use of body cameras to the Governor and General Assembly by December 31, 2020. The bill is pending before the legislature.	State law does not require police officers to collect body camera videos.	Stat. §610.100), body camera and dashcam recordings are considered closed records until an investigation becomes inactive. A person in the video, their parent/guardian (if person is a minor), their first degree family member (if person is dead or incompetent), their attorney, or their insurer may obtain a unedited copy of a recording that is considered "closed" if: (1) the parties submit a written request or (2) the recording is for the purposes of investigation of any civil claim or defense. Any person may bring a claim in the circuit court having jurisdiction to order disclosure of a closed recording, but the court must consider a lengthy factor test. Any person who requests and receives a recording recorded in a nonpublic location is prohibited from disclosing the recording, including any description of any part of the recording, without noticing each officer whose image or sound is in the recording and allowing them no less than 10 days to file and serve an
Montana	No bills proposed or enacted.	None	None

Nebraska	Any law enforcement agency that uses body cameras must adopt a written policy in conformance with minimum standards set by statute. The statute also required the Nebraska Commission on Law Enforcement and Criminal Justice to publish a model policy, which is available at https://ncc.nebraska.gov/forms. Neb. Rev. Stat. Ann. § 81-1452 - 1454. There is no statewide requirement to use body cameras.	Under relevant portions of the model policy, officers may not use a body camera to knowingly record: (1) encounters with undercover officers or confidential informants (when recording could create a dangerous situation or diminish investigative success); (2) in places where a person would intend to be undressed and have a reasonable expectation of privacy (e.g., locker room), unless the recording is part of an ongoing investigation; or (3) in any court, administrative, or mental health proceedings, or any activity within a courtroom or courthouse, unless part	Per the statute, body camera recordings must be retained for a minimum of 90 days from the date of recording. Recordings involved in a criminal or civil court proceeding must be retained until a final judgment or determination is made. Recordings that are part of a criminal investigation that have not resulted in an arrest or prosecution must be retained until the investigation is closed or suspended. Neb. Rev. Stat. Ann. § 81-1454. Under the model policy, personnel may not alter or erase any body camera recordings without prior written consent from a

Nevada	Law enforcement agencies require uniformed officers who routinely interact with the public to wear body cameras while on duty. Nev. Rev. Stat. Ann. § 289.830.	Under the statute's minimum standard, body cameras must be activated whenever an officer responds to a call for service or at the start of any other enforcement or investigative encounter between a uniformed officer and member of the public. The officer must not deactivate the body camera until the conclusion of the encounter. Officers are prohibited from recording general activities and must "protect the privacy" of persons in a private residence, seeking to anonymously report a crime, or claiming to the be victim of a crime. Nev. Rev. Stat. Ann. § 289.830(1)(a)-(d).	Under the statute's minimum standard, body camera video recordings must be retained for no less than 15 days. Nev. Rev. Stat. Ann. § 289.830(1)(e).

New Hampshire	Any law enforcement agency that uses body cameras must meet the minimum statutory standards set forth in N.H. Rev. Stat. Ann. § 105-D:2. Use of body cameras is not mandatory.	while an officer is in uniform. An officer must activate the body camera and start recording upon arrival on scene of a call for service, when engaged in any law enforcement-related encounter or activity or, if required by local policy, upon activation of lights and siren. Officers must not record: (1) entire duties or patrols, "indiscriminately"; (2) communications with other police personnel, unless such communications are "incidental" to a permissible recording; (3) known undercover officers or confidential informants; (4) intimate searches (e.g., strip search); (5) interviews with a crime victim, unless express consent is obtained prior to recording; (6) interactions with a person seeking to report a crime anonymously, unless given consent; (7) while on the grounds of any school, unless responding to an imminent threat to life or health or a call for service; (8) when on break or otherwise engaged in personal	Body camera recordings must be retained for at least 30 days and at most 180 days, from the date the images were recorded. However, recordings must be retained for at least 3 years if the officer whose BWC made the recording, or a related agent, captures images involving: (1) action by an officer that involves use of deadly force or restraint; (2) discharge of a firearm; (3) death or serious bodily injury; or (4) an encounter about which a complaint has been filed with the police department within 30 days after the encounter. Recordings must also be retained for at least 3 years if it is retained by the law enforcement agency as evidence in a civil case, criminal case, internal investigation, or employee disciplinary investigation. N.H. Rev. Stat. Ann. § 105-D:2.

New Jersey	Legislation that would require all police officers in New Jersey to use body cameras and regulate their use has been passed by both houses of the state legislature as of August 27, 2020. See New Jersey Assembly Bill 4312.	law enforcement officers are authorized to wear body cameras in the state. The body camera must be placed to maximize ability to capture video. The body camera functions must be activated whenever an officer is responding to a call to service or at the initiation of an encounter with a member of public. The body camera must remain activated until the encounter has concluded and the officer has left the scene. If there is an immediate threat to the officer's life or safety, which makes activating the body camera impossible or dangerous, the officer must activate the body camera at the "first reasonable opportunity." The officer must inform the subject that they are being recorded as close to the beginning of the encounter as possible. The officer must ask whether the subject wants the officer to stop recording, and must immediately stop recording based on the response when: (1) entering a private residence without a warrant	Under the proposed legislation, body camera footage must be retained by the law enforcement agency for 6 months from the date it was recorded. However, body camera recordings must be retained for at least 3 years if the recording contains use of force, events preceding and including an arrest for a crime or attempted crime, or an encounter about which a complaint has been filed by the subject of the recording. Body camera recordings must also be retained for at least 3 years if a longer retention period is requested by: (1) an officer whose body camera recorded the footage and the officer reasonably asserts that it has evidentiary value; (2) an officer who is the subject of the video reasonable asserts that it has evidentiary value; (3) any member of the public who is the subject of the recording; (4) any parent/guardian of a minor who is the subject of the recording; or (5) a deceased subject's next of kin or designee.

New Mexico	In July 2020, police reform legislation was enacted that requires police officers to wear body cameras. Each law enforcement agency must adopt a policy governing body cameras that must meet minimum standards under the statute. See N.M.S.A. 1978 § 29-1-18 (effective September 20, 2020).	Law enforcement officers are required to wear and activate body cameras while on duty. Policies must require activation of a camera whenever a police officer is responding to a call for service or at the initiation of any other law enforcement or investigative encounter between a police officer and a member of the public. Policies must prohibit deactivation of the camera before the conclusion of an encounter. Policies must include disciplinary procedures for officers who fail to use cameras, who manipulate footage or prematurely destroy footage.	Any video recorded by a body camera shall be retained by the law enforcement agency for a minimum of 120 days.

New York	S.B. S8493, requiring body camera usage by state police in New York, was passed and has been codified as N.Y. Exec. § 234 (signed June 6, 2020; effective April 1, 2021).	§ 234 creates a New York state police body camera program within the division of state police, which shall provide body cameras to be worn by officers at all times while on patrol. Exempts the following situations from the recording requirement, at the discretion of the officer: (1) sensitive encounters (as described in the section) and (2) request from member of public to turn off the camera (officer not required to turn off).	No length of time specified in § 234. Requires division of state police to preserve recordings, create a secure record of recordings, ensure that officers have sufficient storage capacity on their devices, ensure that officers have access to cameras, and perform upkeep on equipment. Proposed legislation S.B. 8736 (July 13, 2020; currently in committee) would specify that footage preservation should last three years from the date of the recording, and that if the recording is evidence in "any investigation of any nature[,]" it shall be preserved "for longer than three years[.]"

North Carolina	Session Law 2016-88 (N.C. Gen. Stat. Ann. § 132-1.4A) governs public access to body camera footage. Body cameras are not required in North Carolina.	§ 132-1.4A requires agencies that use body cameras to adopt a policy regarding the use of body cameras but does not specify minimum standards that must be met.	§ 132-1.4A provides that any recording subject to the statute shall be retained for at least the period of time required by the applicable records retention and disposition schedule developed by the Department of Natural and Cultural Resources, Division of Archives and Records.

North Dakota	N.D. Cent. Code § 44-04-18.7 governs, in part, public access to body camera footage. Body cameras are not required in North Dakota.	None	None

Ohio	Ohio Stat. § 149.43 governs public access to police body camera footage. Body cameras are not required in Ohio.	HB407 (proposed in the 2015-2016 legislative session; currently in committee) would require each law enforcement agency that uses body cameras to enact a publicly available policy that addresses activities during which operation of the body camera is mandatory, optional, or prohibited, as well as standard procedures for obtaining consent to operate the body camera when entering private residences and exceptions to the consent requirement for circumstances in which obtaining consent would be impracticable.	HB585 (proposed in the 2015-2016 legislative session; currently in committee) would require a local records commission to maintain records from a body camera for a minimum of one year, unless the law enforcement agency in question is subject to a records retention schedule that establishes a longer period of time. HB407 would require each law enforcement agency that uses body cameras to enact a publicly available policy that addresses record retention requirements, including the length of time body camera footage is to be retained and the method of storing that footage. § 149.43 requires a public office to make a copy of its records retention schedule available to the public.

Oklahoma	Oklahoma's public records law has included a separate, highly detailed section governing police body-worn camera and dashcam footage. These records generally are considered public records, subject to certain exceptions. Okla. Stat. tit. 51, § 24a.1 et seq., as amended by HB 1037. Oklahoma law also requires audio and video recordings to be retained for time periods specified in the statute. Okla. Stat. tit. 19, § 517.1	Body cameras are not required, but if a law enforcement agency does collect video, the following categories are subject to public inspection: (1) use of force by officer; (2) pursuits; (3) traffic stops; (4) arrests; (5) investigative detentions; (6) any act that deprives someone of liberty; (7) any act that causes officer to be investigated; (8) recordings "in the public interest"; (9) contextual events before any of the above.	§ 517.1 requires recordings from body cameras to be kept for a minimum of 180 days from the date of the incident. They are to be kept for a minimum of one year if they relate to or directly depict: (1) an officer-involved shooting; (2) use of lethal force; (3) incidents resulting in medical treatment; (4) incidents identified in a written application for preservation of the recording of the incident if the request is received prior to the 180-day preservation period; an (5) incidents identified for presevation by the DA.
Oregon	Oregon's public records law conditionally exempts body camera footage from public disclosure. Or. Rev. Stat. § 192.501(40). While body cameras are not required in Oregon, agencies that use them are required to adopt policies that meet certain minimum standards. Or. Rev. Stat. § 133.741.	recording from commencement of probable cause or reasonable suspicion and the time when the officer begins to make contact with the suspect, until completion of officer's participation in the contact. Notwithstanding this requirement, a law enforcement agency may, in its own policies and procedures, provide for exceptions to the recording	Footage must be retained for at least 180 days but no more than 30 months for recordings unrelated to a court proceeding or ongoing investigation.

Pennsylvania	Body cameras are not mandatory in Pennsylvania. The state has a specific statutory provision governing public access to body and dash camera recordings. 42 Pa. Stat. and Cons. Stat. Ann. § 67A03, § 67A04, § 67A05	67A07 requires a law enforcement agency that makes a recording to establish public written policies for when the devices shall be in operation. Policies created by law enforcement agencies must include a statement that a violation of the policies will subject the violator to disciplinary action. The statute also provides that the PA Commission on Crime and Delinquency is authorized to condition funding or grants related to body cameras on policies compliant with the Commission's recommendations. The PCCD's Policy Recommendations are available at https://www.pccd.pa.gov/criminaljustice/advisory_boards/Documents/BWC%20Policy%20Recommendations%20Commission%20Approved.pdf. The Policy Recommendations require officers to record at the initiation of an encouter that is investigative or enforcement in nature or when any encounter becomes confrontational.	No explicit requirement to preserve. § 67A07 requires a law enforcement agency that makes a recording to establish public written policies for how and for how long recordings shall be preserved. § 67A03 requires preservation of unaltered recording in the event that the recording has been requested no less than the amount of time needed to respond, or the time necessary for pending or allowable judicial review of the request. § 5706 requires the state police to annually establish and publish standards in the Pennsylvania Bulletin for equipment standards for the devices and for secure storage of recordings. Additionally, the Policy Recommendations include provisions governing storage and retention of footage, but do not specify time periods.

Rhode Island	Body cameras are not required in Rhode Island. Proposed H.B. 5926, which would have introduced statewide policy standards for use of body cameras by law enforcement, was introduced but stalled in committee in 2017. The bill would have governed when the camera should be activated by the officer and when its use should be discontinued. It would contain provisions governing retention and access to body camera footage, and would allow victims to obtain access to the footage. In August 2020, it was reported that at least one state representative was working on proposed legislation to require use of body cameras by all	Under Rhode Island law, all motor vehicle stops conducted by police vehicles with dashcams must be recorded barring specific exceptions outlined in the bill. Body cameras are not required in Rhode Island. Proposed H.B. 5926 would limit body camera use to uniformed on duty officers or officers operating marked vehicles, SWAT officers and others engaged in planned actions or uses of force. It did not include a mandate that all such officers use body cameras.	Non-evidentiary recordings are maintained for sixty days, and evidentiary recordings are maintained at least until resolution of the applicable investigation or court proceeding, and thereafter in accordance with retention periods for complaint report files. See https://www.sos.ri.gov/assets/downloads/documents/LG6Police.pdf. Proposed H.B. 5926 would require retention for six months from the date it was recorded, then permanently deleted.Footage would be retained for at least 3 years if it captures any use of force, events leading up to and including an arrest for a felony offense or events that constitute a felony offense, or an

South Carolina	In 2015, South Carolina adopted a statewide police body camera law, which is now codified at S.C. Code Ann. § 23-1-240. The legislation included funding to purchase cameras, and requires state and local law enforcement agencies to develop policies and procedures regarding use of body cameras. The program has not been fully funded yet, and many agencies still are not using cameras. See https://www.postandcourier.com/news/despite-celebrated-2015-law-body-cameras-for-sc-law-enforcement-lack-state-funding/article_0741c19e-9aa8-11ea-ad54-33fb0ac91f15.html.	Requires police to use bodycams, with collection policies set forth in the agency's body camera policies and procedures, which must be approved by the state Law Enforcement Training Council. The law provides that a state or local law enforcement agency is not required to implement the use of body cameras pursuant to this section until the agency has received full funding from the Council. As August 1, 2020, the full-funding for the program still has not been provided, so the program is not yet in place according to news reports.	The Law Enforcement Training Council requires recordings that are non-investigative, non-arrest and not part of any internal investigation to be retained for not less than 14 days. Other recordings must follow applicable rules regarding retention for that type of record.
South Dakota	SB 100, introduced in January 2020, would have created regulations on body camera deactivation, video collection, retention, and investigation. Senators amended the bill, eliminating all of these provisions and creating a task force to investigate the use of body cameras instead. This bill was defeated by the Senate State Affairs Committee.	None - body cameras are not required	None

Tennessee	Three statewide bills have been introduced (HB0413/SB 0824; HB 1475/SB 1321; SB 2941/HB 2936), but they all have been either deferred or have stalled.	Proposed SB 2941/HB 2936 would have required all police officers to wear and activate their body cameras any time they are interacting with the public. If an officer fails to activate or tampers with body-worn or dash camera footage or operation, the bill would create a rebuttable presumption in investigations and legal proceedings that the missing footage would have reflected misconduct by the officer.	None

Texas	In 2015, Texas passed legislation providing grant funding for body cameras, subject to conditions. See Texas Occupations Code, Chapter 1701, Subchapter N. Proposed HB 3757 (stalled in committee since 2019) would remove the requirement that local body cam policies allow a police officer to view the body cam recording of an incident before making a statement.	Requires bodycams, if worn, to be actived only for a "law enforcement purpose"; Requires officers to explain the reason if the camera is de-activated during a call for assistance, but officers may freely de-activate for a "non-confrontational" encounter; local jurisdictions must develop additional policies consistent with legislation. (TX Occupations Code Sec. 1701.657). The Texas Commission on Law Enforcement has published two sample policies (see https://www.tcole.texas.gov/content/body-worn-camera-policies).	Minimum 90 days (TX Occupations Code Sec. 1701.655(b)(2)); if recorded event depicts the use of deadly force or gives rise to criminal or administrative investigation, the recording must be kept until resolution of proceeding. (Sec. 1701.660(a)). A person depicted in such a recording (or their authorized representative) may view the recording if the law enforcement agency determines that this would further a law enforcement purpose. (Sec. 1701.660(a-1)).

Utah	Utah law mandates that all law enforcement agencies using body cameras adopt a written policy with certain minimum requirements. Proposed SB 210 would allow for adverse inference jury instruction against an officer who deactivated their body camera without a documented a reason for doing so, if the defendant shows that the officer acted intentionally or with reckless disregard, and the officer's failure to follow regulations is reasonably likely to affect the outcome of the defendant's trial. Proposed SB 160 would have removed the provision that allowed officers to deactivate their body cameras when speaking to another officer or a supervisor, but the bill did not pass.	Officers must activate body worn cameras prior to any law enforcement encounter, or as soon as is reasonably possible (Utah Code 77-7a-104(4))/ The recording must continue in an uninterrupted manner until after the conclusion of the matter, or until the officer's direct participation in the law enforcement encounter is over (Utah Code 77-7a-104(5); 77-7a-104(8)). An officer can turn their body camera off in the middle of a law enforcement encounter while consulting with a supervisor or another officer, or if the person being recorded requests it (Utah Code 77-7a-104(8)).	Recordings must be retained for an unspecified period "in accordance with applicable federal, state, and local laws." (Utah Code 77-7a-107(1)) A previous proposal, H.B. 386, would have provided further guidance, mandating that general recordings be retained for at least 30 days but not longer than 180 days, but it did not pass.

Vermont	Vermont has passed a staewide body camera law which, among other things, required its Law Enforcement Advisory Board (LEAB) to propose a model state policy. SB 219, signed into law in June 2020, requires police departments to equip all officers with body cameras. (The mandate will be added as Sec. 7. 20 V.S.A. § 1818).	Policy (available at https://vcjtc.vermont.gov/) requires police officers to activate body worn cameras in the following situations: a. All calls for service in which citizen contact is made; b. All traffic stops; c. All citizen transports (excluding ride-alongs); d. All investigatory stops; e. All foot pursuits; f. When arriving at law enforcement events and/or citizen contacts initiated by other Officers; g. Other incidents the officer reasonably believes should be recorded for law enforcement purposes, i.e., any contact with the public that becomes adversarial after initial contact. The Model code states that recordings should include (but are not limited to): a. Arrests of any persons; b. Searches of any kind; c. Seizure of any evidence; d. Requests for consent to search; e. Miranda warnings and response from in custody suspect; f. Statements made by citizens and defendants; g. K-9 searches of vehicles; h. Issuance of written violations. The Model Policy	There is not a state-wide law. However, the LEAB Model Code states, "An agency may delete [body worn camera] recordings only if it has a record retention schedule approved by the State Archivist or the deletion is already authorized by law;" and "If a recording is used in a disciplinary action against an employee, then the recording shall be held for a minimum of three years from the completion of the disciplinary action, or a length of time designated in bargaining contract." Releasing video without the specific authorization of the agency head is prohibited.

Virginia	In June 2020, the legislature passed H 246 (enacted at §9.1-102 and §15.2-1723.1), which requires law enforcement agencies to create public policies for regulating use of body cameras based on the Virginia Department of Criminal Justice Services's Model Policy on Body-Worn Cameras. All policies must go through public review and comment before being enacted. The law does not require local departments to adopt any paticular language from the Model Policy or to establish a policy on specific categories like collection or retention. Body cameras are not required in Virginia.	Justice Services's current Model Policy (written in 2015 and available at https://www.dcjs.virginia.gov/law-enforcement/model-policies-virginia-law-enforcement-agencies) states that officers should activate their body cameras "during each law enforcement-public encounter related to a call for service, law enforcement action, subject stop, traffic stop, and/or police/deputy services provided that such activation does not interfere with officer/deputy safety or the safety of others." Officers should also activate cameras "for tactical activities such as, searches of buildings and vehicles, searches for suspects and missing persons, seizing and processing evidence, and building checks when security alarms are triggered." The Model Policy also states that officers should do their best to make sure the cameras are actually recording the incident instead of non-evidentiary footage like the sky or grass. If the officer failed to collect video, they	Video retention is handled by the Library of Virginia. If a record is deemed to have no evidentiary value, it is deleted after 30 days. If it does have evidentiary value, it will be assigned to another retainment schedule depending on whether the case was resolved and the seriousness of the video content. There is currently a working group that is determining whether this policy should be changed. The working group was extended until October of 2020. (https://www.vaco.org/body-worn-camera-workgroup-to-be-extended/)

Washington	Washington law requires any law enforcement agency using body cameras to establish policies governing their use.	Law enforcement agency policies must include (1) when body cameras are to be activated and deactivated, (2) how law enforcement officers respond to incidents where the subject is unwilling to communicate due to the recording, (3) how law enforcement officers document deactivation decisions, (4) how law enforcement officers inform members of the public of recording, (5) training regarding body cameras, and (6) security of body camera records. (RCW 10.109.010)	Law enforcement agencies must retain recordings for at least 60 days.
West Virginia	None	None	None

Wisconsin	SB 50, passed in February 2020, added a section to the Wisconsin Code on Body Cameras (W.S.A. § 165.87). In 2017, AB 557 was introduced, but failed to pass. It would have created more detailed guidelines for collection of video than SB 50, as well as similar retention mandates.	Wisconsin law requires law enforcement agencies to create and publish online their rules for the use, maintenance and storage of body cameras and resulting data, as well as any limitations on which officers can wear body cameras and which situations/people they can record with body cameras. The statute does not provide any guidelines for activation, deactivation, or possible limitations.	retained for at least 120 days after the date of recording. If the footage recorded any of the following, the footage must be retained until the final disposition of any investigation or case: 1) an encounter that resulted in the death of or physical injurt to an individual; 2) an encounter that resulted in custodial arrest; 3) A search during an authorized temporary questioning pursuant to W.S.A. § 968.25 (when officer believes person or another is at risk of physical injury and conducts a search of that person for weapons); 4) an encounter in which the officer uses force, unless the only force was shooting an injured wild animal. If law enforcement, prosecutors, defendant, a court, or a board of police/fire commissioners decide that the footage has evidentiary value, it can be retained beyond 120 days. Footage used in a civil, criminal, or administrative proceeding cannot be deleted unless a court or hearing examiner determines it is okay to do

Wyoming	None	None	None
New York, NY	Pursuant to Patrol Guide, Procedure No: 212-123, effective as of August 3, 2020, activation of body worn cameras for all uniformed members of the NYC Police Department is mandatory during certain police actions.	Officers must record certain events, including: all uses of force, all arrests and summonses, all interactions with people suspected of criminal activity, all searches of persons and property, any call to a crime in progress, some investigative actions, and any interaction with emotionally disturbed people. Officers may not record certain sensitive encounters, such as speaking with a confidential informant, inverviewing a sex crime victim, or conducting a strip search.	The NYPD will retain all video recordings for 18 months. Video of arrests and other significant incidents will be retained longer.

Los Angeles, CA	The Los Angeles Police Commission approved the Los Angeles Police Department's policy on April 28, 2015, requiring all officers to use body cameras (available at http://lapdonline.org/lapd_manual/volume_3.htm#579.15).	Officers must turn on body cameras when engaging in "investigative or enforcement" activities involving the public (including pulling over drivers, making arrests, engaging in foot pursuits, transporting suspects, and interviewing witnesses and victims)	Los Angeles follows California law

Chicago, IL	Per Special Order S03-14 (effective since April 30, 2018), all sworn members and their immediate supervisors assigned to a Bureau of Patrol district normally assigned to field duties and any other member at the discretion of the district commander will be assigned and utilize a body worn camera.	Recordings of all law enforcement related activities are required to be made. Entire incidents, if possible, should be recorded. Law enforcement related activities include, but are not limited to, the following: investigatory stops, traffis stops, pursuits, arrests, use of force incidents, interrogations, searches, high-risk situations, any adversarial encounter with the public, and any other instance when enforcing the law.	All digitally recorded data created by the body camera will be retained in accordance with the Department's Forms Retention Schedule (CPD-11.717) and the Illinois Officer-Worn Body Camera Act (50 ILCS 706/10). Recordings made on body worn cameras must be retained for a period of 90 days unless any incident captured on the recording has been flagged. Under no circumstance will any recording of a flagged incident be altered or destroyed prior to two years after the recording was flagged.

Dallas, TX	Dallas instituted a body camera policy in 2015 with General Order 332.00.	Officers are instructed under Dallas policy to record all contacts that are conducted within the scope of official law enforcement activity, including (but not limited to): (1) all enforcement stops, (2) arrival when on any call for service, (3) pursuits, both vehicular and non-vehicular, (4) arriving to all crime scenes, (5) during execution of warrant or "knock and talk" operations, (6) during consensual searches, (7) during any planned or anticipated arrest, (8) during the inventorying of seized property, (8) when conducting field sobriety tests, and (9) whenever the officer's training and experience causes him or her to believe the incident needs to be recorded to enhance reports, preserve evidence, and aid in subsequent court testimony.	Recordings will be kept for at least 90 days.

Houston, TX	The Houston Police Department issued General Order 400-28 on March 23, 2016 (updated Aug. 16, 2017) establishing guidelines for the use of body worn cameras.	Officers are required to activate body cameras prior to conducting various activities, including (a) responding to a call for service (b) a traffic or pedestrian stop, or responding to an "on view" incident (c) executing a search or arrest warrant (d) transporting a prisoner or passenger (e) any hostile or contentious interaction. Officers may also record "casual interactions" with members of the public or interactions with confidential sources. Camera must be muted before speaking to a DA or a confidential informant. Officers may turn off their recording devices when responding to traumatic incidents if required to get a statement from a victim. Cameras must be turned off in bathrooms and showers unless the officer is responding to criminal activity.	For Class B misdemeanors and above, footage is retained for 10 years. For Class C misdemeanors and traffic stops it is retained 2 years. All other footage is retained 180 days.

Philadelphia, PA	In April 2015, Philadelphia passed directive 4.21, Body Worn Cameras (https://www.phillypolice.com/assets/directives/D4.21BodyWornCameras-rev1.pdf) governing use of body cameras by Philadelphia police officers.	Authorized body-worn cameras shall be activated when responding to all calls for service and during all law enforcement related encounters and activities involving the general public, including (1) responding to crimes in progress, (2) engaging in vehicular or non-vehicular pursuit, (3) conducting any vehicular or pedestrian investigation, (4) initiating sight arrests or citations, (5) taking statements or information from a victim or witness (6) handling disturbances or crisis-related incidents, (7) handling protests or demonstrations, and (8) whenever confronted by hostile members of the public (9) any situation which the officer believes should be recorded (10) conducting a suspect confrontation (i.e., show-up identification of a suspect) with suspect recorded if reasonable per	The retention period of body camera footage shall be no less than 75 days, unless the digital recording is required for evidentiary purposes or further review. If the video is marked as evidence, the retention period will be the same as required for the appropriate investigative file.

Miami, FL	In April 2016, the Miami-Dade Police Department ("MDPD") established body camera guidelines (https://www.miamidade.gov/police/library/bwc-policy.pdf). Body cameras must be worn by uniformed sergeants and officers during their tour of duty. Certain specialized officers are also required to wear a body camera.	place the body camera in record mode as soon as is practicable when involved in an encounter. The policy requires recording for all traffic stops, citizen contacts related to law enforcement, impaired driver investigations, vehicle/foot pursuits, calls for service, prison/citizen transports, and statements made by suspects, searches, arrest situations, and other situations. Once the BWC is on, the officer must continue to record until the event has concluded. Officers are not required to inform an individual or obtain their consent about the recording. Officers must not record where an individual has a reasonable expectation of privacy and can honor a victim's request to stop recording, unless the recording is related to an arrest or search. Officers can also turn off the body camera for intelligence gathering when the individual will not provide information on video. Officers must record until an event concludes and turn over the body camera to an	Body camera data is property of the MDPD and considered an official public record of the department. Non-evidentiary data must be retained for at least 90 days, or as long as needed for administrative investigations or litigation. Data must be retained in compliance with the retention schedules published by the Department of State, Division of Library and Information Services.

Atlanta, GA	Per APD.SOP.3133, effective May 19, 2020, all sworn employees issued a body worn camera shall use it during the course of regular duty, approved overtime, and any other situations which are deemed necessary by the Atlanta Police Department.	Body cameras must be used to observe, photograph, videotape, or record activities that occur in places where there is a reasonable expectation of privacy if they occur in the presence of the law enforcement officer.	Recorded data shall remain stored on a secured storage network. Minimum retention guidelines require the following years for the listed categories: (1) 5 years for general citizen contact, investigations, arrests, use of force, sUAS videos, investigations, incident report, accidental - training, supervisor request, CEW Firing Log - test, and traffic enforcement; and (2) indefinitely for homicide-sex crimes, serious injury / fatality motor vehicle collisions, restricted, pending review, and ID technician.

Boston, MA	Per the BPD's Body Worn Camera Policy (BPD Rule 405), Boston police officers must wear and activate body worn cameras while performing any patrol function, as determined by the Police Commissioner (available at https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/5db05d41e4661c456ab6b870/1571839297911/SO19-015.pdf).	Officers shall record all contact with civilians in the following occurences: vehicle stops, person stops, dispatched calls for service, initial responses by patrol officers, transport of prisoners, pat frisks and searches of persons incident to arrest, incidents of emergency driving, incidents of pursuit driving, crowd control incidents where officer reasonably believes may result in unlawful activity, any adversarial contact (including use of force). If an officer fails to activate the body worn camera, officer must document the failure in the incident report.	Recordings are kept in a cloud-based storage platform managed by the Video Evidence Unit according to the following schedule: (1) indefinite retention for death investigations, Code 303-lethal / less lethal, sexual assualt / abused person; (2) 7 years for use of force, arrest, and felony-no arrest; (3) 3 years for misdemeanor-no arrest, investigate person or premise; (4) 90 days for significant event - public safety, traffic stop, encounter/fio, sick assist, no report-dispatch/onsite; (5) 30 days for test/taining.

San Francisco, CA	The City began equipping officers with body cameras as early as 2013 and adopted a Body Worn Camera Policy in 2016 (available at https://www.sanfranciscopolice.org/sites/default/files/2018-11/COMMISSION-DGO-10.11-BODYWORNCAMERAS.pdf).	Policy requires activation of body worn cameras during (1) detentions and arrests, (2) consensual encounters with the police, (3) 5150 evaluations, (4) traffic and pedestrian stops, (5) vehicular and non-vehicular pursuits, (6) use of force, (7) service of warrants, (8) searches , (9) transportation of arrestees or detainees, (10) during hostile citizen encounters, (11) other circumstances where recording would be valuable, and (12) only in situations that serve a law enforcement purpose. The policy indicates that cameras should not be activated when encountering (1) sexual assault and child abuse victims, (2) situations that could compromise the identity of confidential informants or undercover operatives, and (3) strip searches, unless the officer can articulate an exigent circumstance requiring deviating from this rule.	The policy requires the Department to maintain all recordings for at least 60 days. The Department was required to retain the footage for at least two years, however, if the recording (1) showed an officer's use of force, (2) led to the detention or arrest of an individual, or (3) was relevant to a formal or informal complaint.

Phoenix, AZ	The Phoenix Police Department initially deployed body cameras in 2013 as part of a U.S. Department of Justice pilot program. Since then, deployment has been very slow and largely nonexistent. Advocates have called on the Department to speed up deployment. A 2017 Body-Worn Video Technology policy is available online (https://www.bwcscorecard.org/static/policies/2017-05%20Phoenix%20BWC%20Policy.pdf) but it is not clear if this policy remains in effect.	Per the 2017 policy, users must wear the body camera anytime they may become involved in any enforcement activity while on duty in patrol or workingoff-duty, extra-duty, or any other uniformed assignment. They must activate the camera before engaging in any enforcement contact. The requirement is not intended to be punitive in those situations where a reasonable justification can be made for non-activation. May interrupt or deactivate recording in specific situations.	Per the 2017 policy, retention by the Police Department is required for at least 190 days following the date of the recording. Retention period may be longer in the event the video is the subject of a litigation hold, a criminal case, or part of other discovery.
Detroit, MI	Following a 2015 pilot program, in May 2016 the Detroit City Council approved a $5.2 million contract designed to issue 1,500 body and dash cameras throughout the department. Detroit has adopted a Body Worn Cameras Policy (available at https://detroitmi.gov/sites/detroitmi.localhost/files/2018-03/BODY%20WORN%20CAMERAS.pdf).	Directive #304.6 (2017) requires all Detroit Police Department members who have citizen interactions in the daily performance of their duty to wear a body camera. Body cameras must be activated prior to initiating, or as soon as is practical after initiating, all contacts with citizens in the performance of the officer's official duties. The camera must remain on until the event is completed.	Directive #304.6 requires all media captured by a body camera to be securely stored and maintained by a the department or a third-party vendor for a period of 90 days, but may be retained for longer for administrative or legal reasons.

Seattle, WA	Under Executive Order 2017-03, the Seattle Police Department has equipped all front-line police officers with body cameras. The Department's Manual has a section on in-car and body-worn video (https://www.seattle.gov/police-manual/title-16---patrol-operations/16090---in-car-and-body-worn-video). The Department maintains a helpful web page with information and resources related to use of body cameras (https://www.seattle.gov/police/about-us/body-worn-video).	during all dispatch calls, before arriving on the scene to ensure that there is enough time to turn on the camera; traffic and Terry stops; on-view infractions and criminal activity; arrests and seizures; searches and inventories of vehicles, persons, or premises; transports (excluding ride-alongs); following or riding in abulances or medic units that are transporting persons involved in an event to a medical facility; vehicle pursuits; questioning victims, suspects, or witnesses. If an officer can't record the beginning of an event, they should start recording as soon as possible. Officers must record the event to its conlcusion (when officer has concluded their involvement in the event AND there is little likelihood that the officer will continue to have contact with persons involved in the event). Unless there is a crime in progress or another situation in which an officer can be lawfully present without a warrant, officers may not record on	RCW 42.56.240 (which lists instances in which the footage is exempt from public inspection) and is not known to have captured a unique or unusual incident that could result in litigation or criminal prosecution will be kept for **60 days** after the recording was made. (Law Enforcement Record Retention Schedule Version 7.2, Section 8.1, LE2016-001 Rev. 1). Body camera footage not governed by RCW 42.56.240 that is not known to capture an unusual incident that would likely result in litigation or criminal prosecution will be retained for 90 days after the recording is made. (Law Enforcement Record Retention Schedule Version 7.2, Section 8.1, LE09-01-09 Rev. 4). Body camera and dashcam footage retained as part of a case must be retained until the case is over and all possible appeals have been exhausted, and then destroyed. (Law Enforcement Record Retention Schedule Version 7.2, Section 8.1, LE09-01-08 Rev. 3).

Minneapolis, MN	All Minneapolis patrol and SWAT officers are equipped with cameras (approximately 600 officers). The Minneapolis Police Department maintains a Body Worn Cameras Policy in its Policy and Procedure Manual (available at https://www.insidempd.com/wp-content/uploads/2017/07/Update-Body-Worn-Camera-Policy.pdf).	call, officers must activate their body cameras when two blocks away from the incident or when they recieve the call, whichever is later. Officers must also activate their body cameras when 1) self-initiating a call; 2) prior to taking any law enforcement action; 3) Prior to making an investigatory contact; 3) When any situation becomes adversarial; 4) Prior to assisting a citizen during in-person encounters (other than basic assistance, like giving directions); 5) when instructed to directed to activate the body camera by a supervisors. Examples of situations that would require body camera activation include: (1) traffic stops, (2) suspicious person and vehicle stops, (3) vehicular responds requiring emergency driving, (4) vehicular pursuits, (5) work-related transports, (6) searches, (7) contact involving actual or anticipated criminal activity, (8) contact involving actual or anticipated physical or verbal confrontation, (9) when	Training, startup checks, petty misdemeanor, non-evidence/general recording, and protected recordings are all nonpublic and retained for one year. Citizen complaints are nonpublic and retained for three years. Videos of arrest/evidence, Use of Force, and Police Discharge of a Firearm are retained for 7 years. Videos that show use of force that resulted in substantial bodily harm and footage that shows police discharge of a firearm are public. Videos of arrest/evidence and other Use of Force videos are nonpublic. Any video classified as a "Significant Event" is nonpublic and retained for a minimum of 7 years. (See 4-223 IV. A. 8. d. of the Minneapolis Police Department Policy & Procedure Manual for more information on what each classification category entails).

San Diego, CA	The San Diego Police Department maintains a procedure regarding body cameras (available at https://www.sandiego.gov/sites/default/files/149.pdf).	circumstances, including during (1) enforcement related contacts, (2) arrests, (3) searches (of prisoners, residential dwellings, and commercial buildings), (4) passenger transport, and (5) suspect interviews. Recording is required during suspect interviews unless the suspect declines to make a statement because of the body camera; if recording, officers must record the entire interview. Recording is discretionary during (1) victim and witness interviews (except for in domestic violence cases, in which the victim interview should be recorded by at least audio), and (2) scene documentation. Recording is prohibited during (1) non-work related activity, (2) during administrative investigations, (3) during line-ups or briefings, (4) during major crime briefings, homicide breifings, or during homicide walk-throughs, (5) during contact with confidential informants, (6) where patient privacy is at issue, and (7) during demonstrations	Department policy requires officer to enter metadata for any recorded event and then upload the video to a website that impounds the data for retention. All recordings related to any criminal proceeding, claim filed, pending litigation, or a personnel complaint, are to be preserved until the matter is resolved and/or in accordance with state law.

FOIA Exemptions	**Related Dashcam FOIA Exemptions**	**Notes**
None specific to body camera recordings. Law enforcement investigative records are generally shielded from public record requests (Al. Code § 12-21-3.1(b)).	None specific to dashcam footage. Law enforcement investigative records are generally shielded from public record requests (Al. Code § 12-21-3.1(b)).	

General FOIA exemptions (Alaska Stat. § 40.25.120).	General FOIA exemptions (Alaska Stat. § 40.25.120).	While not directly on point, the Alaska Supreme Court ruled that disciplinary records of law enforcement officers are confidential personnel records under the State Personnel Act. *Basey v. State of Alaska* , Sup. Ct. No. S-17099 (April 24, 2020). The chief of the Anchorage police department stated in June 2020 that the department supports body camera usage but that their contents would be kept confidential under state law (see https://midnightsunak.com/2020/06/09/apd-chief-we-support-body-cameras-but-investigations-of-officer-conduct-remain-confidential-under-alaska-law/).

General FOIA exemptions	General FOIA exemptions	records, but may be withheld in the interest of privacy, confidentiality or the best interests of the state (Carlson v. Pima County). Arizona Revised Statute § 38-1116 states that statements made by an oficer about his involvement in a use-of-force or accidental physical injury incident may not be the sole basis for discipline against the officer unless he/she reviewed related body-worn camera recording before making the statement. In 2015, SB1300 established a Law Enforcement Officer Body Camera Study Committee (repealed June 30, 2016). When SB1300 was introduced (before amended and passed), it sought to exclude such footage from the definition of a public record. In March 2020, the AZ Mirror surveyed and published a report on Arizona metropolitan police departments' policies on public access to body camera footage (see https://www.azmirror.com/2020/03/20/tempe-blurs-all-police-body-

A record depicting the death of a law enforcement officer is confidential and exempt from disclosure under the Arkansas public records law (Ark. Code An.. § 12-6-701). Records related to "undisclosed investigations by law enforcement agencies of suspected criminal activity" are exempt from Arkansas's public records law (Ark. Code. Ann. § 25-19-105(b)(6)).	Same as previous. Note that these are general exemptions for public records, i.e. not specific to police body camera or dashboard camera footage.	None

Video/audio recordings related to a "critical incident" may be delayed no longer than 45 days unless disclosure would interfere with an active investigation (e.g., endangering safety of a witness or confidential source). If the agency delays, it must provide a written explanation of the specific basis for the determination and the estimated date for disclosure. There is a detailed procedure for further delays in releasing video. "Critical incidents" include incidents in which a firearm is discharged by an officer or in which use of force by an officer results in death or great bodily injury. Cal. Gov't. Code § 6254. Other video/audio (i.e., not related to a critical incident) is subject to California's public records act.	Same as previous.	None

Under SB20-217, all recordings of an incident that led to a complaint aginst the police must be released to the public, unedited, within 21 days after receipt of the complaint. Video recordings involving a death must be provided upon request to a family representative at least 72 hours prior to public release. Additionally, certain footage is redacted/blurred -- e.g., juveniles, mental health crises, etc. in the interest of that person's privacy. If redacting or blurring footage is insufficient to protect the relevant privacy interest, the victim has the option to waive his/her privacy interest and have the footage released to the public.	Same as previous	None

Public Act 19-90 requires that footage depicting an incident be released to the public no later than 96 hours following the recorded incident (if the officer chooses not to review the recording) or no later than 48 hours after the officer reviews the recording -- whichever is earliest. Disallowed recordings under Conn. Gen. Stat. § 29-6d(g)(1) as well as recordings depicting deceased victims, minors, and/or victims of violent crimes are exempt under Connecticut's public records law. In the case of a minor, it can be released with consent. Conn Gen. Stat. § 29-6d(g)(2). More generally, law enforcement records may be withheld if disclosure would reveal identity of an informant, info to be used in related law enforcement action, or for certain crimes (Conn. Gen. Stat. Ann. § 1-210(3)).	Covered by general FOIA exemptions	None

Covered by general FOIA exemptions. Del. Code Ann. Tit. 29 § 10002(1)	Covered by general FOIA exemptions. Del. Code Ann. Tit. 29 § 10002(1)	None

Florida's public records law includes special provisions for body camera footage. Body camera footage that is taken in a private residence, inside a health care or social services facility or in a place that a reasonable person would expect to be private is exempt. Body camera footage must be disclosed to a person recorded by a body camera (or their personal representative), to a person not depicted in the recording if the recording depicts a place where the person lawfully lived at the time of the recording, or purusant to a court order. The statute enumerates factors that the court must consider when deciding whether to release	None specific to dashcam footage. Active criminal investigative information is exempt from record requests (Fla. Stat. § 119.071(2)(c)).	Florida law requires local agencies to include in their body camera policies provisions that permit officers to review footage at their request before writing a report or giving a statement regarding what took place (Fla. Stat. § 943.1718(2)(d)).
Police audio and video recordings made in places with a reasonable expectation of privacy are exempt (GA Code § 50-18-72). Material related to pending police investigations is also exempt.	Same as previous.	Recordings exempt if they would interfere with an investigation/proceeding, endanger someone or breach confidentiality in some way (Ga. Code Ann. § 50-18-70-77).
None	None	None

Covered by general FOIA exemptions	Covered by general FOIA exemptions	None
Body camera recordings are not subject to FOIA unless the request is from the subject of the encounter or their attorney, the footage was flagged due to the filing of a complaint, the discharge of a firearm, use of force, arrest or detention, or resulting death or bodily harm, unless a witness or victim depicted in the video had a reasonable expectation of privacy at the time and does not consent to disclosure. FOIA disclosures must be redacted to remove identification of all who are not an officer, the subject of an encounter, or directly involved in an encounter.	Covered by general FOIA exemptions	None

Recordings may be requested by the subject of the video or their representative, the owner of the premises depicted in the video or the victim of the crime depicted in the video. The agency may deny the request if it would expose a vulnerability to terrorist attack, would pose a threat to public safety, would interfere in an investigation or an individual's right to a fair trial, or would "not serve the public interest." Decisions by agencies can be appealed to state courts. Agencies must redact death or serious injury, nudity, minors under 18, victims and witnesses of	Same as previous	None
Covered by general FOIA exemptions	Covered by general FOIA exemptions	None

All FOIA exemptions for criminal investigation records apply. Criminal investigation records are not available to the public unless a court decides that disclosure (a) is in the public interest, (b) would not interfere with law enforcement action, investigation or prosecution (c) would not compromise an undercover agent or confidential informant (d) would not reveal	Same as previous	None

cannot be released if they would reveal the identity of unknown informants or would interfere with an ongoing investigation or adjudication. For body camera footage, agencies cannot release footage that shows (a) the interior of a private residence where there is a reasonable expectation of privacy without permission of the resident (b) someone at a medical facility for treatment (c) HIPAA-protected information (d) a correctional facility in a way that would compromise security (e) sexuality or nudity (f) a minor child (g) a dead body (h) witnesses, confidential informants or undercover officers (i) a domestic violence shelter or program (j) information protected by FERPA (k) FBI-designated non-public or classified Criminal Justice Informational Services data (l) the institutionalization of a mentally ill person (m) serious injury or death of	Covered by general FOIA exemptions	None

Police can refuse to disclose body camera footage if "found by the custodian to violate an individual's reasonable expectation of privacy." Determinations that the footage should not be disclosed may be challenged by filing a lawsuit. Recordings made while the officer is not acting in the scope of their official duties do not need to be disclosed if it "would violate a reasonable expectation of privacy." Requests for footage must include reasonable detail as to the date, time, location or persons involved. The custodian can deny a request for lack of specificity.	Covered by general FOIA exemptions	See 2019 Body Camera Survey, Louisiana Commission on Law Enforcement and Administration of Criminal Justice, Statistical Analysis Center (March 1, 2020, available at http://lcle.la.gov/programs/uploads/2019%20Body%20Camera%20Survey%20%20House%20Concurrent%20Resolution%20No.%2052.pdf).
Covered by general FOIA exemptions	Covered by general FOIA exemptions	None

None specific to body camera recordings. The Body-worn Camera Policy states that body cam video/audio recordings will be released as required under Maryland's Public Information Act or other governing law.	Covered by general FOIA exemptions	None

The taskforce would recommend and adopt regulations pertaining to handling requests for the release of information recorded by a body camera to the public.	Covered by general FOIA exemptions	None
The law exempts from disclosure body camera recordings that are (i) taken inside private places; (ii) the subject of a civil action in which the requesting party and public body are parties; or (iii) subject to regular FOIA restrictions. Disclosure of body camera recordings is subject to crime victim protections.	Covered by general FOIA exemptions.	None

data as private. Body camera data is considered private or non-public unless: (1) the data documents the discharge of a firearm by an officer in the course of duty; (2) the use of force of an officer results in substantial bodily harm; (3) the subject of the data requests that it be made public, so long as the officer and subject's identities are redacted in certain circumstances; or (4) data that is part of an active or inactive criminal investigation to protect the identity of an undercover officer, victim or alleged victim of a sex crime, informant, witness, 911 caller, juvenile witness, mandated reporter, or deceased person whose body was unlawfully unburied. Law enforcement agencies may redact or withhold access to portions of data that are public if the data is "clearly offensive to common sensibilities." Any person may bring an action in district court to authorize disclosure of private or nonpublic data. The court must consider whether the	Subject to general FOIA exemptions	None

Subject to general FOIA exemptions	Subject to general FOIA exemptions	The Mississippi ACLU has reviewed and summarized policies of different police departments in the state and recently published a report (available at https://www.aclu-ms.org/sites/default/files/field_documents/aclu_bodycam_ex_summary-digital.pdf).

Recordings may be ordered closed or redacted if the safety of the victim, witness, or other individual cannot be reasonably insured or if a criminal investigation is likely to be jeopardized.	Recordings may be ordered closed or redacted if the safety of the victim, witness, or other individual cannot be reasonably insured or if a criminal investigation is likely to be jeopardized.	None
Subject to general FOIA exemptions	Subject to general FOIA exemptions	None

The model policy does not include provisions relating to public access to body camera footage. Neb. Rev. Stat. § 84-712.05(5) provides that records developed or received by law enforcement may be withheld from the public if the record constitutes a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training.	Same as previous.	None

Any record made by a body camera is a public record that may be requested only on a per incident basis. If the record contains confidential information that cannot be redacted, then the record may be available for inspection only at the location where such record is held. Nev. Rev. Stat. Ann. § 289.830(2).	None	None

Body camera recordings are for law enforcement purposes only. Access to body camera data must be authorized by the head of the law enforcement agency. Recordings must not be divulged or used by a law enforcement agency for any commercial or other non-law enforcement purpose. N.H. Rev. Stat. Ann. § 105-D:2.	None	None

Under the proposed legislation, the following body camera records would be exempt from public disclosure: (1) video footage not subject to a 3-year retention period (as described earlier); (2) video footage subject to a 3-year retention period because the subject has filed a complaint about the encounter and requests that the footage not be disclosed to the public; (3) video footage that an officer reasonably asserts has evidentiary value of the officer wore the body camera that recorded the footage or the officer is the subject of such footage; or (4) video footage requested to remain private by the subject, their parent or guardian (if a minor), or next of kin/designee (if deceased).	Covered by general FOIA exemptions. Ganzweig v. Township of Lakewood held that if police require the regular recording of police activities, the videos are subject to the state Open Public Records Act	None

Covered by general FOIA exemptions.	Covered by general FOIA exemptions	None

Covered by general FOIA exemptions NY Public Officers Law §§ 86; 87 Exemption exists if disclosure of the body camera video would interfere with police investigations or judicial proceedings, deprive a person of a right to a fair trial, identify a confidential source or disclose confidential information relating to a criminal investigation, or reveal non-routine criminal investigative techniques or procedures.	Covered by general FOIA exemptions NY Public Officers Law §§ 86; 87 Exemption exists if disclosure of the dashboard camera video would interfere with police investigations or judicial proceedings, deprive a person of a right to a fair trial, identify a confidential source or disclose confidential information relating to a criminal investigation, or reveal non-routine criminal investigative techniques or procedures.	§ 234 provides that the Attorney General may investigate any instances where body cameras fail to record an event pursuant to that section. Proposed legislation, S.B. 8736 (July 13, 2020) would amend this to grant investigatory power instead to the internal affairs department of the division of state police.

By statute, body camera and dash camera footage are not state public records or personnel records. Law enforcement agencies have the discretion to release footage to people who are recorded (and only those portions relevant to the request), and if the agency denies a request to disclose the footage, the recorded individual must bring a claim in court to attempt to obtain the footage. Law enforcement agencies may deny a request on confidentiality, sensitivity, safety, or investigarory / other legal grounds. There is no mechanism for law enforcement to release videos to the general public other than through a court order.	§132-1.4's definition of “recording” includes visual, audio and visual and audio captured by both body-worn cameras and dashboard cameras. Specifically, the statue defines recording as “a visual, audio, or visual and audio recording captured by a body worn camera, a dashboard camera, or any other video or audio recording device operated by or on behalf of a law enforcement agency or law enforcement agency personnel when carrying out law enforcement responsibilities." The same requirements apply to body camera and dash cam recordings.	None

N.D. Cent. Code § 44-04-18.7 (2015) provides a specific exemption (classified as an "exempt record") if footage is "taken in a private place." § 44-04-17.1 The definition of exempt record states that while an exempt record is not required to be open to the public, it may be open in the discretion of the public entity. § 44-04-18.1 exempts records relating to a public entity's internal investigation of a complaint against an entity or employee for misconduct until the investigation is complete, but no longer than 75 calendar days from the date of the complaint. This section could potentially apply to law enforcement body camera footage.	Covered by general FOIA exemptions	No statute specifically provides that body camera footage is a public record, but state statute does designate body camera footage taken in a private place as a record exempt from public records law. § 44-04-18 requires public entities to provide a copy of the public record requested. Permits a public entity to refuse to allow inspection of records or provide copies if "repeated requests for records disrupt other essential functions of the public entity[.]"

and dashboard camera footage are public records subject to Ohio's public records law, subject to limited exceptions. "Restricted portions" of body camera or dashboard camera recordings are not public records. "Restricted portions" is defined as any visual or audio portion of a body-worn camera or dashboard camera recording that shows, communicates, or discloses the following: (1) identity of image of a minor or information leading to the identitfication of a minor who is the primary subject of the recording; (2) death, severe act of violence or serious injury, unless caused by officer; (3) nudity; (4) protected health information; (5) identity of a sex crime victim; (6) information identifying a confidential informant; (7) properietary police tactical information; (8) personal conversations between officers or between officers and public unrelated to law enforcement activity; (9) the interior of a private residence or business unless the	Same as previous.	Following passage of the amendments to Ohio's public records law, the ACLU said that "For states around the country considering rules for police body cameras, they should look to a new Ohio law for how to do it right when it comes to holding police accountable." See https://www.aclu.org/blog/privacy-technology/surveillance-technologies/ohio-bucks-bad-trend-new-police-body-camera-law.

§ 24a.8 provides that body camera recordings that depict the following may be redacted: (1) death or serious injury, unless caused by officer; (2) nudity; (3) minors under the age of 16; (4) detention for mental health or drug treatment purposes; (5) personal information; (6) identity of sex crime or domestic violence victim; (7) confidential (and some other) informants; (8) identity of officer during pending investigation; (9) information that would compromise an ongoing criminal investigation, subject to certain time limits.	Dashcam recordings that depict the following are exempt from disclosure: (1) death or serious injury, unless caused by officer; (2) nudity; (3) minors under the age of 16; (4) detention for mental health or drug treatment purposes; (5) personal information; (6) identity of sex crime or domestic violence victim; (7) confidential (and some other) informants; (8) identity of officer during pending investigation.	None
unless "public interest" requires disclosure. If footage is released, all faces must be obscured. If footage is part of a sealed court record, it may not be disclosed. Requests for disclosure of footage must identify the approximate date and time of the incident and be "reasonably tailored to include that material for which a public interest requires disclosure."	Covered by general FOIA exemptions	The ACLU has published recommendations for Oregon law enforcement body camera policies (https://www.portlandoregon.gov/police/article/713622).

statute specifically governing public access to body camera footage, in lieu of providing access under Pennsylvania's general Right-to-Know law. Under the statute, public access to body camera footage is subject to a number of burdensome and restrictive provisions. For example, § 67A03 requires written request for footage by hand delivery or certified mail with proof of service to the designated open-records officer for the law enforcement agency within 60 days of when the recording was made, and the request must specify with particularity the incident or event that is the subject of the recording, including date, time and location. The request must include a statement describing the requestor's relationship to the incident. § 67A04 provides that if a law enforcement agency determines a recording contains potential evidence in criminal matter, confidential information, or victim information,	Same as previous. Prior to passage of the 2017 statute exempting police audio and video recordings from the state's Right-to-Know Law, the Pennsylvania Supreme Court had granted access to dashcam footage under the Right-to-Know Law.	Media outlets have reported that it has been extremely difficult for requestors to obtain access to footage (see, e.g., https://www.mcall.com/news/watchdog/mc-nws-pennsylvania-police-dash-camera-recordings-not-released-act-22-story.html). Proposed legislation introduced in October 2019 would permit electronic requests for recordings, change the written request requirements to only require "sufficient specificity to identify" the recording, and remove the requirement that a request provide a reason. The proposal would also create a uniform request form and change the agency response period from 30 days to 5 days.

While dashcam recordings are expressly carved out from the scope of the state's access to public records act, there is not a clear statutory mandate regarding body camera footage. Proposed H.B. 5926 would make footage a public record under the public records act (38-2-1) and permit public access to footage upon request, so long as identities of minor children are obscured and details that would violate and individual's privacy are redacted, or consent given by the individual(s) whose information would be revealed. A member of the public who is the subject of a recording or their representative / next of kin may view	Rhode Island law requires dashcam recordings of all traffic stops. By statute, dashcam recordings are not public records under the state's access to public records act. A passenger who is recorded and his/her legal counsel has the right to review the in-car recording at the police station if the passenger became the subject of the police interactions recorded, provided that the viewing does not compromise an active investigation. The law requires the police department to have a policy regarding retention of such recordings, including that they must be retained for at least ten days after final resolution of the investigation or proceeding. The policy must prohibit attempts to disengage, tamper with	None

Blanket exemption for bodycam footage: the only persons who are entitled to view footage are those depicted in video, subject to legal action connected to recorded event, or whose property has been seized or damaged in relation to the recording. An attorney for any of the above may also request and receive the footage. Other disclosure is permitted at the discretion of the South Carolina Law Enforcement Division. Legislation introduced in January 2020 (HB 4695) would amend this section to provide that those who are entitled to request the footage may release it to a third party with no legal restrictions, and that an attorney representing an elegible	Covered by general FOIA exemptions	The South Carolina Law Enforcement Training Council's Body-Worn Camera Guidelines can be found here: https://www.masc.sc/SiteCollectionDocuments/Public%20Safety/BWC_guidelines.pdf.
Covered by general FOIA exemptions	Covered by general FOIA exemptions	None

Proposed SB 2941/HB 2936 would require police body camera video and audio to released to the public, unedited, within 14 days after the incident. § 10-7-504 makes body camera footage confidential and not subject to public inspection when it features a) minors, when taken within a school that serves any grades from kindergarten through grade twelve (K-12); b) The interior of a facility licensed under title 33 or title 68; and c) The interior of a private residence that is not being investigated as a crime scene.	Covered by general FOIA exemptions. SB 2941 would make dashcam footage available to the public within 14 days after the incident.	None

Footage related to criminal or administrative investigation is exempt from public view until close of proceedings (may be released if agency believes release furthers law enforcement purpose); any recording made in "private space" is also exempt (Sec. 1701.661(f)).	Same as previous	Sec. 1701.655 (b)(5) of the Texas Occupations Code requires that officers be allowed to review body camera footage of an incident before making a statement on that incident. The Texas Criminal Justice Coalition has proposed suggestions for improving the state's laws governing body cameras (see https://www.texascjc.org/system/files/publications/Body_Camera_Policy_Recommendations_August_2106.pdf).

determining whether recordings are considered private records under Utah's FOIA law, a governmental entity or court must weigh personal privacy interests and public interests served by disclosure. 63G-2-302**.** The Utah Code also states that body camera video taken inside a home or residence is considered private unless it shows the comission of a crime, records an encounter between an officer and a person that results in death or bodily injury, includes an encounter in which an officer fires a weapon, depicts an encounter that is the subject of a complaint against an officer or a law enforcement agency, or an authorized representative of the person featured in the video has requested the video be reclassified as public. Utah Code 63G-2-305 considers body camera video and audio taken inside a hospital or health care facility to be a private records, subject to the same exceptions listed above, in 63G-2-302.	Covered by general FOIA exemptions	None

All body camera recordings are subject to Vermont's open record request laws. 1 V.S.A. § 317. Notably, the open records laws explicitly state that "records relating to management and direction of a law enforcement agency; records reflecting the initial arrest of a person, including any ticket, citation, or complaint issued for a traffic violation, ... and records reflecting the charge of a person shall be public." This should apply to body camera recordings. Recordings that, if released, would interfere with investigation or enforcement, or would harm someone's right to a fair trial, are not considered public. When Vermont's code contains similar terms to 5 U.S.C. § 552(b)(7) (Freedom of Information Act), the courts should follow the U.S. Courts' interpretations of those terms.	Covered by standard FOIA exemptions	None

Footage related to a criminal investigation is exempt from FOIA requests. The Model Policy states that all other requests should be submitted to the local chief of police/sheriff.	VA's FOIA has an exemption for records used in criminal investigations, including dashcam videos. They are not subject to the Act, but may be disclosed at the discretion of the records custodian.	None

Body camera footage is exempt if disclosing it would violate an individual's right to privacy. (Wash. Rev. Code Ann. Section 42.56.240) Footage that would fall under this exemption includes footage that shows the interior of someone's home, the inside of a hospital or medical facility, a minor, an intimate image, and a dead body. These exemptions do not apply to individuals directly involved in the recorded incident and their attorneys. Requests for body camera footage must specifically identify either (1) the name of a person involved in an incident, (2) the incident or case number, (3) the date, time, and location of the incident, or (4) identify an officer involved in the incident	RCW 46.35, while not specifically referencing police dashcams, provides that recordings made in a motor vehicle may not be accessed by a person other than the vehicle's owner, except pursuant to a court order or discovery request, and even then the information is private and confidential. RCW 9.73.090(1)(c) prohibits public access to dashcam videos if there is actual, pending litigation that arose from to events of the recording.	None
Subject to general FOIA exemptions	Subject to general FOIA exemptions	None

Body camera footage is generally subject to Wisconsin's Open Records Law. Footage that could violate a person's privacy (e.g., of a minor, of a residence where a person generally expects privacy, or a violent crime) is exempt unless the public interest in viewing the footage outweighs public policy privacy concerns. This exemption is not applicable if the subject of the video does not object to the footage being shared. (W.S.A. § 165.87)	The public can request police dashboard camera videos under Wisconsin's Open Records Law.	None

W.S. 16-4-203 says that generally, the custodian of a "peace officer recording" recording may not share police body camera footage. Footage must be shared with law enforcement or public agencies if they need it to conduct official business. The custodian may share footage with the person of interest, if the footage depicts deadly force or serious bodily injury, in response to a complaint against law enforcement personnel, or in the interest of public safety.	Same as for body cameras. The statute W.S. 16-4-203 applies to both body worn cameras and dashcams.	None
New York City follows New York State law	New York City follows New York State law	Officers must tell members of the public that they are being recorded unless the notification would compromise the safety of any person or impede an investigation. Officers do not need a person's permission to start, or to continue, recording.

In 2018, the LA Police Commission voted unanimously to direct the LAPD to release all relevant video of officer-involved shootings from body camera, dashcam, bystander or other cameras within 45 days of the shooting. At the time it was cited as the largest department in the nation to release such video (see https://www.scpr.org/news/2018/03/20/81795/lapd-set-to-release-body-camera-videos-what-will-w/#:~:text=In%20an%20historic%20decision%2C%20the,45%20days%20of%20the%20shooting). The policy also requires the release of footage any time an officer uses force that results	Los Angeles follows California law	None

Chicago follows Illinois law	Chicago follows Illinois law	Program Evaluation Committee which is responsible for: 1. ensuring the program is operating efficiently and within compliance of the law, Department policies, and best practices. 2. evaluating the effectiveness of the program and determine if it should be continued, expanded, modified, or terminated. 3. advising the Superintendent on the recommendations concluded by the committee. Additionally, a 2019 report by the City of Chicago Office of Inspector General (available at https://www.scribd.com/document/420220157/CPD-s-Random-Reviews-of-Body-Worn-Camera-Recordings#download&from_embed) found that CPD watch operations lieutenants failed to complete required reviews of body camera footage, and that the department does not have a standardized process to do so, and provided

Information recorded by body cameras is considered "public information" subject to public records law, including Chapter 552 of the Texas Government Code. As part of policy changes implemented in Dallas in July 2020, footage of police shootings or use of force that result in serious injury or death, and deaths in custody will be released within 72 hours of the injury or death (previously the footage was released on a case-by-case basis). The subject or their next of kin and certain government/police officials (including the involved officer) can review the footage before release.	Dashcam footage is also subject to the 72 hour rule.	None

The Texas Public Information Act broadly exempts from disclosure any information held by a law enforcement agency that deals with the detection, investigation or prosecution of a crime if disclosure would interfere with those functions. According to the Houston Chief of Police, family members of a police-shooting victim can review footage, but only if they agree for the footage to be publicly released.	The Texas Public Information Act broadly exempts from disclosure any information held by a law enforcement agency that deals with the detection, investigation or prosecution of a crime if disclosure would interfere with those functions.	None

Access to recordings by non-law enforcement personnel is goverened by relevant state law (42 Pa. Cons. Stat. Ch 67A).	Access to recordings by non-law enforcement personnel is goverened by relevant state law (42 Pa. Cons. Stat. Ch 67A).	None

Public access is in accordance with Florida law.	Public access is in accordance with Florida law.	None

Atlanta follows Georgia law	Atlanta follows Georgia law	The Live Streaming feature enables remote viewing of an officer's body camera while in recording mode. Through the Evidence.com portal, an authorized supervisor can select a camera displayed on the live map and begin viewing and hearing what the body camera is currently recording. The live streaming feature enables a supervisor, to view, in real time, an officer's situation during a call for service.

Boston follows Massachusetts law.	Boston follows Massachusetts law.	None

Governed by the California Public Records Act. Goal is to release body camera recordings to the greatest extent possible, unless disclosure would (1) endanger the safety of a witness or another person involved in an investigation, (2) jeopardize the successful completion of an investigation, or (3) violate local, state or federal laws including the right to privacy.	Governed by the California Public Records Act	None

Release subject to public records laws and department policies pertaining to release of records (Operations Order 4.6). Citizens not allowed to review video captured by body camera unless their is an investigative reason to do so. During the summer of 2020, the PPD announced that it would begin releasing footage within 10-14 days following an incident.	None	None
Covered by FOIA No recording may be released to any third-party without review by the Law Department to make the necessary legal determination whether a portion or the entire video may be exempt from disclosure.	None at the local level	None

Seattle's Police Policy and the Public Records Act, all body camera footage is available to the public unless a specific legal exemption exists. Legal exemptions include videos that are part of an open and active investigation or if releasing the video creates a serious privacy concern. The police department can't withhold an entire video because part of it falls under an exemption; the department must redact the exempted part of the video and release the video with an explanation for the redactions. If the recording includes victims, witnesses, or complainants, officers must ask these persons if they want their identifying information disclosed. Their preference supersedes a disclosure request made by another person. If the victim, witness, or complainant is incapcitated, the officer may indicate non-disclosure if they think that disclosure would threaten the person's life, safety, or property. (Seattle Police Department Manual,	Subject to state law.	Seattle police policy requires officers to check their body and dash cameras at the start of their shift to ensure that it is working. The policy also requires officers to inform people that they are being recorded (either when the officer arrives or when a new person enters the scene), and to make reasonable efforts to convey this to non-english speakers.

Governed by state law. Data collected via body cameras is considered "nonpublic data" unless the data depicts the discharge of a firearm by and officer in the course of duty, the use of force by an officer that results in substantial bodily harm, or if a subject of the video requests that it be made accessible to the public (13.825 Subdivision 2). If a video is deemed public, data on subjects who do not want their identity released and data on undercover officers must be redacted before the video is released. (13.825 Subdivision 2). If body camera footage is part of an ongoing investigation, it is private (13.82 subdivision 7). Police departments may redact anything that is "clearly offensive to common sensibilities." (13.825, subdivision 2). Additionally, any person who wishes to compel disclosure of body camera data may bring an action in district court. (13.825, subdivision 2).	Follows state law.	In June of 2020, the police department changed its policy so police officers could no longer view body camera footage of an incident before making a statement on it. (Previously, they were allowed to). After a city audit in 2018, Minneapolis changed its body camera laws and created disciplinary guidelines for officers who fail to follow department policy. Under this policy, officers who violate body camera rules would face punishments from a 40 hour suspension to termination.

is bound by SB 1241, passed in 2019, which made certain body camera recordings open to the public: records that depict an officer discharging a firearm or using force that resulted in death or bodily injury; records related to an incident in which a law enforcement or oversight agency found that an officer engaged in sexual assault with a member of the public; and records that relate to an incident in which a law enforcement or oversight agency found that an officer was dishonest in reporting, investigating, or prosecuting a crime, or in the investigation of the misconduct of another officer. (California Penal Code section 832.7(b)). The San Diego Superior Court found this law to be retroactive, meaning it applies to current and all past records. The San Diego police union did not appeal this determination, but other departments across California have. The San Diego Police Departments posts body cam footage and related	The department treats body camera and dash cam footage under the same release policies.	Unlike many other states and cities, San Diego's body camera policy does not include a presumption of privacy in one's residence, so it does not require officers to inform people they are interacting with that they are being recorded. There are a few exceptions to this, and if a person asks if they are being recorded, officers should say yes. San Diego has also had a serious issue of officers sexual assaulting people they transported. Because of this, the body camera policy includes provisions stating that if two officers are transporting a passenger, one must have their body camera on at all times; if one officer is transporting a female passenger, they must have their body camera on the entire time; and if an officer is transporting a female passenger or prisoner, they must notify the radio dispather of their beginning and ending mileage.

Statement on behalf of
the Center for Democracy & Technology
before the
D.C. Council Committee on the Judiciary and Public Safety
Public Hearing on B23-0723, The Rioting Modernization Amendment Act of 2020, B23-0881, The Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 and B23-0882, The Comprehensive Policing and Justice Reform Amendment Act of 2020

Thursday, October 15, 2020
By Mana Azarmi, Policy Counsel

Chairman Allen and members of the Committee, thank you for the opportunity to testify at today's hearing. My name is Mana Azarmi and I am a Policy Counsel with the Center for Democracy & Technology.[1] CDT is a nonprofit advocacy organization headquartered in D.C. dedicated to advancing the rights of the individual in the digital world.

The killings of George Floyd, Breonna Taylor, and so many other Black people at the hands of the police have sparked a long overdue reckoning on how our country approaches policing. This reckoning must include by extension, police use of surveillance technology. Unchecked and secret high-tech policing may exacerbate existing racial inequality in our society, and has the potential to chill the exercise of First Amendment-protected speech, intrude on individual privacy, and cast entire communities under a cloak of suspicion.[2] This summer protestors agitating for racial justice around the nation and here in the District were met not only with physical violence, but also the watchful digital eyes of government.[3] Seeking protection from one form of government abuse should not subject a person to another form of it.

District residents need assurances that we are protected from inappropriate government surveillance when we take to the streets, and that we are protected from discriminatory uses of surveillance technology.[4] This requires scrutinizing the technology the MPD already possesses,

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[1] Center for Democracy & Technology, www.cdt.org/about. Our Freedom, Security & Technology Project is dedicated to protecting individual privacy from unwarranted government intrusion. https://cdt.org/area-of-focus/government-surveillance/.

[2] *See e.g.*, Brian Barret, *The Baltimore PD's Race Bias Extends to High-Tech Spying, Too*, Wired (Aug. 16, 2016), https://www.wired.com/2016/08/baltimore-pds-race-bias-extends-high-tech-spying/; Adam Goldman and Matt Apuzzo, *NYPD Defends Tactics over Mosque Spying; Records Reveal New Details on Muslim Surveillance*, Huffington Post (Feb. 25, 2012), http://www.huffingtonpost.com/2012/02/24/nypd-defends-tactics-over_n_1298997.html; Dave Mass & Jeremy Gillula, *What You Can Learn From Oakland's Raw ALPR Data*, EFF (Jan. 21, 2015), https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data.

[3] Heather Kelly and Rachel Lerman, *America is awash in cameras, a double-edged sword for protesters and police*, WaPo (Jun. 3, 2020), https://www.washingtonpost.com/technology/2020/06/03/cameras-surveillance-police-protesters/; Zolan Kanno-Youngs, *U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance,* N.Y. Times (Jun. 19, 2020), https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html.

[4] For an overview of the types of surveillance technology owned by local police departments please see, COMMUNITY CONTROL OVER POLICE SURVEILLANCE: TECHNOLOGY 101, ACLU (2020), https://www.aclu.org/report/community-control-over-police-surveillance-technology-101.

and the technology it may one day seek to obtain. For example, currently, MPD possesses facial recognition technology,[5] which studies demonstrate is less accurate when used on people with darker skin and women,[6] heightening the risk of misidentification and false arrest for such individuals.[7] Any interaction with police may be lethal—especially for communities of color—and this technology risks increasing such encounters. Facial recognition technology can also be used to identify individuals at sensitive locations that may reveal religious or political preferences, such as at places of worship or social protests. We do not know if MPD's technology has been tested for racial bias, or if it is routinely re-evaluated for biases. We do not know if MPD has adopted robust safeguards to protect individual rights. We are in the dark because MPD did not engage the public or City Council prior to deciding to acquire the technology. If in the future, MPD decides to acquire predictive policing software—which is also riddled with racial bias concerns[8]—there is nothing in place to trigger and inform City Council consideration of such a decision. Worse still, without our knowledge, MPD may already possess it. The stakes are simply too great for privacy, civil rights and civil liberties for this lack of oversight to be acceptable.

CDT is a member of a coalition of organizations called Community Oversight of Surveillance-DC, or COS-DC, which seeks to pass legislation that would require transparency, meaningful public input, and D.C. Council approval for all DC government uses of surveillance technology.[9] Our proposed ordinance would ensure democratic control over police surveillance technology, and would subject its uses to oversight and auditing to ensure that policies are adopted to protect individual rights, and that they are abided by. This process would help breed trust in the community, and it would help the City Council make responsible financial decisions about how to invest in public safety.

Sixteen jurisdictions around the nation have already passed laws like this.[10] DC should be next. To begin the process of considering the COS-DC legislation we ask the Council to hold a public

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[5] Letter from Chief of Police Cathy L. Lanier to Councilmember Charles Allen, (March 2, 2020), https://dccouncil.us/wp-content/uploads/2020/03/JPS-Performance-Oversight-Responses-2020-MPD.pdf (confirming the Metropolitan Police Department's use of facial recognition technology in response to Committee questions).

[6] Patrick Grother, Mei Ngan, Kayee Hanaoka, FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS, NISTIR 8280, NAT'L INST. OF STANDARDS AND TECHNOLOGY (Dec. 2019), *available at* https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf.

[7] Kashmir Hill, *Wrongfully Accused by an Algorithm*, NY Times (Jun. 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html; Kris Holt, *Facial recognition linked to a second wrongful arrest by Detroit police*, Engadget (July 10, 2020), https://www.engadget.com/facial-recognition-false-match-wrongful-arrest-224053761.html.

[8] Rashida Richardson, Jason Schultz & and Kate Crawford, DIRTY DATA, BAD PREDICTIONS: HOW CIVIL RIGHTS VIOLATIONS IMPACT POLICE DATA, PREDICTIVE POLICING SYSTEMS, AND JUSTICE (Feb. 13, 2019). 94 N.Y.U. L. REV. ONLINE 192 (2019), *available at* SSRN: https://ssrn.com/abstract=3333423.

[9] *Community Oversight of Surveillance DC*, https://takectrldc.org/ (last visited Oct. 14, 2020).

[10] *COMMUNITY CONTROL OVER POLICE SURVEILLANCE*, ACLU (last visited Oct. 14, 2020), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance?redirect=feature/community-control-over-police-surveillance. *See e.g.*, OAKLAND, CAL., ORDINANCE NO. 13,489, MUN. CODE CH. 9.64 (Supp. 2019) (adopted May 15, 2018), *available at*

roundtable on the state of surveillance in the District this fall. The public and our representatives in City Council must play a meaningful role in decisions about community policing in the fight for racial justice. Attention must be paid to police surveillance technology as well. CDT and our partners in COS-DC look forward to working with members of the Council in this effort.

http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/standard/oak070617.pdf; SAN FRANCISCO, CAL., ORDINANCE NO. 102-19, STOP SECRET SURVEILLANCE ORDINANCE, ADMINISTRATIVE CODE-ACQUISITION OF SURVEILLANCE TECHNOLOGY (adopted May 14, 2019), *available at* https://sfgov.legistar.com/View.ashx?M=F&ID=7206781&GUID=38D37061-4D87-4A94-9AB3-CB113656159A; NASHVILLE, TENN., ORDINANCE NO. BL2017-646, METRO. CODE § 13.08.08 (Supp. 2019) (adopted June 7, 2017), *available at* https://www.nashville.gov/mc/ordinances/term_2015_2019/bl2017_646.htm.

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October 23, 2020

The Honorable Charles Allen
Chairman, Committee on the Judiciary and Public Safety
District of Columbia Council
John A. Wilson Building, Room 412
1350 Pennsylvania Ave. NW
Washington, D.C. 20004

Dear Chairman Allen and Members of the Committee:

The Reporters Committee for Freedom of the Press appreciates the opportunity to contribute to this conversation and to comment on the bills under discussion: the Rioting Modernization Amendment Act of 2020 (B23-0771); the Internationally Banned Chemical Weapons Prohibition Act of 2020 (B23-0882); and the Comprehensive Policing and Justice Reform Amendment Act of 2020 (B23-882). At the outset, we welcome the Committee's attention to these important issues.

Founded in 1970, the Reporters Committee is an unincorporated nonprofit association dedicated to safeguarding the right to a free and unfettered press. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect essential First Amendment freedoms. This summer, in jurisdictions across the country, the Reporters Committee has defended the right of journalists to do their jobs without fear of retaliation, rubber bullets, or tear gas.[1] Our hope in these comments is to highlight why the reforms under discussion matter to the journalists who have risked their safety covering protests against systemic racism and police brutality—and to note room for further progress.

* * *

The right to document government activity in public has long been protected by the First Amendment. *See, e.g.*, *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st. Cir. 1999). As the U.S. Department of Justice has explained, that freedom is "not only required by the Constitution" but also "consistent with our fundamental notions of liberty." *See* Statement of Interest of the United

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[1] *See, e.g.*, *Reporters Committee Condemns Arrest of Journalist Josie Huang*, Reporters Comm. for Freedom of the Press (Sept. 16, 2020), https://bit.ly/2TcQhbA; *Letter to California Governor Denounces Police Attacks on Journalists*, Reporters Comm. for Freedom of the Press, (July 8, 2020); https://bit.ly/2Tal6Of; *In Letter to New York Officials, Reporters Committee Denounces Police Attacks Journalists*, Reporters Comm. for Freedom of the Press (June 7, 2020), https://bit.ly/35mymFk; *Reporters Committee Letter to Minnesota Officials Denounces Polices Attacks on Journalists*, Reporters Comm. for Freedom of the Press (June 2, 2020), https://bit.ly/3kkbcpa.

States, *Sharp v. Baltimore City Police Dep't*, No. 1-11-cv-02888 (D. Md. Jan. 10, 2012). But the indiscriminate use of riot-control tactics—along with the improper use of criminal charges like unlawful assembly, failure to disperse, or rioting—makes it exceptionally difficult to exercise that right safely.

This summer has seen a staggering number of police attacks on clearly identified journalists. Here in Washington, D.C. alone, among the incidents documented by the Reporters Committee and the Press Freedom Tracker, a reporter for the *Washington Examiner* was pepper sprayed while carrying a bag clearly marked "PRESS;" a journalist with *Voice of America* caught an officer on video firing a projectile at him, even though his press badge was displayed; and an Australian news crew was assaulted by U.S. Park Police, live on air, during the clearing of Lafayette Park. *Cf.* Third Amended Complaint, *Black Lives Matter D.C. v. Trump*, No. 1:20-cv-01469 (D.D.C. Sept. 3, 2020) (raising claims against both federal and local law enforcement officers in connection with the clearing of protesters from the park). All told, nationwide, more than eight hundred press freedom violations have been reported to the Tracker in connection with the protests. *See* U.S. Press Freedom Tracker (last visited Oct. 23, 2020), https://pressfreedomtracker.us/.

These interactions run counter to established First Amendment protections for the press. When law enforcement officials assault someone they know or should know to be journalist, they violate clearly established law and are not entitled to qualified immunity. *See Higginbotham v. New York,* 105 F. Supp. 3d 369, 379-80 (S.D.N.Y. 2015) (collecting cases). Even where the use of force is incidental rather than retaliatory, a crowd-control response that is not tailored to accommodate lawful reporting violates the Constitution. *See Index Newspapers, LLC v. U.S. Marshals Service*, No. 20-35379 (9th Cir. Oct. 9, 2020), slip op. at 32 ("[P]eaceful protesters, journalists, and members of the general public cannot be punished for the violent acts of others."). But after-the-fact litigation cannot put a reporter back on the scene if rubber bullets drive that reporter away.

In that light, we appreciate the Committee's effort to ensure fewer are fired in the first place. Unfortunately, experience has made clear that the language under consideration is ambiguous. The legislation provides that less-lethal or chemical munitions "shall not be used by MPD to disperse a First Amendment assembly." MPD, though, appears to interpret that language to permit their use *during* a protected assembly so long as the officers' specific intent is not to disperse protected activity. *See* Rachel Kurzius, *Would D.C.'s Police Reform Bill Have Stopped MPD from Pepper Spraying Protestors?*, NPR (June 25, 2020), https://n.pr/3jKCk05 (quoting MPD spokesperson Brianna Jordan); *cf.* D.C. Code § 5-331.16(b)(1) (setting out pre-amendment standards for the use of irritants). That is not, as we understand it, what the Council intended, and it is not an approach that provides adequate breathing space for lawful reporting.[2]

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[2] Oregon's experience has been similar: When its Governor signed a bill to limit the use of tear gas to "riots," police in Portland declared a riot the same night—and twenty more over the next two months. *See* Jonathan Levinson, *Portland Protests Frequently Labeled 'Riots,' But Some Say Police Use Laws Arbitrarily*, OPB (Aug. 28, 2020), https://bit.ly/30QMfdd.

We urge the Committee to make clear that the use of crowd-control munitions is prohibited where the *effect* would be to disperse those engaged in protected activity. "The proper response to potential and actual violence is for the government to ensure an adequate police presence . . . and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment activity as a prophylactic measure." *Index Newspapers*, No. 20-35379, slip op. at 32 (quoting *Collins v. Jordan*, 110 F.3d 1363, 1373 (9th Cir. 1996)).

* * *

With similar concerns in mind, we appreciate the Committee's attention to the chilling effect of vague, poorly defined criminal charges like "rioting." Across the country, law enforcement officers have used a range of these overbroad "public order" offenses—such as rioting, failure to disperse, unlawful assembly, or obstruction of a police officer—in a manner that has impaired lawful newsgathering. To cite a prominent example: In Los Angeles County, sheriff's deputies violently arrested KPCC reporter Josie Huang for exercising her right to record their response to a protest. *See Reporters Committee Condemns Arrest of Journalist Josie Huang*, Reporters Comm. for Freedom of the Press (Sept. 16, 2020), https://bit.ly/2TcQhbA. The Sheriff's Department cited Ms. Huang for obstruction, initially claiming that she did not comply with the deputies' instruction to give them space and did not identify herself as press. Video evidence made clear that neither claim was true. *Id.* While the District Attorney declined to pursue charges, the damage had already been done—the deputies prevented Ms. Huang from documenting their enforcement actions related to the protest.

As this Committee is aware, the same dynamic has played out in the District. *See* D.C. Code § 22-1322(a) (defining the offense of rioting). During the J-20 protests in 2017, a number of journalists were arrested and charged with rioting while they were engaged in lawful newsgathering at the scene. Thankfully, none of those charges ended in conviction—a District jury acquitted one defendant, and prosecutors ultimately dismissed the remaining charges. *See, e.g.*, Jaclyn Peiser, *Journalist Charged with Rioting at Inauguration Protest Goes Free*, N.Y. Times (Dec. 21, 2017), https://nyti.ms/3nvG2NA. But the law remains badly in need of reform. The statute relies on concepts as vague as "tumultuous" conduct and "does not include the common law requirement of a common purpose or intent on the part of the rioters." Gabe Rottman, *Memo to D.C.: Protesters Are Not Rioters*, Wash. Post. (Feb. 4, 2018), https://wapo.st/3jGikvL (quoting *United States v. Matthews*, 419 F.2d 1177, 1190 (D.C. Cir. 1969) (Wright, J., dissenting)).

In one key respect, the Rioting Modernization Amendment Act improves on that status quo: It requires that the individuals charged themselves commit or attempt a predicate criminal offense. But the Act is unnecessarily broad in ways that could nevertheless chill reporting from the scene of a demonstration. For instance, acts that "cause[] or would cause . . . damage to, or taking of, property" are predicate offenses. Of course, reporters do not have a First Amendment right to cause property damage; still, charges for trespassing, an offense that arguably involves risks to property, have been

misused to target reporters. *See, e.g.*, Mark Berman, *Washington Post Reporter Charged with Trespassing, Interfering with a Police Officer*, Wash. Post (Aug. 10, 2015), https://wapo.st/2Teu5xN. In some cases, avoiding plausible trespass liability will be almost impossible: In the chaos of a protest, it can be exceptionally difficult to stay within the bounds of a public forum, especially where a police response gives reporters no lawful place to go. In Minneapolis, for instance, a correspondent for the *L.A. Times* was forced to scale a wall to escape a cloud of tear gas after officers backed the press into a corner. *See* Molly Hennessey-Fiske, *Times Reporters Recounts Being Hit With Rubber Bullets by Minnesota Police*, L.A. Times (May 30, 2020), https://lat.ms/3ogwUNl.

Once an individual has arguably committed a predicate offense, the Act's *mens rea* provision is too vague to provide meaningful protection. A defendant can be charged if they are "reckless as to the fact nine or more other people are attempting to commit or committing a criminal offense . . . in the area perceptible to the person." It is not clear what it means to be reckless as to the presence of someone you do not know whose actions you do not and cannot control. *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (noting that the constitutional bar on vague criminal laws is "more stringent" when overly broad laws "threaten[] to inhibit the exercise of constitutionally protected rights," such as "the right of free speech"). This recklessness provision would continue to deviate from the common law, under which "the true gravamen of the offense" of riot was the fact that participants had "*planned*" to commit violent acts together, "for that is what made the entire group, rather than just the actual and direct perpetrators of the violent or tumultuous behavior, guilty of the offense." *Schlamp v. State*, 891 A.2d 327, 332 (Md. 2006) (emphasis added). As a result, the Act still threatens to impose liability for the uncoordinated actions of third parties, which would chill First Amendment activity—including newsgathering and reporting—in the District of Columbia.

We urge the Committee to amend the Act to address these concerns: by making clear that mere trespass is not a predicate offense, and by making clear that individuals can only be convicted if they share a common, unlawful intent with the other assembled individuals who commit criminal acts. Those revisions would ensure that "rioting" does not sweep in reporters engaged in lawful First Amendment activity at a protest.

* * *

The Reporters Committee appreciates the opportunity to present these views. Please do not hesitate to contact Grayson Clary, the Stanton Foundation National Security/Free Press Fellow at the Reporters Committee, at gclary@rcfp.org with any questions.

Sincerely,

Grayson Clary
Stanton Foundation National Security/Free Press Fellow
Reporters Committee for Freedom of the Press

Written Testimony to the Committee on the Judiciary & Public Safety
Charles Allen, Chairperson

Public Hearing on

B23-0723, The "Rioting Modernization Amendment Act of 2020"

B23-0771, The "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 ACT OF 2020"

AND

B23-0882, The "Comprehensive Policing and Justice Reform Amendment Act of 2020"

October 15, 2020

Submitted by Jonathan Blanks, Visiting Fellow in Criminal Justice
Foundation for Research on Equal Opportunity

Thank you for the opportunity to provide testimony on the "Comprehensive Policing and Justice Reform Amendment Act of 2020" and other topics related to the Metropolitan Police Department (MPD). My name is Jonathan Blanks and I'm a criminal justice fellow at the Foundation for Research on Equal Opportunity, a nonpartisan think tank focused on how to provide economic opportunity to those who have least access to it. I am also a Ward 6 resident interested in making D.C. a safer and better place for all who live and visit here. I commend Chairman Allen and the rest of the Council for taking up these important matters.

My testimony reflects my interests and concerns with the laws and policies governing MPD actions and how they affect the communities its officers are sworn to protect and serve.

Background and Expertise

In these fractious political and social times, the most polarizing voices often dominate the public debate. Of course, these voices often represent those individuals most directly affected by both the status quo and proposed changes to it, and it is thus important not to marginalize those individuals who may have the most direct stake in the political outcomes at issue just because some of their ideas seem radical. Nevertheless, when shaping policy, stakeholder buy-in is crucial to policy success and thus I provide these comments to the committee as ideas for how best to move forward for the benefit of both police officers and community members.

My father was a police officer in my hometown of Fort Wayne, Indiana from 1957 to 1978, retiring with the rank of Lieutenant. He was among the first generation of Black police officers during a time of a cultural (rather than legal) Jim Crow discrimination in the state and worked through the social upheaval and change of the 1960s and 70s. My father imparted in me a respect for police, as he was proud of his time with the FWPD, but he was also a realist who did not make excuses for bad officers or bad policy. It is through this lens that I view the state of policing in America today.

I have spent more than a decade learning about policing as a think tank writer and researcher. Among other things, I've collected and read thousands of news articles chronicling local police misconduct as the managing editor of the (now-defunct) website PoliceMisconduct.net. Through that data collection and other observations, I came to believe that the MPD is among the most professional and least corrupt major city police departments in the United States. This view was confirmed by my experiences with MPD's Citizen Engagement Academy and a number of subsequent ride-alongs with patrol officers in 2019. I maintain that opinion to this day.

However, the state of American policing is in terrible shape. The problems that have led to this situation are historic, structural, legal, social, cultural, political and too numerous to get into in this testimony. These problems manifest from causes both inside and outside of departments, which leads to wide variance between not only between jurisdictions but also within policing organizations.

That said, the vast majority of the American people still want police, and I count myself among them. But even granting that eliminating the need for police through community improvement is a goal worth working toward—like the goals of perfecting liberty and ending racism—leaders still must craft policy recognizing that police departments are and will remain public institutions for the foreseeable future. As such, finding solutions that work in the shared interests of the police and the community is the only workable path forward.

Beyond Police-Violence Triage

The three bills before the council impose a number of prohibitions and policy remedies that, if enacted and implemented in good faith, will likely make the District of Columbia safer and make its police department more accountable and transparent. A recurring theme in these bills are means to address and presumably reduce incidents of MPD violence. However, it is important that policymakers take steps to reduce the opportunities for that violence to occur in the first place.

Nonviolent police encounters can harm communities, and particularly African Americans, who bear the brunt of overpolicing in D.C. and across the nation. Unnecessary and antagonistic involuntary police contact has a cost to communities that is often ignored by police leadership in the name of proactive policing. This is hardly exclusive to MPD, but data show MPD deploys some version of these tactics without evidence of tangible benefit to community safety or security. In this respect, the proposed Comprehensive Policing and Justice Reform Amendment Act of 2020 is sadly inadequate.

Gun Recovery Myopia

All available data-driven evidence indicates MPD is not reducing serious crimes like homicide through aggressive policing. Not only are these policies ineffective, they make officers' jobs more difficult by breeding resentment and mistrust from community members, and particularly Black residents. The most glaring way MPD officers are working against both the community and themselves is in their drive to recover illegal firearms.

In numerous media and public events over the years, Chief Peter Newsham has repeatedly emphasized that his officers—both patrol and specialized teams like the Gun Recovery Unit (GRU)—are focused on getting guns off the street. While MPD has undoubtedly been successful in that respect, with thousands of guns recovered during his tenure as chief, recorded homicides have reached at least 160 people the last two years, with 2019's total of 163 the District's highest number of homicides since 2008.

Racially Biased NSID Stops

Thanks to the reporting requirements of the NEAR Act, we now have data from MPD's Narcotics and Special Investigations Division (NSID), the home of the GRU, and it confirms an overwhelming concentration of aggressive policing against Black men. In the report, which tracked NSID officers' stops from August 2019 through January of this year, NSID officers stopped 3,226 Black individuals—almost 90 percent of the people they stopped.[1] 1,672 of that number were searched or frisked[2], and from those, NSID officers recovered 210 firearms[3]. That produces an NSID firearm hit rate per stop of a Black individual to 6.5 percent. But even throwing in drugs and other contraband, and reading these numbers in the most flattering way to NSID[4], more than 80 percent of the Black people they stop looking for drugs and guns have nothing on them.[5]

Of course, NSID makes up a small fraction of MPD and accordingly patrol officers stop far more people. The National Police Foundation report showed that from July 2019 through the end of the year, a similar but not identical timeframe covered in their report, MPD as a whole recorded 62,842 stops.[6] Although data is available on those stops as well, I focus on NSID because "The overarching mission of NSID is to reduce violent crime in D.C. through countering the trafficking of humans, firearms, and substances; interdicting illegal firearms; and, identifying and apprehending large-scale sellers of illicit substances" and the NSID is "responsible for all long-term, complex, and multi-jurisdictional investigations of vice-related complaints (e.g. drugs and prostitution) and conspiracies."[7] In short, because their mission is to reduce violent crime and their actions would presumably be more targeted than an officer on patrol, NSID should have the greatest success identifying and finding the guns and drugs they search for. And yet, a majority of the people these special units stop aren't carrying any contraband, and few of them are carrying the firearms that Chief Newsham says are a priority.

Bad Stops, Blown Cases

But even when MPD officers recover guns, the cases are not the proverbial slam dunk. A 2018 investigative report by WAMU showed that as many as 40 percent of simple gun possession

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[1] "Metropolitan Police Department Narcotics and Specialized Investigations Division Police Foundation Report," prepared by the National Police Foundation (hereafter NSID Report), Fig. 2, p.21, available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf.

[2] *Ibid.*, Table 6, p. 18.

[3] *Ibid.*, Table 7, p. 19.

[4] Because more than one item of contraband could be seized during any given search, the "hit rate" was certainly lower per stopped individual.

[5] I chose to cite hit rate per stop rather than per search because stops themselves can be harmful. Focusing on how productive a search is glosses over how the search came to happen in the first place. But even using that data, almost 2/3 of searches or pat-downs of Black individuals by NSID officers recovered no contraband. (NSID Report, Table 6 at 18.)

[6] *Ibid.*, p. 16, citing Metropolitan Police Department February 2020. Stop Data Report, available at https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Report.pdf.

[7] NSID Report, p. 8.

cases brought in the District are ultimately dismissed in court.[8] Such a high dismissal rate on possession charges strongly suggests illegal searches or other misconduct by police.[9] If the number is anywhere near that high in cases where guns are present, one must consider how many individuals are likely being subjected to illegal police searches but never see the inside of a courtroom. Perhaps the analytical scrutiny produced by the NEAR Act has lessened this problem in the years since, but the numbers produced confirm both ongoing racial disparities of MPD stops and that innocent Black people are overwhelmingly the target of these tactics.

Investigatory Stops Do More Harm than Good

I've previously written about how and why investigatory police stops of both motorists and pedestrians can erode police legitimacy, particularly among Black Americans.[10] Individuals resent being investigated because a police officer is looking for evidence of a crime without the legal justification to suspect any crime has occurred. The U.S. Supreme Court decision in *Whren v. United States* (1996)—which originated here in D.C.—provided the legal blueprint for police officers around the country to subvert racial profiling prohibitions by allowing officers to cite any one of myriad traffic violations to stop a vehicle in order to investigate a crime they have no legal reason to suspect.[11]

Book length studies such as *Pulled Over: How Police Stops Define Race and Citizenship* show that Black individuals are far more likely to be subject to dubious pretextual investigatory traffic stops and are more likely to mistrust and resent the police because of those stops.[12] This resentment stems, in part, from Black drivers correctly believing they were targeted because of their race.[13] Other studies show that resentment is reflected in the social and familial networks of those who have negative experiences with police, reflecting a high social cost to every day policing strategies.[14] By contrast, Black drivers who were subject to traffic safety stops for unambiguous moving violations—such as speeding—did not produce mistrust of police, even when those stops resulted in ticketing or arrest.[15]

It is hardly a wonder that policing tactics that treat innocent Black people like criminals would have negative effects on police-community relations. But that mistrust can have a public-safety

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[8] Patrick Madden, "Collateral Damage: Caught Between Gun Violence And Aggressive Policing," WAMU.org, September 19, 2019, available at https://wamu.org/story/18/09/19/collateral-damage-caught-gun-violence-aggressive-policing/.

[9] A conviction for illegal gun possession does not require a person intending to use the gun for any other crime, possession itself is typically enough for a conviction. The exclusionary rule—that evidence obtained by police illegally should not be used against a defendant—would be the most likely explanation a simple possession case would be dismissed.

[10] Jonathan Blanks, "Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy," *Case Western Reserve Law Review*, Vol. 66, Issue 4, (2016), pp. 931-46, available for download at https://scholarlycommons.law.case.edu/caselrev/vol66/iss4/5/.

[11] *Ibid.* p. 932.

[12] Charles R. Epp, Steven Maynard-Moody, & Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship*, University of Chicago Press (2014) (hereafter *Pulled Over*) Table 7.1, p. 144.

[13] *Ibid.*, p. 6.

[14] See, *e.g.*, Patricia Y. Warren, "Perceptions of Police Disrespect During Vehicle Stops: A Race-Based Analysis," *Crime and Delinquency*, Vol. 57, Issue 3, (2011), pp. 356-76.

[15] *Pulled Over*, pp. 83; 156-7.

impact because individuals who don't trust police officers are going to be less likely to cooperate with them, making serious crime-solving more difficult.[16] This creates a situation in which police become adept at manufacturing low-level arrests in Black neighborhoods but struggle to close major cases like homicides in those same communities.[17]

Ending Rather than Amending Consent Searches

The Comprehensive Policing Bill, if passed in its current form, would require MPD officers to calmly explain to an individual that they have a right to refuse an officer-requested search that is based solely on their consent.[18] This may mitigate some problems that arise when police agencies use consent searches to search for evidence of crimes they lack legal reason to suspect, including deception and coercion,[19] but this is only a marginal improvement on the status quo. Indeed, the request to search is often adding insult to injury if the initial stop is perceived as illegitimately based on race or other bias:

> "[A] deeper truth has been forgotten in the effort to legitimate inquisitive police stops by making the officer more polite. What makes inquisitive police stops so offensive to so many African Americans and Latinos is not that the officers are carrying them out are impolite or even frankly bigoted, but that these stops are common, repeated, routine, and even scripted.This scripted practice treats its targets not as individuals worthy of dignity but as numbers to be processed in search of the small percentage who are carrying contraband or have an outstanding warrant."[20]

Consent searches are means to subvert the Fourth Amendment rights to be secure in one's person and effects, and police have abused the discretion to ask for that consent for decades.

Left to their own devices, police tend to train and act to the bare minimum required by law. As police can use any vehicle-related violation to stop and question a motorist under *Whren*, so too have officers used the Supreme Court ruling in *Terry v. Ohio* (1968) to stop millions of pedestrians to question and frisk them for weapons.[21] The most glaring example is New York City's Stop and Frisk program that stopped approximately four million people—the majority of whom were young Black and Latino men—over its most active ten-year period.

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[16] See, *e.g.*, Jill Leovy, *Ghettoside: A True Story of Murder in America*, Spiegel & Grau, (2015). Among other things, when trying to solve a murder, Los Angeles homicide detectives had to overcome community mistrust driven by actions of other LAPD officers.

[17] See Jill Leovy, "The Underpolicing of Black America," *Wall Street Journal*, January 23, 2015, available at https://www.wsj.com/articles/the-underpolicing-of-black-america-1422049080.

[18] Washington, D.C. Council Bill B23-0882, "Comprehensive Policing and Justice Reform Amendment Act of 2020," Subtitle F. Limitations on Consent Searches, pp. 13-15 available at https://legiscan.com/DC/text/B23-0882/2019.

[19] See discussion of coercion and deception in Blanks "Thin Blue Lies," *supra* at note 10, at Part III, pp. 935-37 and Part V, pp. 940-942.

[20] *Pulled Over*, p. 6.

[21] Although *Terry* acts as the primary legal basis for aggressive pedestrian stops, the Court's opinion warned against the widespread use of field interrogations and frisking individuals because they "cannot help but be a severely exacerbating factor in police-community tensions." *Terry v. Ohio*, 392 U.S. 1 (1968) at 14, note 11, available at https://supreme.justia.com/cases/federal/us/392/1/.

But young Black men in D.C. are likewise familiar with that practice. In a dyspeptic concurrence written because the U.S. Court of Appeals for the D.C. Circuit is bound by Supreme Court precedent, Judge Janice Rogers Brown wrote about the tactics of the Gun Recovery Unit:

> "[GRU actions comprise] a rolling roadblock that sweeps citizens up at random and subjects them to undesired police interactions culminating in the search of their persons and effects. If the Fourth Amendment is intended to offer meaningful protection in the context of *Terry* stops, the voluntary consent exemption cannot be used to engage with members of the public *en masse* and at random to fabricate articulable suspicions for virtually every citizen officers encounter on patrol."[22]

While requiring GRU and other MPD officers to inform a stopped person that they have the right to refuse a search is an improvement, the unsettling and unnecessary involuntary contact with police is an overlooked harm insufficiently addressed in the pending legislation.

Re-task NSID Officers

Given the number of innocent people stopped and searched by NSID, it is fair to question whether their current constitution and *modus operandi* are serving the public interest. Certainly, NSID has taken many illegal guns off the street, but at the cost of the personal security of thousands of innocent District residents and primarily our Black neighbors. Removing illegal guns from the street is a noble idea in principle, but that does not excuse the tactics—both legal and illegal—that MPD has employed to follow through with that task.

Evidence-based policing research suggests that increasing visible police presence in certain "hot-spots" of criminal activity can reduce incidents of crime, often without "displacement" effects where criminal activity simply moves to other less-policed zones.[23] Importantly, such strategic deployment of officers can often be implemented without resorting to the aggressive methods that result in stops, searches, and arrests. Indeed, it is impossible for police presence to deter crime if the officer is processing an arrest at the station house.

Moreover, MPD has not been immune to the officer turnover and attrition that is affecting many police departments nationwide. Different people will have divergent views as to why those shortfalls happen within and between police agencies, but this is a reality police departments have to manage. Perhaps NSID officers should be re-tasked to patrols near hot-spots rather than continue the practices that don't seem to be reducing gun violence in the District.

Conclusion

The status quo of policing needs to change in D.C. and across the country.

D.C. residents want to be safer, and most MPD officers undoubtedly want the same for them. And while illegal guns are unquestionably bad, the aggressive methods MPD has used to recover them have not been effective in reducing violent crime. Evidence shows that the division most

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[22] *U.S. v. Gross*, 784 F.3d. 784, at 791 (Brown J., concurring) (D.C. Circuit 2015).

[23] See, "5 Things You Need to Know About Hot Spots Policing & the Koper Curve Theory," National Police Foundation, available for download at https://www.policefoundation.org/5-things-you-need-to-know-about-hot-spots-policing-the-koper-curve-theory/; see also, generally, Evidence-Based Policing Matrix, created by Center for Evidence Based Crime Policy, George Mason University, that features a number of rigorous studies on which police tactics work and do not. Available at https://cebcp.org/evidence-based-policing/the-matrix/.

responsible for bringing those numbers down harassing innocent people while homicides creep upward.

Beyond being ineffective, such invasive policing by MPD disrupts the lives and personal security of innocent individuals going about their daily lives, and do so in a way that is justifiably perceived as racially biased against Black residents.

Suspicionless, pretextual investigatory stops ensnare far more innocent people than guilty and, though blessed by the Supreme Court, are noxious to the presumption of innocence enshrined in the Constitution.

While the procedural safeguards for consent searches included in the Comprehensive Policing and Justice Reform Amendment Act of 2020 is an improvement compared to the status quo, the MPD should be strongly discouraged from making unnecessary stops in the first place. There is no way to build effective relationships with officers who stop you because they think you look like a criminal.

The NSID and its component units create arrests, but many of those officers could likely be better used in less antagonistic roles that support community well-being and public safety. Their current methods of operation are not in the public interest.

Thank you again for this opportunity to share my thoughts with you.

Jonathan Blanks
Visiting Fellow, Foundation for Research on Equal Opportunity
Ward 6 Resident

Vera INSTITUTE OF JUSTICE

Testimony of Akhi Johnson
Reshaping Prosecution Program Deputy Director
Vera Institute of Justice
Hearing on Comprehensive Policing and Justice Reform Amendment Act of 2020
Committee on Judiciary and Public Safety

Oral testimony provided on October 15

Good morning, my name is Akhi Johnson. I am a DC resident and the Deputy Director of the Vera Institute of Justice's Reshaping Prosecution Program. Vera is a research-based non-profit that works with government stakeholders to end mass incarceration.

Prior to joining Vera, I was an Assistant United States Attorney in the District for five years. Throughout my time as a prosecutor I saw the racial disparities in our system on a daily basis. Regrettably, I didn't critically examine why those disparities existed and I didn't take it upon myself to craft policies that addressed them.

The pursuit of equal justice under the law requires eliminating bias and racial disparities from our system. As part of that pursuit, the Council should consider prohibiting pre-textual stops – those where someone is detained for a minor infraction while police seek evidence of a more serious crime. These stops increase racial bias in the system and do not provide a public safety benefit.

People of color are stopped, questioned, and searched at higher rates even though they are not more likely to possess contraband.[1] A 2019 study of 100 million traffic stops nationwide found that Black and Latinx drivers were more likely to be stopped and searched despite not being more likely to carry contraband.[2] Moreover, beyond racial disparities, the vast majority of stops don't result in the recovery of contraband.[3]

Similar trends exist in the District. Based on MPD data from July to December 2019, they conducted nearly 63,000 stops.[4] Black people accounted for 72% of all stops, even though we make up less than 50% of the population.[5] And, less than 1% percent of all stops resulted in a weapon recovery.[6]

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[1] Charles R. Epp, Steven Maynard-Moody, and Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* (Chicago and London: The University of Chicago Press, 2014), 3.
[2] Emma Pierson, Camelia Simoiu, Jan Overgoor, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops across the United States* (Stanford, CA: Stanford Computational Policy Lab, 2019), https://5harad.com/papers/100M-stops.pdf.
[3] Epp, Maynard-Moody, and Haider-Markel, *Pulled Over*, 2014, 9. See also David Rudovsky and David Harris, "Terry Stops-and-Frisks: The Troubling Use of Common Sense in a World of Empirical Data," *University of Pennsylvania Public Law and Legal Theory Research Paper Series* No. 18-10 (2018), 34-35, https://www.law.upenn.edu/live (of 297,000 frisks conducted in New York in 2012, only 2% resulted in a weapon recovery).
[4] *Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, American Civil Liberties Union – DC, June 16, 2020, 2, https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.
[5] Ibid.
[6] Ibid., 1.

Research has shown that limiting police stops to those for public safety reasons reduces racial disparities. Officers often describe two categories of stops: must stop situations, like a DUI, when there is a serious risk to safety, and situations where there are pretext reasons, like dark window tint, when officers merely *want* to stop someone. When researchers isolated the two categories, they found that "virtually all of the wide racial disparity" could be attributed to pre-textual stops.[7]

Although recent MPD data did not specifically track them, there are indications that pretext stops in DC have significant racial disparities. The closest approximation in current MPD data are stops that did not result in a warning, ticket, or arrest – effectively those where there was no public safety concern. Black people accounted for 86% of those stops.[8]

By condoning pre-textual stops, we sanction officers focusing on "suspicious people" instead of suspicious actions, and allow racial bias to distort our pursuit of equal justice. I will submit written testimony to supplement my remarks that includes proposed legislation to eliminate these stops. Thank you.

Supplemental written testimony

The proposed legislation below addresses pre-textual traffic stops.[9] I focus on traffic stops because other organizations have noted ways to curb pretext pedestrian encounters by, among other things, greater restrictions on consent searches.

The legislation would limit traffic stops to offenses that pose a significant public safety threat. If the legislation is passed, people could no longer be stopped for trivial infractions like dark window tint, object hanging from a rearview mirror, or partially obstructing a license plate. To enforce the prohibition, the legislation adopts a version of the exclusionary rule to prohibit the use of evidence obtained from non-public safety stops.

Section (a) of the legislation attempts to capture conduct that poses a significant safety risk. The section does not include all offenses that could impact safety, especially if the concerning conduct is captured by a more narrowly tailored provision. For instance, section (a) does not list any municipal regulations because the only regulations posing a significant risk to safety (i.e. colliding) are aptly captured by the D.C. code provision for reckless driving – which is included in section (a).

The proposal would also require a judge to find probable cause of the offense given to justify a stop, which safeguards against a public safety reason being used to disguise a pre-textual one. For example, an officer reports conducting a stop to investigate a DUI and recovers evidence of a different crime. Under existing law, the stop is permissible as long as there was reasonable articulable suspicion of any offense – even if not related to the reason given for the stop. This allows stops for any reason, no matter how minor, and provides no check on the subjective basis for the stop.

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[7] Epp, Maynard-Moody, and Haider-Markel, *Pulled Over*, 2014, 72.
[8] *Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, American Civil Liberties Union – DC, June 16, 2020, 1, https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.
[9] The Council can prohibit pre-textual stops even though they are constitutional. Under *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001), a state can impose greater restrictions on police activity than those required by the federal constitution – which sets the minimum protections a state must afford its residents.

Under the proposal, however, a judge would have to find probable cause (a higher standard than reasonable suspicion) of the DUI (the officer provided basis) before admitting the recovered evidence. As such, the judge's finding helps ensure that the stop was actually related to public safety and not a pretext to investigate.

Finally, in deciding whether to prohibit pretext stops, I don't think we should overlook the safety risks that traffic stops pose to police officers. According to research by the Department of Justice, "the most common type of Self-Initiated Activity involved in a fatality was when an officer initiated a traffic stop."[10] To ask officers to continue conducting traffic stops for minor infractions that don't impact public safety is problematic for the reasons noted above, but it also unnecessarily places them in dangerous situations.

Proposed legislation

(a) A law enforcement officer may only conduct a stop or seizure to investigate a violation of Title 50 of the D.C. Code or Title 18 of the DCMR based on the following offenses:

- Failure to restrain a child (§§ 50-1703 – 50-1708);
- Distracted driving (§ 50-1731.03);
- Use of safety belts (§ 50-1802);
- Speeding and reckless driving (§ 50–2201.04);
- Leaving after colliding (§ 50–2201.05c);
- Negligent homicide (§§ 50-2203.01 – 50-2203.03);
- Driving while under the influence of alcohol (§§ 50-2205.01 – 50-2205.03); or
- Impaired operating or driving (§§ 50-2206.01 – 50-2206.59).

(b) A stop or seizure premised on any other violation of Title 50 of the D.C. Code, or any violation of Title 18 of the DCMR is not permissible. Evidence obtained from an impermissible stop or seizure under this section shall not be admissible in any criminal proceeding.

(c) Evidence obtained from a permissible stop or seizure, as defined in subsection (a), shall only be admissible in a criminal proceeding if a judicial officer finds probable cause of the offense provided to justify the stop or seizure.

[10] Nick Bruel and Desiree Luongo, *Making it Safer: A Study of Law Enforcement Fatalities Between 2010 – 2016*, December 2017, 38, https://cops.usdoj.gov/RIC/Publications/cops-w0858-pub.pdf.

Testimony

of

Robert Pittman

Chairman

First District Police Citizens' Advisory Council, Inc.

Before

The Committee on the Judiciary and Public Safety

Charles Allen, Esq.

Chairman

Anita Bonds, Member

Mary Cheh, Esq. Member

Vincent Gray, Member

Phil Mendelson, Esq. Council Chairman

Kenyan McDuffie, Esq. Chairman Pro Tempore

Robert White, Jr., Esq.

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Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020

Monday 15 October, 2020

09:00 AM

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Greetings Chairman Allen, Members of the Judiciary and Public Safety Committee, Bonds, Gray and Cheh. We also send greetings to your fellow Members, Mendelson, McDuffie, Nadeau, Todd, T. White, R. White, Silverman, Pinto and Grosso.

I am Bobby Pittman and today, I submit this testimony **(Part I)** on **Bill B23-0882** ***Comprehensive Policing and Justice Reform Act of 2020*** on behalf of the First District Citizens' Advisory Council, Inc. and the communities we advocate for which includes businesses, tenants, residents and our visitors to the nation's capital. We can unequivocally state that the number one issue when on public space is safety, security, and a sense of not having to worry about being attacked, robbed. People, Black, White, Asian, Latino, African or Indian do not wish to be the victims of burglary, murder or robbery. When planning a trip to a strange city, travelers want to know that risks in the District of Columbia are at a minimum. If you reduce the number of police you increase the risk of public safety. The numbers speak are clear. Not everyone reports incidents of crime to the police for many reasons. There must be those considerations as well. The Council's legislation threatens to increase insurance costs on taxpayers, raise the price of medical coverage, car insurance and miscellaneous expenses that the Council's Budget Office has not computed. These are all increased cost for doing business in the District of Columbia at a time when we are threatened by a pandemic which is not going away soon.

Reimaging Policing is always ongoing and should be as our society grows. We also recognize the issues of ***Justice*** exceeds uniformed police officers. The institution of policing and the cultures that derive from being in a police organization. The Justice system has many moving parts. To truly understand policing is to know that policing is both science and art. Police as a working profession include management that is properly trained in how to manage field operations, community interactions, statistics, performance, forecasting of events, arrests and diversions, juveniles, senior citizens, mental illness contact, discipline versus punishment of employees, trusts from the external and internal customer and so much more.

Your heart must be in policing, not just your mind. We advocate for compassion, empathy and a love of the community you care for and serve when you accept the uniform of the people of the District of Columbia. We expect our police to be responsive and courteous even when they must make an arrest. Sometimes that is not easy. Sometimes some of our officers fail to meet that goal and sometimes the reinforcement of Master Patrol Officers, Sergeants and Lieutenants missed that mark in all neighborhoods. Sometimes command officials override good decision on the ground and that can affect outcomes. We know this and we are working on ways to address these shortcomings without interfering in the daily management of our police. We know that working with the executive team of Chief Newsham we can research and develop modules where our Captain, Inspectors, Commanders and Assistant Chiefs are given the data and tools to ensure that we are not punishing but correcting behavior in all police in

our communities that leads to a wrong way of policing. We believe these types of constructive actions will benefit the District of Columbia.

This is the real world and while any police chief would establish procedures for how an organization should perform it is unrealistic given the current set of tools that are in use by many organizational structures that we would meet these goals without some reform. So yes, I think we all agree that we must examine cultures, bias from police, and community. It's no different for the Council, as none of you know everything, each staff member does or each other and we don't hold you to such standards. The Community bears equal responsibility for how it is policed. Its easy to blame police, however community must be held to bear for what it allows in term of policing and what it allows individuals of the community to accept as its norm.

The Council of the District of Columbia has taken on the challenge of addressing these issues. If the Council chooses to take this action, then the Council must equally accept responsibility to addressing community behavior. We all have a role in society and there are rules that all must abide by and to if society is to remain civil. We can help the Council develop tools to be better. The issue of policing, its effects, the trauma created in the communities is also shared by police personnel. It does not go away because that police officer goes home. I can tell you that all seven CACs have spent countless hours in discussion around the issues that exploded in 2020. I can also tell you; we were not surprised that this day has come. Some of us have been planning for how to respond to events like this for years.

What, I present today is crafted to address what we think the Council should be looking at as it relates to the Metropolitan Police Department. We will be submitting an additional testimony by next week which specifically addresses issues outlined in the legislative bill being discussed today. Its too large of an issue to place everything at your table in one setting. It requires consumption and digestion of voluminous amounts of material. So, let us begin the adventure. Here is what we believe our voters, including the DC Council should consider when approaching the Metropolitan Police Department:

1. In 1968, there was a project that would have combined civilians with police to manage policing. That project did not go well for many reasons. The police along with certain democratic interests wanted it to fail and it did. There is history to the Metropolitan Police at least attempting to reform its practices under then Chief Wilson.

2. The protests of the past 5 months and indeed looking backward to Rodney King and even further to the 1968 riots and all that has happened in between those years, policing has had individuals who have not lived up to what community would expect. However, the vast majority always answered the call in the manner that community needed. We recognize there are many people out in society and in the National Capitol Region who have had traumatic experiences involving police which we believe has created an aggregate of animosity towards DC police rightly or wrongly deserved. We are still filtering that out.
3. **Community Policing** – establish what this really means. Almost every officer has their own definition. Query police managers at every level to ensure they understand the term and its mission. Regularly assess each police district to determine how the goals are met. Community meetings are not community policing. We believe all police departments should have to meet the goal of making constructive contact with those they serve. As a legislative body, as advisory councils, we need and we must collaborate with police management, union officials and policing researchers to determine exactly what metrics we should develop for our state. We should reexamine those metrics yearly or every two years to determine if they are capturing the necessary data that 1.) helps us to truly understand how effective our policing is beyond making arrest, responding to calls for service or traditional crime statistics. 2.) we should implement a tool through OUC (Office of Unified communications) to reverse call the 911 caller to assess how that consumer perceived our police response. We should include in the Body Worn Camera system a tool that allows the officer to rate the condition of the call as the officer saw it. We can use that data district by police district to determine effectiveness of policing, quality assurance of policing and training, understanding of police procedure, direct personal attitudes associated with the officer or officers that responded to the call and overall perception of police. In redacted form this information can be shared with the community and police in roll-call, not to embarrass police managers but to educate community and police on response management as a class and training tool. This will require re-training and there will be resistance internally to such a radical idea. However, my team see this as a part of 21st century policing. 3.) A gentleman called into the Kojo Nnamdi show a few months ago with an idea that there should be an app that allows the user to text directly to police what they think is abuse by police. Kojo pushed back on this idea, however we agree. We think that a National Capital Region Police access application should be developed which allows a user to notify Public Safety Answering Point (PSAP) of activity that the user thinks may not fit any police agency expectation by a police officer. That information and GPS data would be transmitted to the appropriate law enforcement agency for investigation.

It goes further, there would be a public side of this that allows the public to see how many referrals have gone to each agency in our 24 local governments and 3 states. Again, this requires a retooling of thinking because everyone hides data until it comes out in court. Our goal is to avoid court by catching those who may need a review and also looking at our public in ways that we can build confidence in the System to hear a concern, address that concern and bring resolution to the concern that is raised. It is our belief that this will help reduce the level of trauma that is out there. Then and only then, can we then come back to our 24 communities, but specifically in the District of Columbia an ask for trust.

4. **Arrests** – In the 20th century a police officer was often considered productive based on how many arrests that officer was responsible for in a given period. District Inspectors and Deputy Chiefs would refer to the good officers who were out making those arrests. Officers who spent more time befriending the community were less effective. Community Services Officers were even less respected because they were the baby police. Some of that thinking continues in our country and in our city. While I can give answers to how we change, I challenge the Community, including you the Council to help design a metric that takes us beyond just making arrest. What I learned long ago was arrest don't change behavior. Most of us would be terrified to be arrested. So, when you have a community of people who tell you they are not afraid of being arrested it tells you that community has become numb. It tells you that we have to change our strategies to reach that part of the community. It tells you that other government agencies, non-profits and members of the community on the block have to step up. We are our brothers and sister's keeper. What affects your neighbor affects you. I caution however codifying certain statues and prohibiting certain techniques and tools while looking polished and sounding nice may not provide you with the results you seek. We are all charged with addressing violent offenders, who must be dealt with by our police. Those who riot are not protesters and must be addressed by our police. Those who will not allow Council Members to enter the Wilson building and block your path from moving are ultimately addressed by the police. We have national and international responsibilities of our police that include anti-terrorism (including domestic terror threat) response. Our police have US Marshal interaction as deputies and other missions. Our police have duties to the US Secret Service and the President of the United States in protection and movement. You the Council must understand this issue of police officer and the weapons they use is so much bigger than the legislation you are considering and must be reasoned carefully.

5. **<u>The Tale of Two Consumers of Police</u>** – Oftentimes when our citizens and residents are polled regarding their views of the police, we hear from those respondents that are not likely to be arrested. There is the other consumer of police services, those who are in constant conflict, repeated arrest, and situations where contact on the street is not welcomed. We have and know there are generational attitudes toward policing that we must overcome. We must develop a metric for determining how our police interact in these situations. A question, we have long struggled with is how do we ensure that **Officer A** in the Seventh District and **Officer B** in the Second or First District approach the same situation the same way? An argument used is that an encounter using **Officer A** who encounters a citizen who does not receive a police officer as calmly as **Officer B** situation. I reject that notion as citizens advisory councils have expectation and demand that our citizen contacts with police be respectful period. Getting to how we change this requires much more understanding of how police operate and on how citizens respond. You must understand both equally.
6. **<u>Stopped by Police What Now</u>** – No one wants to be detained by police. Can police do a better job of explaining the stop and can those stopped consider their reactions? How do we develop a metric for teaching de-escalation on both sides of the stop?
7. **<u>Policing in Schools</u>** – The elimination of security guards, special police officers and police in schools, parochial, private, charter or public based on the **data (in the District of Columbia-only)**results in far less violence than would occur if police were not present. In our research of SROs (School Resource Officers) we have found:
    - **a.** SRO's are routinely thought of by students as someone they can ask for help with safety from other students.
    - **b.** SRO's interact with school administrators, parents/guardians, and students to assist with resolving students' problems.
    - **c.** SRO's are trained and the Metropolitan Police Department is a member of the National School Resource Officer Association (NSROA). According to NSROA The Centers for Disease Control reports that in 2009, the most recent year for which statistics are available, 5.6% of children nationwide carried a weapon on to school property at least one a day in the 30 days before the survey, 7.7% were threatened or injured with a weapon on school property during the 12 months before the survey,11.1% were in a physical fight on school property during the 12 month period, 19.9%were bullied, 5% did not go to school at least one day in the month before the survey because they felt it was unsafe to be at school or to travel to and from school, 4.5%drank alcohol and 4.6% used pot on school property at least once in the 30 days before the survey, and 22.7% were offered, sold, or were given illegal drugs on school property in the 12 months before the survey.

d. From Child Welfare Reform Law to the School Safety Team - The major experience of public schools in the last quarter-century in America has been about relationships—from isolation to involvement—through interagency reform. The integration of this model of assessing and providing for the needs of students, including their safety, is a version of comprehensive child welfare reform law. When critics of school disciplinary policies attempt to link their criticism to the mere inclusion of an interagency partner it reflects a fundamental misunderstanding of both child welfare law and education law. There-fore, any discussion about reform in school safety law has to take into proper account the model by which communities and institutions share their duties and responsibilities to children, right down to the public school campus and the school resource officer.

e. **Evolution of the Collaborative Model of Child-Welfare Law** Early development of the interagency model focused on child victimization, neglect, and abuse. In 1984, the United States Department of Justice began to encourage coordination of units of state and local government.

f. **Congress** added its voice bypassing The Child Abuse Prevention and Treatment Act, which conditioned federal funding on the effective use by states of multidisciplinary teams and coordinating councils. The focus of collaborative programs on child victimization, abuse and endangerment remains the most compelling feature of child welfare reform law and, understandably, heavily in-fluence school safety programs.

g. **The Triad of SRO Responsibility** Effective SRO programs recognize and utilize the special training and expertise law-enforcement officers possess that is well suited to effectively protect and serve the school community. SROs contribute to the safe-schools team by ensuring a safe and secure campus, educating students about law-related topics, and mentoring students as counselors and role models.

8. Which Students Are Arrested the Most?

Location	Total Student Enrollment	Percentage of Schools With Police	Number of Arrests*	Percentage of Arrests		Number of Referrals	Percentage of Referrals
Washington, D.C.		76,276	69.307%	288	0.378%	364	0.477%
Maryland	882,334	33.404%	1,911	0.217%		3,308	0.375%
Virginia	1,274,850	44.456%	851	0.067%		14,629	1.148%

In MCPS, 460 students were arrested in the past three school years, according to data presented to the school board on Monday. Of those arrests, 382 (83%) were of Black and Hispanic students. Eleven percent of arrests were of white students during the same time period. MCPS' student population is about 27% white, 21% Black and 32% Hispanic, according to MCPS data.

These are the fundamental concerns we have ahead of the supplemental testimony that we hope you will consider. We will submit part II of our testimony in the coming days, which will address more of the pending legislation. We are your partners and a repository of police knowledge. We have existed since the late 1960s and would be delighted to share with you how our police have and continues to evolve.

Thank you for allowing us to share. We look forward to working with you on behalf of all people who are serves by the District of Columbia.

Testimony

of

Robert Pittman

Chairman

First District Police Citizens' Advisory Council, Inc.

Before

The Committee on the Judiciary and Public Safety

Charles Allen, Esq.

Chairman

Anita Bonds, Member

Mary Cheh, Esq. Member

Vincent Gray, Member

Phil Mendelson, Esq. Council Chairman

Kenyan McDuffie, Esq. Chairman Pro Tempore

Robert White, Jr., Esq.

Trayon White

Elissa Silverman

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Brandon Todd

Brooke Pinto

David Grosso, Esq.

Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020

Thursday 15 October, 2020 Part II

09:00 AM

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Greetings Chairman Allen, Members of the Judiciary and Public Safety Committee, Bonds, Gray and Cheh and to your fellow Members, Mendelson, McDuffie, Nadeau, Todd, T. White, R. White, Silverman and Grosso.

I am Bobby Pittman and today, I submit the second part of our testimony on **B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT, B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020", and B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION AMENDMENT ACT OF 2020"**on behalf of the First District Citizens' Advisory Council and the communities we advocate for in the Nation's Capital.

After hearing the testimonies of others (some of whom live in the District but may not be voters and seeing the protest of many who we are certain don't live in the District of Columbia, there are several issues that caught our attention. We heard "defund the police" and we heard "seek justice". We believe its important to place Justice in a separate discussion as we believe that involves the Courts which should have serious oversight and review. That is a discussion we hope to have another day.

Today we wish to focus on the Police. Our view is we can treat the symptoms of the police; effects of traffic stops, shootings, asset forfeiture, warrants etc. that will have traction, however we do not believe that will solve the issues of policing. We believe there are ways to preserve the budget of the police and create a budget for non-police responders to mental health crisis, homeless and non-violent nuisances that the consumer calls the police for in the District of Columbia. We believe that for comparison sake, Washington, DC is not Seattle, Washington, Ferguson, Missouri, Chicago, Illinois or even Prince Georges, Montgomery, Arlington or Fairfax counties. We recognize we have our issues. We note for the record our police STOP a large number of people for many reasons. We recognize also that interactions with children/students does not yield the arrests, many of these other jurisdictions have amassed. We want everyone else to see that as well.

How do we fix our problems as a family? We acknowledge on all sides of the issue that we can all do better. The Police are the face of government for many people, as that initial encounter can have long-lasting, if not permanent effects of individuals and communities. The 1DCAC understands that policing in the 20th and 21st centuries is not looking to prior times and tying policing of certain regions of the fledging nation to acts of capturing runaway slaves or containing Irish and Scottish immigrants. That is too simplistic and narrow view in our opinion. In some places policing was a duty no one wanted. Our police/sheriff/constable origins derive from England and has indeed been used to victimize all demographics of people in this country. Lots of people hate the police regardless of color of skin or class. This is where we are now and how we believe we move forward. Police are community and are family regardless of issues that exist. Organizations such as police advisory councils exist to bridge those gaps between citizens and citizens with police powers.

1. The Cost of Calling 911 with a Police Response

In the late 1980's calling 911 for a medical issue would result in a fire truck and pumper coming to the location with an ambulance to follow. In a committee we analyzed the cost of that response and determined it was too expensive and unnecessary. It was changed to a single engine response and unfortunately, we also closed firehouses.

In the mid 1990's we tried to reduce the number of ambulance runs by creating the *Make The Right Call* campaign. Finally, a program to address issues of certain consumers of that part of the 911 system so that resources are not overtaxed came online.

Now we look at police response. To fully understand what we are spending on police and understand where our real needs are, we should cost out policing. What is the cost of dialing 911 and getting a response? How much does it cost for a police officer to arrive on a scene? What is the cost of writing a report? How much does an arrest cost? How much does an investigation and prosecution costs versus incarceration? How much does it cost to have a police officer in a school and is that cost the same school to school and how do we evaluate the presence and interactions? Can we weight the responses positive and negative and arrive at a core value for police effectiveness? If we can do this based on the number of schools and interactions, we believe we can then begin to have a picture of exactly what portion of police ratio we need, versus social, medical and mental health specialists assigned to schools.

To have a blanket statement repeated by multiple people testifying on a script of what has happened in other jurisdiction is a malpractice of legislating. We need more information about what police do in schools, how police spend their time when they are not answering a radio run. If we apply a value for community interaction, patrolling, writing reports, arrests, and all of the other functions, the picture becomes even clearer.

2. Supervision and Discipline

Maybe frontline supervisors should have more responsibility, than simply writing up officers for an infraction of the rules. Our goal is for responsibility to be shared for what goes wrong within an individual unit (a police station, sector, or division perhaps). Maybe supervisors should be held accountable at every level for performance evaluation and discipline. In other words, if you are a sergeant you have some responsibility for how your platoon behaves and performs. If they do not evaluate well, you don't either. If there are multiple discipline issues, then there has to be something wrong with supervision and management. There must be better incentives to fix these issues that tie supervisors to officers. The same must be for lieutenants on through to assistant chiefs. The goal is to ensure there are enough supervisors in place to respond to active scenes, respond to community inquiries, train and evaluate the actions of officers who are on the streets or in assignments where they come into contact with the public. We believe, if we add a valuation system here, we begin to create more controls and start a management system that is traceable and available in a transparent manner. This is a part of the community building process.

3. Quality Assurance Controls

We have heard the argument for not calling the police. It starts with 911 or in our city's case the Office of Unified Communications. We looked at what some were saying about the police response they received. Some outcomes where less than ideal. We thought how do we change this? Our solution is to change 911. After police close a call, within a 72-hour period, a reverse 911 call is sent to the end user who dialed 911 asking for an evaluation that is no more than 5 questions or points. If the response is less than a certain value, the incident is automatically flagged for follow up by a police supervisor and a OUC supervisor. Each would have to verify that certain data had been received from the end-user before the call could be considered complete. The police officer who had the contact would use a device or BWC to also measure their feelings about the reactions to the caller. The idea here is to develop internal/external tracking tools to identify patterns, behaviors of certain neighborhoods and police officers and their response. The methodology would have to be developed in a manner that near eliminates bias in the application. We believe it is impossible to eliminate bias to level zero because we are human, and all humans have bias. It is however possible to manage bias.

There would also be measurement for those who don't respond to the query. The data from the police officer and from the end user would be compared and analyzed every 90 day period for comparison in a yearly report. We then can develop outcomes and deliverables which the Administration and the community can see. We believe this is the formation of community management of policing. We must let police do their jobs otherwise we will be accused of meddling. We do not think that is helpful.

4. National Capital Region Application 911+ (PLUS)

We suggest developing an app which we call 911+ which could be managed through OUC or the City Lab and eventually jointly with PSAPs (Public Safety Answering Points) in the region and possibly expandable to West Virginia and Delaware since we are all connected. The app would allow through text, email, phone the opportunity to immediately report a police encounter that someone feels should be investigated. Then there would be documented follow-up.

5. Non-Police Agencies

Blaming police for the social ills that exist, we object to this but understand it also. The communities demand that police respond. We can provide documented proof and testimony if necessary, from former police officials who have spent hours attempting to get DPW, DCRA, CFSA, DOH and other agencies simply to show up! I can even tell you when certain officials are/were to be on call through HSEMA for emergencies they do not always answer the call in the middle of the night even though they are paid to perform that task. I suggest we must have dedicated night teams that specifically work nights, weekends, and holidays. They must coordinate with MPD and FEMS and respond where police need a different type assistance. When police are outgunned or in certain situations, they call for SWAT (ERT). This is simply developing a different type of SWAT without guns, but you still need the police.

6. School Resource Officers and Youth Services Division

While I appreciate the Committee's concern about SROs, we suggest that this approach be data driven. SRO's in schools play a vital role. What would be helpful is ensuring that there is law that allows the assigned SRO to a school to have classification to know if a student has special needs or is dealing with specific types of trauma. The SRO must be trained and capable of meeting students who are in distress without arrest. The variations can occur when a teacher or school administrator demands that a student be arrested. I do not believe the Committee has considered the many different calls for students touching students or sexual abuse which happens every day all day in schools. The police must respond to this regardless of social workers, nurse, and psychologist.

SRO's need to have access to a student's IEP or their 504 plan. Why? Because an assigned SRO is handicapped when called by teachers to assist with a child who is having difficulties in the learning space. The Council should inquire into these types of issues to better understand why Police are needed.

We all know that many children are abused in their familial environments. Whether the first responders are people without guns, the people with guns will still have to show up. Consideration should be given to this duplication of responses. The question is how do we capture that data and how do we share that in a cumulative manner that helps CACs and the Council of the District of Columbia understand what goes on in schools? We believe these are solvable problems.

7. Violence Interrupters, Social Workers, Mental Health Specialists and Liability Costs

There is no question that all these services are needed and welcomed by the Metropolitan Police Department and our communities. As you structure these programs and responses without police as backup, what happens if a Violence Interrupter is killed by someone they are responding to save? What happens if a mental health worker is killed while responding to a distress call or if the person, they have responded to kills them? Is the city indemnified from harm? Who will pay the expenses of the victim?

What happens if the person in distress or the people around them attack non-police responders? Is there a provision to charge that adult or juvenile with harming a public safety responder? Who pays the medical bills or psychological treatment that may be incurred?

Will this new group of responders have a right to unionize as issues associated with responding become clearer of the present danger to being in an unsafe environment? How will legislation address what the Executive can do to protect this new group of public safety workers?

What happens if a member of this group refuses to respond to a situation, they deem unsafe? What regulations will come from your existing legislation to address these issues? If while responding to an emergency will these responders without police have emergency lights and sirens? What happens when one is involved in a crash, hurts a pedestrian or a cyclist (the new ones refuse to get out of the way) or they kill someone while responding? The City is liable. What do we do then? Should we cap compensation, should we use other municipal measure to protect taxpayer dollars while being fair to all involved? Where do they park while responding to an emergency? Will they get ticketed? All reasonable questions.

Tuesday, October 20, 2020 in Philadelphia, a **Violence Interrupter** shot and killed a sex worker who attempted to rob him while armed. How is the current legislation prepared to handle a situation like this? What happens if a juvenile of whom law enforcement concludes is acting out because of their home life, attacks one of these workers? Is this legislation prepared to address those issues or charge the juvenile?

What is the direction to the Office of the Attorney General and the US Attorney of filing charges that may result from the response by this new group of First Responders?

8. Masks versus Face Coverings

We caution the Council to look carefully at eliminating the ability of law enforcement to stop, detain or arrest someone with a mask. Face coverings are new to our world (the western hemisphere). Masks are not new and have a history.

We believe language must be inserted in your current bill that allows for prosecution of those who use masks to commit crime. We also believe that face coverings and or masks under the medical definition of a mask should reference using a mask for fear or committing a crime can be prosecuted. We have inserted below our reference to why we think this is possible to legally and fairly legislate:

Anti-Mask Laws

By Robert A. Kahn

Other articles in Categories of Laws and Proposed Laws

Members of the Church of the American Knights of the Ku Klux Klan march around the Madison County Courthouse in Canton, Miss. Klan members argued that if their masks were removed, they would face harassment. Opponents contended that most anti-mask laws violate the equal protection clause because they make exceptions for Halloween masks, masquerade ball masks, and masks worn for medical reasons, but not masks for political acts. (AP Photo/Rogelio Solis, used with permission from The Associated Press)

The earliest laws banning masked demonstrations date back to the antebellum era. In 1845 New York made it illegal to appear "disguised and armed." Most anti-mask laws were passed, however, in response to the Ku Klux Klan, whose members used masks to hide their identities as they terrorized their victims.

Around 15 states have anti-mask laws, as do many counties and municipalities. Most anti-mask laws do not target specific groups explicitly. Instead, they use neutral language, typically banning mask wearing that intimidates others.

Supporters of such laws argue that wearing masks emboldens people to commit crimes and makes those crimes more frightening to the victims. Opponents argue mask laws impair freedom of association. Opponents, in turn, make three arguments.

First, they invoke freedom of association, claiming that mask laws deprive wearers of the anonymity needed to express their views. They rely on NAACP v. Alabama (1958), which held that because its members feared harassment from opponents of civil rights, the NAACP did not have to reveal its membership list unless Alabama could supply a compelling state interest.

Klan members argued that if their masks were removed, they would face harassment. The Klan's unpopularity added fuel to this argument. For example, in American Knights of the Ku Klux Klan v. City of Goshen (N.D. Ind. 1999), a court found that Klan members had indeed suffered harassment, through vandalism and bomb threats, and ultimately invalidated the city's anti-mask law.

The Second Circuit Court of Appeals, in Church of the American Knights of the Ku Klux Klan v. Kerik (2d Cir. 2004), held that harassment of Klan members was irrelevant because the Constitution guarantees only the right to speak, not the conditions under which one speaks. Furthermore, in most cases involving the Klan, courts held that protecting citizens from intimidation was a compelling state interest.

Non-Klan mask wearers generally fared better when making freedom of association claims. In Aryan v. Mackey (N.D. Texas 1978) and Ghafari v. Municipal Court (Ct. App. 1978), political opponents of the shah of Iran successfully argued that they needed masks to avoid reprisals from the shah's security forces.

Anarchists convicted under New York's anti-mask law failed, however, to raise a constitutional claim in People v. Aboaf (Crim. Ct. 2001) because they could not show any harassment beyond famous anarchists having been persecuted in the past.

The earliest laws banning masked demonstrations date back to the antebellum era. In 1845 New York made it illegal to appear "disguised and armed." Some 15 states have anti-mask laws, as do many counties and municipalities. Most anti-mask laws do not target specific groups explicitly. Instead, they use neutral language, typically banning mask wearing that intimidates others. In this photo, members of the Anonymous group wear Guy Fawkes masks in Los Angeles, California. (Image via Vincent Diamante on Flickr, CC BY-SA 2.0)

Some have argued masks constitute symbolic speech. Second, opponents of anti-mask laws argued, largely unsuccessfully, that masks constitute symbolic speech.

In Klan cases, courts held that the masks added little to the expressive content of the rest of the Klan regalia. They also ruled that the state's concerns about safety and avoiding intimidation easily satisfied the substantial state interest test for symbolic speech cases.

Distinguishing between threatening and nonthreatening masks

Third, opponents contended that most anti-mask laws violate the equal protection clause because they make exceptions for Halloween masks, masquerade ball masks, and masks worn for medical reasons, but not masks for political acts.

These arguments convinced the California court in Ghafari but not the Georgia Supreme Court in State v. Miller (S.E. 2d 1990), which defended Georgia's exemptions as distinguishing between threatening and nonthreatening masks.

Overall the general trend has been toward upholding anti-mask laws, at least where mask wearers cannot show direct, specific evidence of harassment.

This article was originally published in 2009. Professor Rob Kahn teaches at St. Thomas University School of Law in Minneapolis, Minnesota. His 2004 book Holocaust Denial and the Law: A Comparative Study (Palgrave 2004) dissertation examines Holocaust denial litigation. He has also written on topics such as cross-burning in the United States, blasphemy regulation and the defamation of religions debate, and use of law to ban statements about the past.

9. DC Law on Mask states

§ 22–3312.03. Wearing hoods or masks.

(a) No person or persons over 16 years of age, while wearing any mask, hood, or device whereby any portion of the face is hidden, concealed, or covered as to conceal the identity of the wearer, shall:

(1) Enter upon, be, or appear upon any lane, walk, alley, street, road highway, or other public way in the District of Columbia;

(2) Enter upon, be, or appear upon or within the public property of the District of Columbia; or

(3) Hold any manner of meeting or demonstration.

(b) The provisions of subsection (a) of this section apply only if the person was wearing the hood, mask, or other device:

(1) With the intent to deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing for all persons within the District of Columbia equal protection of the law;

(2) With the intent, by force or threat of force, to injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;

(3) With the intent to intimidate, threaten, abuse, or harass any other person;

(4) With the intent to cause another person to fear for his or her personal safety, or, where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability; or

(5) While engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification.

(Mar. 10, 1983, D.C. Law 4-203, § 4, 30 DCR 180.)

Prior Codifications

1981 Ed., § 22-3112.3.

Section References

This section is referenced in § 22-3312.04 and § 23-581.

Emergency Legislation

For temporary (90 days) repeal of this section, see § 108(a) of Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (D.C. Act 23-336, July 22, 2020, 67 DCR 9148).

Title: Section 66-3.2 - Face-Coverings

Effective Date

10/07/2020

Section 66-3.2 Face-Coverings

(a) Any person who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or face-covering when in a public place and unable to maintain, or when not maintaining, social distance.

(b) Any paying passenger of a public or private transportation carrier or other for-hire vehicle, who is over age two and able to medically tolerate a face covering, shall wear a mask or face-covering over the nose and mouth during any such trip; any employee of such public or private transportation carrier who is operating such public or private transport, shall likewise wear a mask or face-covering which covers the nose and mouth while there are any paying passengers in such vehicle.

(c) Any employee who is present in the workplace shall be provided and shall wear a mask or face-covering when in direct contact with customers or members of the public, or when unable to maintain social distance. Businesses must provide, at their expense, such face coverings for their employees.

(d) Business operators and building owners, and those authorized on their behalf or otherwise authorized to use the building shall deny admittance to any person who fails to comply with this section and shall require or compel such persons' removal. Provided, however, that this regulation shall be applied in a manner consistent with the federal American with Disabilities

Act, New York State or New York City Human Rights Law, and any other applicable provision of law.

(e) For purposes of this section:

(i) Face-coverings shall include, but are not limited to, cloth masks (e.g. homemade sewn, quick cut, bandana), surgical masks, N-95 respirators, and face shields.

(ii) A person shall be considered as maintaining social distancing when keeping at least six feet distance between themselves and any other persons, other than members of such persons' household.

Statutory Authority

Public Health Law, Sections 201, 206 and 225 & Executive Order 202.14

Volume

VOLUME A-1a (Title 10)

10. Who is Killed in the National Capital Region?

1) At least 109 people died in police encounters in Maryland between 2010-2014.

These deaths were dispersed throughout the state in 17 counties and Baltimore

City. At least 109 people died in police encounters in Maryland between 2010-2014.

These deaths were dispersed throughout the state in 17 counties and Baltimore City. Nearly one-third of those who died were age 25 or younger. The ages of those who died ranged from 15-78; their average age was 35. Five of those who died were women; three of these women were Black. During the same time period, four officers died in civilian encounters. Two of Them died in vehicle pursuits and two were shot. One was shot in a raid and the other was shot when off-duty and working as a security guard.

County Deaths

Allegany 1

Anne Arundel 4

Baltimore City 31

Baltimore County 13

Carroll 2

Cecil 3

Charles 2

Frederick 4

Harford 3

Howard 4

Montgomery 10

Prince George's 21

Queen Anne's 2

Somerset 2

St. Mary's 2

Washington County 1

Wicomico 3

Worcester 1

Total 109

We believe some of the sentiment against DC Police results from experiences in the National Capital Region.

In conclusion we ask the Council of the District of Columbia to slow down the movement on

B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020"

B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION

AMENDMENT ACT OF 2020"AND B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

There are enormous costs associated with many aspects of what the Council is attempting to implement. There are many consequences that have not been explored. The police commission you have established is not balanced and is singularly focused on eliminating police from schools without a clear understanding of what police in DC actually do in schools. The efforts to remove chemical weapons is short sighted and does not consider that these chemicals may actually be needed! We understand that some exposed to these chemicals can have adverse effects. Why not change when, how these chemicals are deployed including proving notification to those who are about to become exposed to those chemicals. We believe that our police would be willing to meet the Council at this point.

We thank you for the opportunity to share our thoughts.

Testimony on Police Reform Bills

By

Brenda Lee Richardson

October 15, 2020

Good morning Councilmember Allen and other distinguished Councilmembers. My name is Brenda Lee Richardson. I am a resident of Ward 8 and a strong supporter of the Metropolitan Police Department. As I reviewed the Police Reform Bills, I am mindful of a few things as we look at this golden opportunity to re-ignite our spirits and re-imagine our future in collaboration with the community, the Metropolitan Police Department and our policymakers.

When it comes to police reform there are two significant partners that play a critical in the implementation process:

- The Community
- Metropolitan Police Department

Together we serve on the frontline as agents of change. PSA 702 has been working closely with the 7th District Police to improve our relationship and looking at better ways to respond to each other. We learned almost 4 years ago that the best way to approach public safety is by:

1. Understanding the culture of the community and the police department. I attended the Community Engagement Academy that gave me a totally different perspective of the police.
2. Acknowledging the trauma and exhaustion that disfavored communities are exposed to on a daily basis and how it adversely impacts our mental well-being.
3. Communicating with each other to ensure that we are clear about our roles and responsibilities. Yes, communities have a role as well – to abide by the law.
4. Responding to community and MPD in a humanizing way is very important. Police reform is unlikely to be effective if arduous efforts are not made to encourage disfavored community to respond when they see or hear something as it relates to crime or violence.
5. We have also been working on improving favorable police visibility with a myriad of projects that we have worked on over the years (i.e. StoryTime

with MPD with young children during the summer months.) This affords both parties to see each other differently and in a positive view.

We cannot legislate effective policies without meaningfully engaging the community and the police department who are ultimately impacted by the decisions of our Councilmembers. It also looks like MPD has no formal role in the DC Police Commission. I find that very interesting.

Your experience is not my experience. When you are exhausted by the daily trauma of living in disfavored communities from my view the police are guardians who keep me safe when no one else will.

Our legislators have an opportunity to bridge the gap between the community and the police. In closing please be mindful there is also great concern about a reduced police force and the depth of greater anxiety that will not only be imposed on under-resourced communities who are on life support but the police force as well. Thank you.

Georgine L Wallace

As I noted in my oral remarks, for the last four years, I've served as the Community Facilitator for Southwest, now Police Service Areas 103 and 105. I coordinate the monthly PSA meeting and educate the community on public safety issues. We also work on enhancing our communication with the entire Southwest Community. Some areas are more receptive than others. In the interest of full disclosure, I am also a 2016 graduate of the Community Engagement Academy.

The Rioting Modernization Act is headed in a good direction but I encourage you to work with not only MPD but the USAO to clarify it. By making rioting a secondary charge, you may be unwittingly protecting those demonstrators who damage property and threaten the livelihoods of businesses. The additional, oddly specific, provision of nine or more people acting in concert impedes the ability to charge those who violate it. The Chicago Seven are proof that fewer than 9 people can start a riot. Charging individuals will be difficult. I encourage you take a second look and tweak this bill to ensure the protection of peaceful demonstrators and provide law enforcement with the ability to charge those who violate our laws and our trust.

The use of chemical irritants are prohibited by two of the bills. Looking at section 102 5-331.16, "a commanding officer at the scene" makes the decision to deploy canisters. Rather than prohibit its use completely, move the authority to deploy tear gas canisters up the chain of command to someone not as engaged- a cooler head. Then evaluate the policy change in a year. Completely abolishing the use of tear gas severely limits non- lethal options for officers when a group refuses to disburse and turns aggressive. The use of tear gas should not be used as readily. However, MPD should be provided with a mechanism to defend the city and themselves when a crowd is non-responsive. I saw many friends hurt this summer. In fact the officer with the serious leg injury mentioned in the Chief's video was one of our best from the First District.

Line 183 in the Comprehensive Policing and Justice Reform Act prevents an officer's ability to view BWC footage when making their initial report. Changing the ability to review the BWC for minor details may result in less accurate reports. If not edited at a later date, criminal defense attorneys could use missing details to exonerate a client on a technicality. Plus, officers may be reprimanded or accused of lying if they omit anything. I was in exchanges of gunfire as a teenager and I know that your memory can get

fuzzy. Officers or their supervisors should be allowed to least add an addendum if the footage reflects that the officer flipped events or had a memory lapse. Director Tobin noted that officers had to do reports from memory in the past. Well, in the past, reports were not then compared to a recording that missed little if anything and was available to everyone but the officer writing the report.

The addition of citizens from each ward to the Office of Police Complaints Board provides greater citizen representation. The elimination of an MPD representative from the Board will mean the loss of a knowledge base of police policies and procedures that is essential to the process. Expand the Board but omit the at-large member and retain the MPD position. Or, add an MPD Commander or Chief as a non-voting member as Chief Burke suggested. This allows the civic involvement you seek and lends higher credibility to the Board's actions and any reports or recommendations to other government entities.

The importance of the knowledge of police policies and procedures was evident when I viewed the Police Reform Commission meetings. As a taxpayer, I am not exactly thrilled that at least half of the commission is clueless as to police procedures (at least until the 9/14 meeting). If the Council is spending precious city resources on consultants for this Commission, the Commissioners should at least try to learn about why and how officers do certain things. A ride along or a tour of the academy for the entire Commission would be helpful. In fact, such activities would be good for all of the appointees to the Commissions or Boards provided for in this bill.

We are living in a time when it is vital that law enforcement respects those they protect. It is also important that respect be afforded to them as well. The current practice to plea down Assault on a Police Officer to simple assault is well-known. I first heard about it from an eleven year old whose older cousin bragged that did not matter that he hit an officer. Several officers told me it happened to them and that they felt betrayed when the charge changed. Thank you for fixing this.

I want to close my testimony by making it clear that I have not always been a fan of law enforcement. I was raised in the mountains of Pennsylvania where the State Police assigned to the area were not worthy of wearing a badge. They not only refused to respond to calls for service at night but they harassed the residents when they deigned to appear. Because of their negligence, I had to learn how to shoot at the age of four, guard my parent’s home starting at age 9, and hold an adult male at gun point at age 12 after he attempted to hurt my elderly father. I was 13 when 5 of my male classmates decided to attack me as I walked from one school building to another. A teacher called the State Police but the officer said that they would not respond because girls from my neighborhood probably asked for it. I

had to go back to my classroom and sit with my attackers for the remainder of the school year. I was afraid to tell my mom and lied to her as to why my shirt was ripped. When I visit the area today, I am followed, they attempt to search my car, and they harass me. Needless to say, I do not visit very often. It took me over a decade to trust MPD. I had to learn that you need to evaluate each officer on his or her own merits and not hate the badge.

I would like to bring one more thing to your attention and that is the morale of the MPD. My First District Officers have been working long hours and covering shifts for officers injured in civil disobedience duty or on COVID protocol. Most went for over a month without a day off, working at least a 12 hour shift each day. Earlier this year, people lined up to do special things for all first responders: buying lunches, waving at them, etc.). Now, only medical first responders are portrayed as heroes in commercials or public acknowledgements. The country has essentially turned its back on the good officers who are worthy of the uniform. Even my church deleted a prayer for first responders from the weekly bulletin. I struggle to keep good officers in the First District and my PSAs. I try to work with them to let them know they are valued. An officer who feels valued will value others. They are no different than the rest of us.

I ask the Council to not only consider the above changes and concerns but to also be mindful that your words often wound even if you do intend them in that way. We do need to make changes but we also need to keep our best in a MPD uniform. Thank you for your time and your own service to our City.

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October 15, 2020

Good morning Members of the Committee, thank you for this opportunity to testify. As the Chairman of the D.C. Police Union, I speak on behalf of more than 3,600 sworn police officers, detectives and sergeants who serve this community as members of the MPD. 66% of our members are minorities, making us a minority-majority Union. I have been a DC resident and a DC police officer for fifteen years and I take great pride in serving this city.

In regards to the Police Reform Bill, the Union has a number of significant objections to the technical and legal aspects of much of the Bill, some of which are being challenged in the Court system. Because of the limited time I have in this hearing, those objections have been highlighted in great detail in our written testimony, which has been provided to the Council and made available to the public on our website, DCPoliceUnion.com.

I will focus my time today on more general aspects of the Bill that our members believe will have a considerable impact on the hiring, retention, and attrition of the MPD, as well as an impact on our ability to provide quality and efficient service to citizens.

Let me first say that the Union remains steadfastly committed to important discussions on police reform and is always willing to be on the cutting edge of professional policing, we have only asked that the voices of the men and women who perform this work every day be included in these deliberations.

That being said, the Council has approached the idea of "Police Reform" in an extremely myopic manner. Legislation should be based on rigorously established empirical data and research, not anecdotal complaints or unrelated incidents that occur halfway across the country.

The Police Union made a public statement on June 8 which stated, *"[T]he outcome of the current language in the Bill will undoubtedly result in an exponential increase in crime and a mass exodus in personnel."* While many Councilmembers scoffed at this assertion, it seems that in just four months, both of these predictions have come to pass.

Crime data on the department's website from June 1st to this week confirms our suspicions about the devastating impacts of this law. Take areas like Ward 7 and Ward 8 where, just since June 1, shootings are up 25% and 30% respectively. Or take burglaries in Ward 3, which are up *122%* since June 1. Since the announcement and passage of this temporary bill, citywide homicides have increased 27%.

Just this past weekend we had 6 homicides in a 20 hour period, bringing our Y-T-D homicides to 155, putting us on pace for murders in the District to reach numbers not seen in over 12 years.

All of this can be attributed to the implementation of the police reform bill and its chilling effect on professional and responsible policing.

While the impact on crime is harrowing enough, the effect it has had on attrition is also startling. Between January and July, MPD lost an average of 20 members per month. Since August 1st, the department has lost 80 members, nearly doubling the average. Over half of those that left were resignations.

What the Union is asking from the Council is simple. Please be guided by the data and not rhetoric, not demagoguery, and certainly not abhorrent videos of police officers in other jurisdictions. The Council has instituted a commission to provide review, and the DC Auditor has launched a probe of similar concerns as well.

We encourage the Council to refrain from instituting any permanent policy until these reports are completed. The members of the DC Police Union thank you for your time today.

Gregg Pemberton
Chairman
DC Police Union

Encl: Full written testimony and comments on the Comprehensive Policing Reform and Justice Act of 2020

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DC POLICE UNION

October 15, 2020

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

Council of the District of Columbia
Committee on the Judiciary & Public Safety
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Comprehensive Policing and Justice Reform Amendment Act of 2020

Dear Councilmembers:

I am writing as Chairman of the Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union ("D.C. Police Union") and on behalf of the nearly 3,600 members of the D.C. Police Union regarding the proposed legislation entitled the Comprehensive Policing and Justice Reform Amendment Act of 2020 (the "Act"). The Act proposes sweeping changes to many of the laws, rules, and regulations that govern D.C. Police Union members. Notably, several of the provisions contained in the Act are subject to pending lawsuits in the U.S. District Court for the District of Columbia and the Superior Court of the District of Columbia, challenging the constitutionality of identical provisions contained in the predecessor Emergency Act. Therefore, it would be premature for the Council to enact permanent legislation prior to these Courts determining the legality of the Act. While I have concerns about many of the proposed amendments contained in the Act, I have focused my comments on five specific proposals that are most troubling.

1. Eliminating Collective Bargaining Rights of Police Officers

Subtitle L of the Act proposes to amend D.C. Code § 1-617.08 to state: "All matters pertaining to discipline of sworn law enforcement personnel shall be retained by management and not be negotiable." Act at 20. This proposal would strip the D.C. Police Union of its collective bargaining rights over the disciplinary process, which help to ensure that the disciplinary process provides members with their due process rights and complies with the CMPA's requirement that "disciplinary actions may only be taken for cause." *See* D.C. Code § 1-616.51(1). Singling out police officers and stripping them of their most important right that arises in collective bargaining is unprecedented and legally invalid. Significantly, this amendment is currently being challenged in the U.S. District Court for the District of Columbia on the grounds that it violates the United States Constitution's equal protection and substantive due process requirements, is an unconstitutional bill of attainder, violates the Contracts Clause of the Constitution, and violates the District of Columbia Home Rule Act. The Constitutional challenge to this amendment is fully-briefed and awaiting a ruling from the Honorable James E. Boasberg. *See FOP v. District of Columbia, et al.*, Case No. 1:20-CV-02130. Therefore, the Council should refrain from enacting permanent legislation until the U.S. District Court rules on the constitutionality of Subtitle L.

In the District, the CMPA guarantees all employees the right to "organize a labor organization free from interference, restraint, or coercion" and "[t]o bargain collectively through representatives of their own choosing." Designating discipline as non-negotiable for only one union in the District contradicts these guaranteed rights of all employees. In attempting to defend this amendment, the District has argued that it is necessary to prevent police officers from being shielded from accountability. However, stripping D.C. Police Union members of their bargaining rights does nothing to increase accountability. Instead, the collectively bargained disciplinary process in place between the D.C. Police Union and the MPD helps to ensure that D.C. Police Union members receive the due process rights they are guaranteed under D.C. law. For example, D.C. Code § 1-616.51 requires that the disciplinary system include:

> (1) A provision that disciplinary actions may only be taken for cause;
> (2) A definition of the causes for which a disciplinary action may be taken;
> (3) Prior written notice of the grounds on which the action is proposed to be taken;
> (4) Except as provided in paragraph (5) of this section, a written opportunity to be heard before the action becomes effective, unless the agency head finds that taking action prior to the exercise of such opportunity is necessary to protect the integrity of government operations, in which case an opportunity to be heard shall be afforded within a reasonable time after the action becomes effective; and
> (5) An opportunity to be heard within a reasonable time after the action becomes effective when the agency head finds that taking action is necessary because the employee's conduct threatens the integrity of government operations; constitutes an immediate hazard to the agency, to other District employees, or to the employee; or is detrimental to the public health, safety or welfare.

D.C. Code § 1-616.51. Moreover, D.C. Code §1-616.52 provides that "[a]n official reprimand or a suspension of less than 10 days may be contested as a grievance" and "[a]n appeal from removal, a reduction in grade, or suspension of 10 days or more may be made to the Office of Employee Appeals." The Office of Employee Appeals permits parties to request "an evidentiary hearing to adduce testimony to support or refute any fact alleged in a pleading." 6-B DCMR § 624.1. These required, statutory due process rights have provided the framework for the D.C. Police Union and the MPD to negotiate a disciplinary system that adheres to these requirements and ensures that D.C. Police Union members receive the due process rights they are guaranteed.

Thus, many of the provisions contained in the disciplinary article of the Collective Bargaining Agreement ("CBA") between the D.C. Police Union and the District help to ensure that discipline is administered in a manner that comports with due process, thereby decreasing the likelihood that discipline will be overturned based on an error or a due process violation committed by the MPD. This process does not remove the final decision on discipline from the Chief of Police and does not preclude the Chief from imposing discipline in a swift manner. Indeed, even the right to appeal certain suspensions and terminations only accrues *after* the Chief has imposed final agency action and the member has been suspended or terminated. By taking away the D.C. Police Union's right to bargain over discipline, it appears that the Council wants the Chief of Police to have the ability to summarily discipline or terminate D.C. Police Union members without first providing them with basic due process rights aimed at ensuring that discipline is properly imposed in a fair manner. In doing so, the D.C. Council is actually attempting to shield MPD management from any

accountability on how it imposes discipline and is opening up all future discipline to due process challenges.

In addition, the D.C. Police Union is similarly situated to other public employees and unions that engage in the same police-related activity, but are nonetheless left untouched by the Act. As with the D.C. Police Union, the Fraternal Order of Police maintains labor committees (*i.e.*, unions) for public employees in four other departments and agencies within the District: (1) the District of Columbia Department of Corrections; (2) the District of Columbia Housing Authority; (3) the District of Columbia Department of General Services' Protective Services Division; and (4) the District of Columbia Department of Youth Rehabilitation Services. The public employees under these FOP unions all share substantial similarities to D.C. Police Union members, including the ability to make arrests, the ability to carry non-lethal and lethal weapons, and the ability to legally use physical force on the District's citizens. *See* D.C. Code § 6-223 (conferring on the Housing Authority Police Department "the same powers, including the power of arrest . . . as a member of the Metropolitan Police Department" and authorizing the carrying of handguns). Notably, each of these unions operates under their own collective bargaining agreements that contain express disciplinary procedures distinct from the procedures afforded under the CMPA. Thus, through Subtitle L, the District has separated the D.C. Police Union and its members into a new, distinct class, distinguishing them from all other similarly situated District employees and has discriminated against that class by stripping them of their right to bargain with management concerning discipline. As such, Subtitle L violates the equal protection requirements contained in the United States Constitution through the disparate treatment of similarly situated employees, and the Council should strike it from the Act.

2. <u>Requiring Immediate Release of Body Worn Camera Footage and Names of Officers</u>

Subtitle B of the Act requires the Mayor to "[w]ithin 5 business days after an officer-involved death or the serious use of force, publicly release the names and body-worn camera recordings of all officers who committed the officer-involved death or serious use of force." Act at p. 5. This amendment removes any discretion previously held by the Mayor in the release of body-worn camera recordings and unquestionably puts the lives of D.C. Police Union members, their families, and members of the public in jeopardy. The great danger caused by Subtitle B was immediately evident through the recent release of the body-worn camera footage and name of the officer involved in the September 2, 2020 shooting incident. Despite the fact that the shooting was justified, immediately upon release of the officer's name and the body-worn camera footage numerous death threats were made against the officer and D.C. Police Union members generally. For example, one threat stated: "we need the police officer's picture so we can see who he is…it's not going to be safe for him no more…street justice is the best for this cop…we need to know who he is an address and everything." Through the release of the officer's name and body-worn camera recordings, criminals seeking "street justice" will be able to identify the officer and attempt to carry out a death threat against the officer and the officer's family.

In addition, Dr. Beverly Anderson, the Clinical Director of the Metropolitan Police Employee Assistance Program ("MPEAP"), stated that public release of body-worn camera footage depicting a death in which an officer is involved can inflict serious psychological trauma on the officer and their families. Dr. Anderson further noted that in the early days following a serious use of force incident

or incident concerning an officer involved death, officers are particularly vulnerable to psychological harm, which would be exacerbated by the public release of the body-worn camera footage of the incident.

In addition to the significant risk of harm caused by Subtitle B, Subtitle B also impermissibly intrudes on the Mayor's exclusive power and duty to "preserve the public peace," and "prevent crimes and arrest offenders" by requiring her to release body-worn camera footage and names of officers, even if it will jeopardize the arrest of criminals, the prosecution of crimes, and place citizens of the District and police officers at immediate risk of significant bodily harm. Subtitle B of the Act has removed the necessary discretion the Mayor previously had in executing her specifically-delegated executive duties. This necessary discretion was described by Michael R. Sherwin, Acting United States Attorney for the District of Columbia, who expressed serious concerns that the immediate release of body-worn camera recordings "could create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony." Acting U.S. Attorney Sherwin also raised concern that the early release "could inadvertently publicize the identities of witnesses" and could result in "unjust reputational harm" that would "unjustly malign an officer" who is involved in justified use of force. These legitimate concerns became a reality and were crystallized through the death threats and unjust maligning of the reputation of the officer involved in the September 2, 2020 shooting incident.

The predecessor to Subtitle B contained in the Emergency Act is currently being challenged in the Superior Court of the District of Columbia. *See FOP v. District of Columbia, et al.* Case No. 2020 Ca 003492 B. Notably, during the August 13, 2020, temporary restraining order hearing held before the Honorable Hiram Puig-Lugo, Judge Puig-Lugo expressed significant concerns regarding the cavalier nature in which Subtitle B disregarded officers' safety and privacy rights through the immediate release of body-worn camera footage and officer names. As such, the Council should refrain from enacting permanent legislation until the Superior Court rules on the legality of Subtitle B.

3. Prohibiting the Review of BWC Recordings by Investigating Officers

The Act further proposes the amendment of 24 DCMR § 3900.9, to state: "Members may **not** review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing." Act at p. 7 (emphasis added). A sworn members' ability to review BWC recordings when drafting initial reports is critical to ensure that crimes committed against District residents are properly investigated and solved; suspects are properly identified, arrested and ultimately convicted; citizens are protected in instances of ongoing crimes; and future crimes are prevented. By preventing arresting officers from having access to critical evidence when drafting their initial reports, the Act jeopardizes these vital components necessary to allow the MPD to accomplish its mission. The MPD's General Order concerning the Field Reporting System states:

> A field reporting system that provides accurate information to members within the Department and to the citizens we serve is an essential part of delivering effective law enforcement services.
>
> . . . .
>
> The need to document and preserve information gathered from reported offenses and incidents provides a record for action taken by law enforcement members, whether

> self-initiated or in response to a request for police services, **helps ensure that appropriate enforcement action is taken when conducting investigations and provides information that can be used to identify crime trends and solve crimes**.

General Order 401.01 at p. 1-2 (emphasis added). Notably, sworn members "shall not be relieved from their shift until all reports are completed accurately and have been submitted and approved." *Id*. at p. 9. The MPD's Body-Worn Camera Sworn Program explicitly permits members to "use BWCs to record initial interviews of victims, complainants and witnesses." General Order 302.13 at p. 9. Thus, by preventing sworn members from reviewing BWC recordings when drafting initial reports, the Act impedes ongoing investigations and the arrests of suspects by interfering with police officers' access to evidence in connection with reporting critical information they receive from victims, complainants, and witnesses that was captured on BWC. This will undoubtedly result in an increase in crime and a decrease in crime prevention.

If a victim provides critical information identifying a violent suspect during an interview conducted on BWC, and the sworn officer cannot review that interview when drafting the initial report, critical identifying information may be left out of the report, thereby decreasing the chances of an arrest and increasing the probability that the violent suspect will commit a crime against another victim. For example, if a child has been kidnapped and an officer is prevented from reviewing necessary information obtained during an interview on BWC, the missing details in the initial report could prevent the child from being located and a suspect from being apprehended before a tragedy occurs. Conversely, if an initial report is conducted without the aid of BWC recordings, the wrong suspect could be identified in the report resulting in unnecessary arrests and encounters between police and innocent citizens.

Precluding sworn members from reviewing BWC recordings when drafting initial reports unnecessarily threatens the District's ability to obtain convictions in nearly all crimes committed in the District. Indeed, if an officer drafts an initial report without the aid of BWC recordings and simply forgets a fact that occurred during the incident, but one that can be easily observed on the BWC recording, this unintentional omission will be used by defense attorneys to attempt to create reasonable doubt at trial and avoid a conviction. Just as the Council would not prevent a detective from reviewing crime scene photographs when attempting to solve a crime, the Council should not preclude sworn members from reviewing BWC recordings when creating initial reports that are critical to criminal investigations and solving crimes. Through the Act, the District would unnecessarily restrict its own access to critical evidence when drafting reports and taking positions related to criminal prosecutions. This artificial restriction on its own access to evidence will jeopardize the District's ability secure convictions.

The Act's proposed amendment would further contradict the stated policy of the BWC program, which is as follows:

> It is the policy of the MPD to use BWCs to further the mission of the Department, promote public trust, and enhance service to the community **by accurately documenting events, actions, conditions, and statements made during citizen encounters, traffic stops, arrests, and other incidents, and to help ensure officer and public safety**.

General Order 302.13 at p. 1-2 (emphasis added). The BWC's ability to document events, conditions, and statements is rendered meaningless if those events, conditions, and statements cannot then be included in initial reports and used for law enforcement purposes.

Moreover, the review of BWC recordings currently in place requires sworn members to notify Department officials if they observe any violation of Department policies, laws, rules, regulations or directives. Specifically, 24 DCMR § 3900.8 requires: "When reviewing BWC recordings, members shall immediately notify Department officials upon observing, or becoming aware of, an alleged violation of Department policies, laws, rules, regulations, or directives." Thus, continuing to allow sworn members to review BWC recordings to assist in initial report writing will preserve the requirement that any violation of Department policies, laws, rules, regulations, or directives observed on the BWC recording will be immediately brought to the attention of Department officials.

4. Removing All Police Officers from the Office of Police Complaints Board

Subtitle C of the Act further proposes to remove the MPD representative from the Police Complaints Board. *See* Act at p. 10. This proposal undermines the purpose of the Police Complaints Board and the Office of Police Complaints as a whole. D.C. Code § 5-1102 sets forth the purpose of the Police Complaints Board and the Office of Police Complaints, as follows:

> The purpose of this subchapter is to establish an effective, efficient, and fair system of independent review of citizen complaints against police officers in the District of Columbia, which will:
> (1) Be visible to and easily accessible to the public;
> (2) Investigate promptly and thoroughly claims of police misconduct;
> (3) Encourage the mutually agreeable resolution of complaints through conciliation and mediation where appropriate;
> (4) Provide adequate due process protection to officers accused of misconduct;
> (5) Provide fair and speedy determination of cases that cannot be resolved through conciliation or mediation;
> (6) Render just determinations;
> (7) Foster increased communication and understanding and reduce tension between the police and the public; and
> (8) Improve the public safety and welfare of all persons in the District of Columbia.

D.C. Code § 5-1102. To help achieve this purpose, the Police Complaints Board is empowered, in part, as follows:

> The Board shall conduct periodic reviews of the citizen complaint review process, and shall make recommendations, where appropriate, to the Mayor, the Council, the Chief of the Metropolitan Police Department ("Police Chief"), and the Director of the District of Columbia Housing Authority ("DCHA Director") concerning the status and the improvement of the citizen complaint process. The Board shall, where appropriate, make recommendations to the above-named entities concerning those elements of management of the MPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers.

. . . .

The Board shall review, with respect to the MPD:

(A) The number, type, and disposition of citizen complaints received, investigated, sustained, or otherwise resolved;

(B) The race, national origin, gender, and age of the complainant and the subject officer or officers;

(C) The proposed discipline and the actual discipline imposed on a police officer as a result of any sustained citizen complaint;

(D) All use of force incidents, serious use of force incidents, and serious physical injury incidents as defined in MPD General Order 907.07; and

(E) Any in-custody death.

D.C. Code § 5-1104. The unprecedented proposal to remove the MPD representative from the Board would eliminate necessary background, context and a perspective on citizen complaint matters that can only be provide by an MPD representative. A board designed to review complaints against other professionals, such as doctors or engineers, would not be comprised solely of members outside of the profession. Such boards would necessarily include members of the profession they are reviewing to provide necessary context, governing protocols, and perspective. The Act's proposal would also greatly diminish the Board's ability to accomplish its purpose of increasing communication and understanding and reducing tension between the police and the public because an MPD representative would no longer serve on the Board to consider, more fully understand, and convey to MPD management the complaints raised by citizens. The removal of the MPD representative from the Board would further threaten the Board's purpose and ability to render just determinations and provide adequate due process protection to officers accused of misconduct.

The Act further proposes to empower the Executive Director of the Office of Police Complaints with the ability to initiate the Executive Director's own complaint against a police officer for "abuse or misuse of police powers that was not alleged by the complainant in the complaint." *See* Act at p. 10. This proposal completely re-writes the purpose of the Office of Police Complaints, which was established to address citizen complaints against police officers, often times through "conciliation, mediation, or other dispute mechanism techniques," to enhance "communication and mutual understanding between the police and the community." D.C. Code § 5-1101. The Act's proposal would replace this purpose with a system in which the Executive Director generates complaints against police officers where none have been made by a citizen.

As proposed, the Executive Director would be empowered to serve nearly all roles in the "citizen" complaint process, including the role of the complainant, the initial complaint review process, the assigning of the complaint to a complaint examiner, and the ultimate disposition of the complaint to the MPD for discipline or the U.S. Attorney for criminal prosecution. Any hearing then conducted by the Office of Police Complaints for a complaint made by the Executive Director would presumably require the Executive Director to testify as the complainant. This would serve to deprive the sworn member of due process and a fair hearing when the Executive Director, who will ultimately refer the case for discipline or criminal prosecution, also testifies against the member in a hearing before a complaint examiner who was appointed by the Executive Director. It should be noted that the Executive Director and OPC are proposing sweeping changes to the disciplinary process that would effectively take the final decision on discipline away from the Chief of Police and

place it in the hands of the Police Complaints Board in instances where OPC's Executive Director believes the discipline should be harsher.

Moreover, the Executive Director is an unelected official, with no law enforcement background, who is appointed to a three-year term by the Police Complaints Board. *See* D.C. Code § 5-1105. The Act's proposal would greatly expand the jurisdiction of the Executive Director to incidents that involve any purported "abuse or misuse of police powers that was not alleged by the complainant." Currently, the Office of Police Complaint's jurisdiction is limited to citizen complaints involving incidents such as "use of language or conduct that is insulting, demeaning, or humiliating" and "failure to display required identification or to identify oneself by name and badge number when requested to do so by a member of the public." D.C. Code § 5-1107. Empowering the unelected Executive Director with such unfettered discretion and wide-ranging jurisdiction would be unprecedented. Even the D.C. Inspector General, which is an independent office, has limited jurisdiction and scope of its investigatory authority. The proposed Act would remove any such jurisdictional restrictions on the Executive Director while at the same time greatly expanding the scope of his authority. It should be noted that the Executive Director already serves as a member on the Use of Force Review Board that reviews all instances of serious use of force involving sworn officers. Therefore, the Executive Director already actively participates in the review of "excessive force" matters involving police officers and there is no need to expand his jurisdiction and authority to any type of misconduct when the purpose behind the legislative change is to address issues relating to excessive force.

5. Eliminating the Requirements of Bringing Timely Charges Against Officers in Use of Force Cases

The Act proposes to amend D.C. Code § 5-1031 to include a new subsection that states: "If the act or occurrence allegedly constituting cause involves the serious use of force or indicates potential criminal conduct by a sworn member or civilian employee of the Metropolitan Police Department, the period for commencing a corrective or adverse action under this subsection shall be 180 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause." Act at p. 20-21. The proposed amendment to D.C. Code § 5-1031 does not define "serious use of force." However, the Act's proposal seeks to expand the time for commencing corrective action to 180-days. Corrective action is the lowest level of discipline imposed on sworn members and includes a letter of prejudice or an official reprimand. Thus, the Act's undefined "serious use of force" could encompass any use of force, however minor, involving a sworn officer because it encompasses the commencement of corrective action. The Council should understand that sworn members are placed in non-contact status during the pendency of these investigations. This means the officer has his badge and all weapons taken, his police powers revoked, and has no public contact. Because the vast majority of use of force incidents are ultimately determined to be justified, the proposed amendment will result in countless sworn members being placed on non-contact status for extended periods of time, preventing them from providing necessary policing to the citizens of the District.

To the extent that the Act's proposed amendment intends to adopt the definition of "serious use of force" contained in the MPD's General Orders, the proposed expansion of the time for commencing corrective or adverse action to 180-days is not necessary. The current version of D.C.

Code § 5-1031(b) contains a tolling provision that addresses cases involving ongoing criminal investigations, as follows:

> If the act or occurrence allegedly constituting cause is the subject of a criminal by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

D.C. Code § 5-1031(b).

In practice, when the Department believes that conduct by a sworn member may involve serious use of force or potential criminal conduct, the case is referred to the U.S. Attorney for the District of Columbia to determine whether the U.S. Attorney's Office will pursue criminal prosecution of the sworn member. Pursuant to D.C. Code § 5-1031(b), when the matter is referred to the U.S. Attorney's Office and under active investigation by the office, the 90-day period for commencing corrective or adverse action is tolled until the U.S. Attorney completes its criminal investigation. In cases in which the U.S. Attorney declines to criminally prosecute the sworn member, the U.S. Attorney issues a formal letter advising the Department that it is declining criminal prosecution and that the Department can now proceed with whatever administrative action it deems appropriate. The time period from when the Department refers the matter to the U.S. Attorney until the U.S. Attorney issues its declination letter often takes several months. Thus, in many cases that involve serious use of force or potential criminal conduct well over 180-days passes from the date of the incident to the date that the Department commences any adverse action against the sworn member. Expanding the time to bring a disciplinary action against an officer under the proposed legislation to 180 business days, when combined with the existing tolling provisions and the Department's practice of delaying action until a deadline is upon it, will result in many of these investigations taking well over a year to conclude. These substantial delays will take officers off the streets for extended periods of time, cost the citizens of the District in both wasted tax dollars and a decrease in available crime prevention, and likely violate the officer's dues process rights, resulting in un-sustained disciplinary action.

Notably, this Committee previously considered and rejected a proposal to repeal D.C. Code § 5-1031, determining that such action would result in "abusively long disciplinary investigations." Indeed, this Committee determined that the 90-day deadline currently set forth in D.C. Code § 5-1031 created a "system of accountability that is responsive and effective," as follows:

> The 90-day rule serves multiple purposes, but at its core, it is a protection for the employee. At the time the 90-day rule was established, the committee report for the Omnibus Act stated, "Employees should not be subject to disciplinary action for an incident that occurred three years prior, especially when management knew about the incident and [chose] not to pursue action at that time. How can employees defend themselves or get on with their lives once an allegation has been made? . . . **Without a timeline requirement in place, the Committee found that MPD and FEMS had "failed to process discipline cases in a timely fashion."**

> **The history of the timeline further reveals that a promise by either department to efficiently process disciplinary cases, in place of an enforceable rule, is not sufficient.** Years before the 90-day rule was created, a 45-day rule governed disciplinary proceedings, not just at MPD and FEMS, but across other District agencies, as well. The 45-day rule was repealed by the "Omnibus Personnel Reform Amendment Act of 1997" because it was found to be "unduly restrictive" in some cases. However, the Committee on Government Operations wrote in its corresponding report that it expected that 45 days would "remain the goal, and that agencies will take appropriate action within that time frame in all but the most unusual instances." By 2003, it was clear that goal was not being met. **The committee report for the Omnibus Act concluded that the repeal of the 45-day rule resulted instead in abusively long disciplinary investigations that were conducted against employees by MPD and FEMS in the absence of a mandatory deadline.**
>
> Chief of Police Cathy Lanier testified at the public hearing on Bill 20-810 that the 90-day rule must be repealed in order to increase police accountability and to ensure that officers who should not be on the force are not kept on due to a technicality. The Committee shares the Chief's concerns for accountability; however, the risk of losing disciplinary appeals to the 90-day rule must be weighed against the value that the rule provides. **The 90-day rule protects employees who are being administratively investigated from working under the threat of disciplinary action for an excessive length of time; the rule prevents the government from having to pay employees who are put on administrative leave for an exorbitant length of time during the pendency of these investigations; and the rule incentivizes MPD and FEMS to follow up on allegations of misconduct quickly, to conduct investigations efficiently, and to resolve disciplinary cases in a timely fashion – three things that all lead to a system of accountability that is responsive and effective.**

See Committee Report on Bill 20-810 at 2-3 (emphasis added).

Moreover, "[a]ll incidents involving deadly force, serious use of force, or the use of force indicating potential criminal conduct" are investigated by the MPD's Internal Affairs Division after the U.S. Attorney conducts its criminal investigation. *See* General Order 901.08 at p. 4. "[A]ll use of force investigations completed by the Internal Affairs Division" are then reviewed by the Use of Force Review Board, which includes the Executive Director of the Office of Police Complaints as one of its a members. *See* General Order 901.09 at p.2. Notably, as part of this review process, "The Use of Force Review Board shall review the actions of all members involved in the use of force incident, not just the actions of the member(s) who used force." *Id*. at p. 5. The Use of Force Review Board is then empowered to affirm or reject the Internal Affairs investigation's recommendation and refer the matter for discipline when it determines that a violation has occurred. Importantly, the Use of Force Review Board has an assigned administrator who is required to track all investigations to determine if any are at risk of missing the 90-day deadline contained in D.C. Code § 5-1031, and the Office of Risk Management further conducts periodic audits to review the timeliness of cases submitted to the Use of Force Review Board. *See id*. at p. 8-9. Thus, the MPD

has developed several levels of review for all serious use of force incidents and multiple checks and balances to ensure that such investigations and reviews are completed before the expiration of the 90-day deadline contained D.C. Code § 5-1031.

During these difficult times, the nearly 3,600 members of the D.C. Police Union remain steadfastly committed to serving and protecting the citizens of the District of Columbia. I welcome the opportunity to address the Council on these issues and answer any questions it may have.

Very Truly Yours,

Greggory Pemberton,
Chairman D.C. Police Union

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Testimony on behalf of the Partnership for Civil Justice Fund
before the D.C. Council Committee on the Judiciary Hearing on Bill 23-723, the "Riot Modernization Act of 2020," and Bill 23-882 and the "Comprehensive Policing and Justice Reform Amendment Act of 2020."

By Mara Verheyden-Hilliard, Executive Director

I am Mara Verheyden-Hilliard, co-founder and Executive Director of the Partnership for Civil Justice Fund. As a constitutional rights litigator specializing in First Amendment and police misconduct cases, much of my and my organization's work focuses on the unique area at the intersection of First and Fourth Amendment rights and the defense of free speech and assembly. I am also a life-long resident of the District of Columbia.

We wish to thank Councilmember Allen for the opportunity to speak at this hearing and for his and other councilmembers' efforts in recognizing the critical moment that we are in, and moving to act in response to the demands and needs of the people standing against racism, seeking change and demanding justice.

Over the last two decades, my organization has litigated most of the major cases in the District of Columbia that resulted in meaningful equitable changes and reforms and restrictions on police conduct – reforms that federal judges have called historic and a benefit for future generations. Our cases have been litigated against both the DC Metropolitan Police Department and its highest officials and against federal police including Park Police.[1]

[1] Among the District cases are: *Becker, et al. v. District of Columbia, et al.*, Civil Action No. 01-0811, U.S. District Court for the District of Columbia (successfully resolving claims for mass false arrest, excessive force and other violations by law enforcement in connection with the April, 2000 IMF/World Bank protests in Washington, D.C. including changes in policies and practices and more than $14 million in damages), *Barham, et al. v. Ramsey, et al.,* Civil Action No. 02-02283, U.S. District Court for the District of Columbia (successfully resolving claims of false arrest in connection with the September, 2002 IMF/World Bank protests in Washington, D.C., including changes in policies and practices for both the MPD and the Park Police, and more than $10 million in damages) Circuit opinion at: 434 F.3d 565 (D.C. Cir. 2006): *Mills, et al v District of Columbia*, (obtaining unanimous ruling in the U.S. Court of Appeals for the D.C. Circuit finding Washington, D.C. police's military-style checkpoint program to be unconstitutional and ultimately forcing rescission of operation) Circuit opinion at: 571 F.3d 1304

In the context of free speech and policing in D.C. it is important to understand where we were in the past and what has occurred in the interim in order to understand where we are now, and what can and should be done now.

We have represented protestors, journalists, tourists, passers-by, legal observers – all of whom have been subject to false arrest and brutality while lawfully exercising or being in proximity to free speech activities in Washington, D.C., and through a series of cases and through related work undertaken by the D.C. Council major reforms were put in place restricting and making unlawful police tactics that punished, suppressed and disrupted First Amendment protected assembly and organizing activities.

In addition to the equitable and injunctive relief we obtained, the D.C. Council enacted landmark legislation, the First Amendment Rights and Police Standards Act which went into effect in 2005. This legislation had a significant impact on the ability of people to exercise their free speech rights in D.C. However, ever since the current Chief of Police, Peter Newsham, has taken office, the MPD has violated the FARPSA with impunity time and again, and appears to be regularly using the existing rioting statute, D.C. Code § 22-1322, in an unlawful effort to get out from under the conduct requirements and First Amendment protections contained in the FARPSA, D.C. Code § 5-331.01 *et seq.*

Twenty years ago, attending demonstrations in Washington, D.C. carried significant risk of police abuse and false arrest. Our peacefully protesting clients were beaten bloody with batons, police routinely trapped and detained demonstrations, surrounded demonstrators with riot gear-clad officers keeping people from joining demonstrations and making free speech activities look presumptively criminal, assaulted demonstrators with motorcycles and bicycles which they used to flank demonstrations, soaked people in pepper spray, and on multiple occasions engaged in mass false arrests, including sweeping more than 1000 peaceful people off the streets, and hog-tying them in stress and duress positions for more than 24 hours. We brought the successful class actions resulting from the two largest mass arrests of the post-Vietnam era, *Becker v District of Columbia* and *Barham v Ramsey. Barham,* the infamous Pershing Park mass arrest, resulted in a ruling before the U.S. Court of Appeals for the District of Columbia Circuit finding that the representations and assertions of the Assistant Chief of Police were "ludicrous" and "indefensible." That Assistant Chief was Peter Newsham.

Through these cases, the MPD and its legal counsel were exposed for engaging in significant cover-ups including issues involving destruction and tampering with key evidence. Our cases exposed and worked to end the MPD's illegal practice of sending undercover officers on long-

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(D.C. Cir. 2009); *Bolger, et al. v. District of Columbi*a, Civil Action No. 03-906, U.S. District Court for District of Columbia (obtaining settlement in favor of political activists who were targeted and falsely arrest by law enforcement based on political affiliation; obtaining major sanctions against the OAG for discovery abuse); *A.N.S.W.E.R. Coalition v. Norton*, Civil Action No. 05-00071, U.S. District Court for the District of Columbia (successfully enjoining permitting system restricting First Amendment assembly along Presidential Inaugural Parade route).

term assignments posing as activists to infiltrate peaceful protest groups without any allegation of criminal activity and further acting as *agents provocateur* attempting to encourage peaceful activists to undertake unlawful actions - actions which were rejected.

Under the leadership of Councilmember Kathy Patterson, and with the assistance of Mary Cheh (who was not on the council at that time) serving as a special investigator, the D.C. Council engaged in an extensive investigation into police misconduct in the context of demonstrations including fact finding, interviews and multiple days of hearings and testimony. The findings and report of that investigation are incorporated here by reference. The First Amendment Rights and Police Standards Act (FARPSA) was the result.

That law had a major and beneficial impact on the ability of people to express themselves in Washington, D.C. However, as mentioned earlier, the Metropolitan Police Department has sought to evade the requirements of the law, wrongfully pointing to the District's riot statute as an exception to its obligations under that law, and using the riot statute to undertake mass false arrests and threaten people with extensive jail time without basis in law or fact.

We believe it is imperative that the Council act to end this practice, which poses a fundamental threat to free speech and civil rights in the District.

The D.C. Police and the Attorney Generals' offices have leaned on one outlier case in the District, using it as a playbook for repression against mass assembly and defense of that repression. That case, *Carr v District of Columbia* was brought in the wake of our litigation (we did not bring or litigate that case) and its very negative outcome has been injurious to demonstrators in Washington, D.C. and around the country. *Carr* is a go-to for defending unlawful indiscriminate mass arrests and for attempting to justify acting without the constitutional requirement of particularized probable cause, and the use of the riot statute has been a linchpin in those efforts. The indictments for those arrested at the Trump inauguration of 2017 read as if they were written with the *Carr* opinion adjacent and the fact pattern for the police response to demonstrators appeared carried out specifically with that in hand. The *Carr* case did not appear to be vigorously litigated and unfortunately went up to appeal on limited record but it has had an outsized impact and has laid the foundation for the MPD's now employed practice of declaring First Amendment assemblies "riots," acting against demonstrators without particularized probable cause, punishing lawful associational activity, and in so doing claiming that they are not subject to the restrictions of the FARPSA. This must stop, and the Council has the ability to end this practice.

At the onset, we wish to make clear that we believe that the riot statute should be repealed in its entirety.

The criminal code already addresses any crime of violence or property crime that could be encompassed by the riot statute. The statute serves prosecutors' abusive practices of charge-stacking to force innocent people to plea to lesser offenses or otherwise face decades in prison.

In the context of First Amendment activities, the riot statue is serving as a weapon against free speech, sweeping up persons solely because of their association with and proximity to other

people who share a political point of view. Even in the circumstances where someone may be credibly alleged to have violated an element of the criminal code, the riot statute is serving as a means to arrest *everyone else in any proximity* who may have done nothing more than been at a demonstration where such act is alleged to have occurred[2].

The FARPSA, and the Constitution, make clear however, that in the context of First Amendment activities, the government and the police must act with precision.

The proposed reform to the riot statute is a significant improvement, and in the absence of a complete repeal, should be further refined to provide the protections for First Amendment activities that are imperative.

The reform proposal includes the following language, "(b)(1) nothing in this section shall be construed to prohibit conduct protected by the First Amendment Rights and Police Standards Act of 2004..."

This language will not serve its intended effect. The FARPSA is not a grant of rights or authorization of conduct to persons engaged in free speech activities. Rather it is a series of prohibitions on illegal police tactics that abridge freedom of speech, assembly and association. Directly relevant to the riot statue, are the prohibitions under the FARPSA at D.C Code §§ 5-331.07 and 5-331.08.

These requirements restrict general orders to disperse and group arrests or kettling, recognizing that in the context of First Amendment assemblies there are very limited circumstances where law enforcement may act against a group as a whole. Only where a substantial number of persons are engaged in specified unlawful actions may a group be acted against as a group through dispersal and thus the extinguishing the free speech. These statutory provisions reinforce requirements of particularized probable cause, and require that even under the limited circumstances where the police may act towards the group as a whole, they must give notice to the demonstration group by a means calculated to be heard by all subject to the order, and opportunity to comply with a lawful dispersal order including through identifiable exits. This prohibits the police practice of kettling and mass sweeps of persons including arrests without opportunity to disperse. It is these requirements that the MPD has sought to evade through its abuse of the riot statute.

Any riot statute reform must include language explicitly stating that "a person participating in a First Amendment activity shall have no obligation to extinguish her protected activity by leaving or otherwise disassociating herself from a demonstration, regardless of unlawful conduct that may occur by other persons also present, in the absence of a lawful order to disperse and opportunity to comply with such order issued in accordance with FARPSA at D.C Code §§ 5-331.07 and 5-331.08."

[2] This also provides easy opportunity for the deployment of *agents provocateur*, where one or a handful of persons' violations of the law can be used as the basis to arrest hundreds of others who have committed no crime and are otherwise lawfully present at a demonstration or march.

Moreover, the FARPSA should state that nothing in the riot statute acts to limit the restriction on and requirements of police conduct in the context of First Amendment activity codified by the FARPSA. Police failure to comply with the legal requirements of the FARPSA should serve as a clear defense to any riot charges.

Further the FARPSA should be amended to include an explicit private right of action for violations of the law. Officers and command staff should not be able to violate the law with impunity and without accountability to the persons who suffer harms from those violations.

With regard to other proposed reforms to the riot statute, the Council should eliminate proposed (a)(1)(B) and (a)(2)(C). It is a danger to the residents of the District of Columbia's multi-unit housing areas to create further opportunity for criminalization of their day-to-day lives. Many of these residents already feel that they are living in open air jails and subject to the abuse of police and Special Police Officers. Many who have organized for tenants' rights have been threatened with penalty for doing so, and this provision directly threatens tenant organizers' ability to engage in lawful organizing activity. The addition of "sexual contact" similarly opens the door to abusive enforcement because of the breadth of the definition of the offense.

Finally, the *mens rea* requirement of the statute in proposed (a)(3) should be changed from "reckless" to "knowing." A mere reckless requirement will tend towards criminalizing proximity, rather than intentional actions.

<u>Ban on Military Weapons, Indiscriminate Weapons Deployment and Establishment of Community Control Over Weapons and Surveillance Techology</u>

We support Bill 23-882's restrictions on the acquisition and use of military weapons. We also believe that the Council should impose greater oversight on the acquisition of weapons in general. Any weapons that the MPD wishes to obtain, as well as surveillance technology, should be subject to review by the public and the Council. The Council should require the MPD to submit a listing of all current weapons and surveillance technology to it for review and approval, and require submission on a regular basis any other proposed acquisitions – including donated weapons and technology through the Police Foundation. The Council and the public should have opportunity to review whether such weapons or surveillance technologies are appropriate for use against the civilian resident population, the impact and scope of such material, the intended use and restrictions on use, all warning materials, and other information on the impact of such weapons or technology. They should also have full information about police training in use of the materials. Based on this information, and public input, the Council should approve or disapprove any such acquisitions. The Council owes this to their constituents, the residents of the District of Columbia.

We support Bill 23-771's prohibition on the use of chemical irritants. Use of many so-called "less lethals" are by their nature indiscriminate in effect and impact and are therefore, by their very use, a violation of First Amendment and Fourth Amendment rights when used in the context of mass assembly. To that end, we believe that there should be an immediate ban on all weapons of indiscriminate nature include stinger grenades and other projectile weapons for the same constitutional reasons.

The Public's Right to Know the Actions of the Police Force

Police are commissioned by the government to use lethal force and deprive persons of their liberty. They are interacting with the public and in public view and cannot be allowed suddenly upon use of force to attempt to retroactively cloak and conceal those activities. Nor should the decision as to disclosure of crucial information regarding police actors and actions be left in the hands of the MPD itself or the Mayor's Office or the OAG. The OAG has a conflict between public disclosure and its often scorched earth litigation to defend police misconduct and has repeatedly and consistently worked to protect information that should be made public from disclosure. There must be an independent review body that can assess body cam footage and other information for public release in conformance with public records laws

Consent Searches

The PCJF strongly endorses the proposals that seek to create constitutional safeguards in the context of "consent" searches. This can be strengthened by requiring that all such consent discussions and requests be visible and audible on camera and that in the absence of such recording any search shall be deemed nonconsensual and any evidence obtained inadmissible. Just as with interrogation, youth "consent" searches should be banned as a young person facing an officer with the weight of authority, and a gun, cannot be assumed to meaningfully give voluntary consent.

The Police Cannot Discipline Themselves

It is not possible to have effective police accountability and discipline when it is left up to the institution itself. Over our years of litigation, time and again, we have found that the institutional officials within the police department do more than disregard police misconduct, they ratify it. Policing must be subject to effective independent civilian review. The disciplinary process must be removed from the bias and confines of the MPD. It also must rest fully outside of any relationship with the OAG. The officers and command staff of the MPD know that they can generally act with impunity, that there will be no meaningful discipline and that they can rely on the full resources of the District's residents' tax dollars and the OAG's lawyers to defend them, even with egregious violations of the law. There must be a fully independent review process that does not include law enforcement personnel or any other entity with a conflict of interest that has the authority to evaluate police conduct and take meaningful action in response.

Accountability Also Requires an End to Qualified Immunity

Similarly, the Council should create a right of action for violations of the Constitution under District of Columbia law that eliminates the defense of qualified immunity. This would provide an opportunity for justice and accountability for the residents of the District of Columbia.

This would be a meaningful change, and while it, along with all the other reforms discussed are just a step on the path to justice, it is that path that the people of the District and of the United States have made clear must be taken. This is an important moment to take these steps, and we appreciate the Council's efforts to take action in the service of justice.

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Written Submission of International Center for Not-for-Profit Law
to the Washington DC City Council Committee on the Judiciary and Public Safety

Nick Robinson, Legal Advisor
Oral Testimony: October 15, 2020
Written Submission: October 23, 2020 (expanded from oral testimony)

Thank you for providing me the opportunity to speak today. My name is Nick Robinson. I am a legal advisor at the U.S. Program of the International Center for Not for Profit Law (ICNL) based here in Washington DC. We have advised policymakers in the U.S. and around the world on how to create a legal environment that better protects the freedoms of association, assembly, and expression.

We welcome the proposed Rioting Modernization Amendment Act of 2020. In recent months, the U.S. has seen overbroad and outdated anti-riot acts being used to target and harass peaceful protesters during the ongoing nationwide demonstrations for racial justice. As I wrote in a recent piece in NBC THINK, anti-riot acts have a history of being abused by police and prosecutors. In our work globally, we find that anti-riot acts are one of the favorite tools of authoritarian regimes to crack down on protesters given how much discretion they frequently provide the government.

Arguably there is no need for anti-riot acts at all. If someone commits violence or vandalism they can be punished, frequently severely, for assault, destruction of property, or another related crime. Indeed, the District's anti-riot act is rarely used, and when it has been used it rarely results in a successful prosecution, and almost never any jail time.

I attach for the record data on the use of the anti-riot act I received from the DC Sentencing Commission covering the period 2012 to 2020. It shows that between January 1, 2012 and August 31, 2020 there were 241 instances of cases being filed in DC Superior Court under the anti-riot act. The overwhelming majority arose from the J20 incident, in which over 200 protesters were arrested and charged with rioting during demonstrations on the Inauguration Day of President Trump in January 2017. Of the 23 convictions under the anti-riot act, 22 were at the misdemeanor level and only 2 resulted in anyone being sentenced to time in jail.

This data from the DC Sentencing Commission also details arrest records from 2020 under the anti-riot statute. There were 110 arrests under this act from January 9 to August 31st. While the data is not yet available, my understanding is that most of these arrests have not resulted in charges under the anti-riot act. Instead, the record shows that over the past decade when the anti-riot act has been used it has been used as a tool for the police to engage in mass arrests, but almost never leads to any successful prosecutions.

The revised act being considered today is a clear improvement. Notably, it requires that individuals charged with rioting have to be engaged themselves in a criminal offense that causes, or would cause, bodily injury, property damage, or sexual contact. It reduces the maximum penalty for the crime of rioting from a felony to a misdemeanor. It also eliminates the incitement to riot offense, which in its current wording criminalizes "urging" someone to

riot. The Fourth Circuit and a U.S. district court judge in the 9th circuit recently found that similar incitement language in the federal anti-riot act was unconstitutional.

While we broadly support the proposed reform, it could be made even stronger. In particular, we make the following recommendations:

1. There should be more explicit language to ensure that the anti-riot act cannot be used to bring attenuated charges against protesters or be used to stack charges against protesters. The current anti-riot act was used in both manners in the J20 incident, where many of those accused were charged as a "conspirator to riot" or "aiding and abetting a riot". Those charged then became liable for property damage done by others. This is why many of the protesters faced upwards of 60 years in jail for essentially merely being present at a protest where property destruction occurred.

   The Council should make clear in the bill that merely being present near those engaged in unlawful activity does not then make one liable for rioting, including under a theory of conspiracy or aiding and abetting. In addition, the Council should make clear that being found guilty of rioting does not make one liable for other criminal offenses that occur during a riot. In other words, one can be guilty of rioting and any criminal offense one engages in, but not other criminal offenses that occur at a "riot".
2. The Council should also detail what specific "criminal offense[s]" would constitute a component of "rioting". For example, would someone jaywalking who bumps into another during a demonstration be considered to be engaged in an offense that would be covered by the anti-riot act since jaywalking is an "offense" and bumping into someone could cause physical injury. In particular, the Act could require that the underlying offense be a "felony criminal offense" to convey the severity required of the underlying crime. This would be in line with how, for instance, Hawaii defines a "riot" which is that those engaged in the underlying conduct must intend to commit or facilitate a "felony".
3. The Council should also eliminate the provision that "rioting" can take place in a "communal area of multi-unit housing" as it is unjustified, and the data shows this is not where rioting has historically occurred. This provision seems to be taken from DC's disorderly conduct statute, but the current anti-riot act does not have a similar provision nor is it present in anti-riot acts in other states. The arrest data for DC's anti-riot act for this year also shows that no one was arrested in the communal area of multi-unit housing. Keeping this provision in the Act is unnecessary and can lead to abuse of the Act by law enforcement, particularly at public housing.
4. The bill should reiterate the protections provided to peaceful protesters when others are engaged in unlawful conduct that are already provided under the First Amendment Rights and Police Standards Act of 2004 (FARPSA). If law enforcement followed the rules laid out in FARPSA many of the controversial incidents involving the arrest of protesters in recent years would likely never have occurred, both better

safeguarding the First Amendment rights of protesters and saving the District significant resources.

Turning to the Comprehensive Policing and Justice Reform Amendment Act of 2020, we think that there needs to be significantly more robust restrictions on the use of less lethal weapons. We have undertaken extensive analysis of how different states and cities have restricted these types of weapons, like chemical irritants and kinetic projectiles, in crowd control (attached).

DC's proposed approach of banning the use of these weapons to disperse First Amendment assemblies does not go nearly far enough. It is just too easy for law enforcement to declare an assembly unlawful and then subsequently use these weapons against protesters.

Instead, the Council should adopt a more holistic approach. This would involve, first, banning the most dangerous of these weapons for use in any type of crowd control. As my colleague from Physicians for Human Rights testified some less lethal weapons are just much more dangerous than others – particularly kinetic impact projectile weapons. The Council should prohibit these weapons for crowd control or at the very least require that the public participate in procurement of these weapons, including assessing the relative safety of different types of LLWs.

Second, for any approved less lethal weapons, the Council should place significant restrictions on their use for crowd control. This can include a proper trigger for use, such as preventing actual physical violence to persons; appropriate command authorization; a requirement for a warning and opportunity to disperse; and a requirement that these weapons can only be used by specifically trained officers.

Finally, there should also be required public reporting detailing when these weapons are used and why de-escalation strategies were not effective. If there are violations of these restrictions by MPD, there should be consequences – offending officers should be punished and those who were injured by these weapons should be able to receive compensation from the District.

Finally, I wanted to speak in support of the repeal of DC's anti-face mask law. An anti-mask law clearly does not make sense during a pandemic and, more generally, it just gives too much discretion to law enforcement. In this ICNL article on state anti-face mask laws we find that most states do not have anti-mask laws and do not seem to suffer any negative consequences as a result. New York state repealed their archaic anti-mask law earlier this year, and we applaud the Council for also taking this sensible step.

Thank you for having me today, and I am happy to share additional information.

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The International Center for Not-for-Profit Law (ICNL) works to improve the legal environment for civil society, philanthropy, and public participation in the United States around the world.

LEGISLATIVE BRIEFER

Legislative Options to Restrict the Use of Less Lethal Weapons in Crowd Control

AUGUST 2020

The killing of George Floyd by police in Minneapolis, Minnesota, in May 2020 sparked nationwide protests against police violence targeting Black Americans. It also led to a confrontational response. Law enforcement have used tear gas or rubber bullets on protesters in over 100 U.S. cities.

The use of these and other "less lethal weapons" (LLWs) for crowd control has been heavily criticized.[1] These weapons were often used indiscriminately against peaceful assemblies and were blamed for escalating confrontations. Dozens of people were injured by "less lethal" projectiles, including peaceful protesters, journalists, and legal observers. Numerous lawsuits have been filed against municipalities for violating the constitutional rights of demonstrators in the use of these LLWs.

In response to criticism over the use of LLWs at protests, municipalities, states, and the federal government have introduced, and in many cases enacted, new legislation to limit the use of these weapons.

This briefer provides an overview and analysis of the most common types of reforms. It calls for a prohibition on the use of these weapons at First Amendment assemblies, and a ban on the use of the most dangerous forms of these weapons in crowd control more generally. If these weapons are used for crowd control, to protect public safety and ensure they are not used against peaceful protesters, legislators should impose a rigorous set of restrictions on their use. They should also mandate reporting and transparency requirements in their procurement and use.

The manufacture of these weapons is poorly regulated. As a result, weapons that create disproportionate safety concerns are both widely available to, and wielded by, law enforcement officers who may not fully understand the harm they can cause. There is

[1] For a description of common less lethal weapons and their health impact, see PHYSICIANS FOR HUMAN RIGHTS, CROWD-CONTROL WEAPONS AND SOCIAL PROTEST IN THE US 6 (June 2020)

an urgent need for the federal government to mandate independent testing and transparency requirements for manufacturers.

Banning Less Lethal Weapons at First Amendment Assemblies

Less lethal crowd control weapons, like tear gas, rubber bullets, or sonic weapons, are inherently indiscriminate when used in the context of a protest. As such, they should be prohibited to the police or to disperse First Amendment assemblies, including protests, rallies, and parades.[2]

Some recent legislation bans the use of crowd control weapons at First Amendment assemblies. For instance, under legislation recently enacted in Washington DC, chemical irritants and less lethal projectiles "shall not be used by [the police] to disperse a First Amendment assembly."[3]

While this is an important prohibition, it still potentially allows for these weapons to be used on peaceful protesters. Law enforcement might declare peaceful protests that are not properly permitted unlawful, and thus not a protected "First Amendment assembly." Similarly, if there is a confrontation or isolated disturbances at a protest, law enforcement has, at times, declared the entire assembly unlawful. In either of these scenarios, law enforcement could then potentially use LLWs against peaceful protesters.

Banning Disproportionately Dangerous Less Lethal Weapons for Crowd Control

Some jurisdictions have proposed or enacted bans on categories of less lethal weapons, such as kinetic impact projectiles, chemical irritants, disorientation devices, and acoustic weapons.[4] For example, Seattle has enacted a complete ban on the use of such "crowd control weapons" by law enforcement.[5]

Bans have two primary benefits. First, restrictions short of a ban, as this briefer has described and will detail further, can allow for continued abuse of these weapons against peaceful protesters and others. Second, some of these weapons are disproportionately dangerous, and there is no reason to use them for crowd control given alternatives available to the police.

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[2] Law enforcement may disperse assemblies only in exceptional cases, following carefully delineated rules that among other things require giving a clearly audible order to disperse and providing an adequate opportunity for the crowd to comply.
[3] Washington DC B23-0825 (2020)
[4] ICNL has tracked recently introduced legislative initiatives to ban or restrict the use of Less Lethal Weapons. See, ICNL, Reforms Introduced to Protect the Freedom of Assembly
[5] Seattle Ordinance 126102 (2020) (The ban applies not only to Seattle police, but also law enforcement agencies with which they have mutual aid agreements operating in the city. The ban exempts oleoresin capsicum spray unless it was used at a First Amendment protected event or landed on another individual besides where it was targeted.)

KINETIC IMPACT PROJECTILES

Kinetic projectiles have long been singled out by experts as raising inordinate safety concerns.[6] During the ongoing Black Lives Matter protests, as many as 60 protesters have been hit in the head with kinetic projectiles, causing traumatic brain injuries, blindness, and bone fractures. Kinetic projectiles with a metallic component – such as certain rubber bullets, bean bag rounds, and pellet rounds – are particularly dangerous.

Given these longstanding and well-documented safety concerns, many jurisdictions have introduced legislation to ban kinetic projectiles for use in crowd control.[7] Barring a complete ban, they should be prohibited until independent and rigorous testing can provide legislators with needed information to properly assess the safety of particular kinetic impact projectiles.[8]

Other countries have prohibited the use of less lethal kinetic impact projectiles in crowd control. For example, several countries in Europe, including the United Kingdom, have banned, or discontinued, the use of rubber bullets and similar kinetic projectiles.

DISORIENTATION DEVICES

Flash bangs, blast balls, and stun grenades also raise significant safety concerns for their use in crowd control. These weapons have severely injured protesters and can trigger cardiac arrest.

Physicians for Human Rights found that while these weapons "stated objective is to cause disorientation and a sense of panic, the potential for injuries caused by the pressure of the blast or by shrapnel from the fragmentation of the grenade is disproportionately high, and could even lead to death."[9]

ACOUSTIC WEAPONS

Acoustic weapons emit painful levels of sound and can cause long-term injury to hearing. Few jurisdictions have used these weapons against the public. Given the lack of understanding about their effect, they should be banned as a tool of crowd control, or at least prohibited until their impact on health can be further studied.[10]

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[6] Rohini J. Haar et al., *Death, injury, and disability from kinetic impact projectiles in crowd-control settings: a systematic review*, 7(1) BMJ 2017) (surveying the academic literature to use injury data on 1984 people who had been shot with kinetic impact projectiles in crowd control settings from around the world. 53 people died of their injuries and 300 suffered permanent disabilities).
[7] See, for example, New York S8516 (2020); Minnesota HF 86 (2020); or Massachusetts HD 5218 (2020).
[8] Amnesty International has called for such a prohibition, AMNESTY INTERNATIONAL, USA: THE WORLD IS WATCHING, MASS VIOLATIONS BY U.S. POLICE OF BLACK LIVES MATTER PROTESTERS' RIGHTS 64 (2020) (also calling for independent and rigorous testing of kinetic impact projectiles before their use by law enforcement).
[9] PHYSICIANS FOR HUMAN RIGHTS, CROWD-CONTROL WEAPONS AND SOCIAL PROTEST IN THE US 6 (June 2020)
[10] *Id.* at 8 (making a similar recommendation that sonic weapons be banned at least until their health effects can be further studied).

TEAR GAS AND CHEMICAL IRRITANTS

Tear gas and other chemical irritants can also cause substantial health consequences.[11] The American Thoracic Society has warned that "[t]hey cause significant short- and long-term respiratory health injury and likely propagate the spread of viral illness, including COVID-19." Protesters have repeatedly been hit with tear gas canisters fired by law enforcement, sometimes causing severe injury.

Several states have introduced legislation that would ban the use of chemical irritants like tear gas for crowd control. For example, California has introduced legislation that bans the use of all CN tear gas or CS gas for crowd control.[12] Many of these bills make an exception for the use of oleoresin capsicum spray (i.e., pepper spray) when used in a targeted and proportionate manner.

Restrictions on Use

Where Less Lethal Weapons are used for crowd control, legislators have considered other options to restrict the use of these weapons and enhance transparency and accountability. Although such restrictions provide some protection, they each have deficiencies. As such, legislators should adopt these restrictions as a package to better protect First Amendment activity and public safety.

TRIGGER FOR USE

Besides banning these weapons entirely at First Amendment assemblies, legislators have prohibited the use of less lethal weapons for crowd control more generally unless there is precipitating violent conduct or the threat of imminent violence. These measures provide some protection but need to be carefully crafted not to provide law enforcement too much discretion, which can lead to abuse.

RIOT

Under legislation enacted in Oregon:

"A law enforcement agency may not use tear gas for the purposes of crowd control except in circumstances constituting a riot."[13]

This trigger of requiring a riot adds additional protection against the abuse of LLWs for crowd control, but in many states, the standard for a riot is not a high threshold. In fact, commentators have long noted that riot statutes in many states are so broad and vague that they are likely unconstitutional. For example, in Oregon, a person is guilty of rioting if they engage with at least five other persons "in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm." This is a relatively subjective standard that can potentially be triggered in situations where there is only isolated property destruction or "tumultuous" conduct

[11] See, for example, Massachusetts HD 5218 (2020); New York S 8512 (2020); Minnesota HF 86 (2020); and Ohio HB 707 (2020).
[12] California AB 66 (2020). CN and CS gas are both commonly used in tear gas.
[13] Oregon HB 4208 (2020)

that law enforcement judges are causing "public alarm." As such, even with this provision, law enforcement retains relatively wide discretion in declaring a largely peaceful protest a riot and then using crowd control weapons.

Where this standard is introduced, legislators should also closely examine the definition of a riot in their jurisdiction to ensure that it is not vague or overly broad.

NECESSARY AND PROPORTIONATE TO PREVENT IMMINENT HARM

In Massachusetts, legislators have proposed that law enforcement can only use LLWs if

"measures used are necessary to prevent imminent harm and the foreseeable harm inflicted by the [LLW] is proportionate to the threat of imminent harm."[14]

This language around proportionately provides limited protection but ultimately is subjective and malleable. For example, it is not clear if harm also includes property damage or what response is proportionate. Under this standard, a law enforcement officer might decide it is proportionate to fire tear gas towards a crowd in response to relatively minor property damage.

PREVENTING PHYSICAL INJURY OR THREATS TO LIFE

In California, legislators have drafted a bill that would require that to use a less lethal weapon for crowd control that "the use is objectively reasonable to defend against injury to an individual, including any peace officer."[15]

This standard usefully distinguishes between violence to persons and damage to property, but still provides relatively wide latitude to officers. It also does not have an imminence requirement, providing more latitude for the officer's subjective interpretation of the situation.

In Portland, Oregon, the mayor of the city prohibited the Portland police from firing tear gas except for in cases of "violence that threatens life safety" situations. This standard heightens the standard for harm to persons, but again can be interpreted subjectively by an officer.

PROCEDURE FOR USE

Jurisdictions have introduced several procedural measures to restrict the use of less lethal weapons in the context of crowd control. These restrictions can be usefully constraining but still allow for the possibility of abuse.

WARNING AND OPPORTUNITY TO DISPERSE

A number of states and municipalities require that officers provide a warning and opportunity to disperse before using LLWs against a crowd.

In Oregon, in the restricted situations in which tear gas can be used, an officer must first:

[14] Massachusetts S 2820 (2020)
[15] California AB 66 (2020)

"(a) Announce the agency's intent to use tear gas; (b) Allow sufficient time for individuals to evacuate the area; and (c) Announce for a second time, immediately before using the tear gas. . . ."[16]

A similar provision was recently enacted in Colorado.[17]

TRAINED OFFICERS ONLY

LLWs should only be used by those who are trained to use them. California's proposed legislation states that kinetic impact projectiles or chemical agents shall only be deployed and used by officers to disperse an assembly "who have received training on their proper use that is approved by the Commission on Peace Officer Standards and Training."[18]

This requirement is important but depends significantly on the quality of the training and certification process. Further, law enforcement agencies need to have robust systems in place to discipline officers who deviate from rules around the use of these weapons.[19]

COMMAND AUTHORIZATION

Some jurisdictions have required that tear gas can only be used if approved by the commanding officer on the scene.[20]

DE-ESCALATION FIRST

In legislation introduced in Massachusetts, one of the requirements before using a crowd control weapon is that "de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances."[21]

This provision is a helpful legislative reminder, and de-escalation tactics should be part of any training in the use of these weapons. Still, by itself, this requirement may not be a significant barrier to law enforcement using these weapons given the subjective language.

NO INDISCRIMINATE USE

In Colorado, new legislation states that law enforcement shall not "discharge kinetic impact projectiles indiscriminately into a crowd."[22] This is a helpful reminder to law

[16] Oregon HB 4208 (2020)
[17] Colorado SB 20-217 (2020) (requiring that before firing tear gas law enforcement must issue "an order to disperse in a sufficient manner to ensure the order is heard and repeated if necessary, followed by sufficient time and space to allow compliance with the order.")
[18] California AB 66 (2020)
[19] BOSTON POLICE, COMMISSION INVESTIGATING THE DEATH OF VICTORIA SNELGROVE (Stern Report) 40 (May 25, 2005) (recommending that only certified officers should be able to use less lethal weapons).
[20] Washington DC, First Amendment Rights and Police Standards Act of 2004, Sec. 116 ("Large scale canisters of chemical irritant shall not be used at First Amendment assemblies absent the approval of a commanding officer at the scene, and the chemical irritant is reasonable and necessary to protect officers or others from physical harm or to arrest actively resisting subjects.") (note: this provision has since been repealed as Washington DC has now banned the use of tear gas to disperse First Amendment assemblies.)
[21] Massachusetts S 2820 (2020)
[22] Colorado SB 20-217 (2020)

enforcement officers, who should never fire anything "indiscriminately" at the public, but is only a starting point in the required restrictions of the use of these weapons.

Damages

To ensure compliance with rules on LLWs, jurisdictions can create additional damages that can be awarded to protesters injured by law enforcement for failing to abide by them. For example, a person injured by an officer in violation of Seattle's new prohibition on LLWs is entitled to at least $10,000 in damages, plus attorney and court fees.[23]

Reporting and Public Participation Requirements

Reporting and public participation requirements help create transparency and accountability around the procurement and use of these weapons.

REPORTING AFTER USE

Law enforcement should be required to make a public report any time less lethal weapons are discharged in the context of crowd control, detailing how the weapons were used, what precipitated their use, and why de-escalation tactics failed. This report should be reviewed by an independent body that can make further factual findings and recommendations.

Under a proposed bill in Massachusetts, if law enforcement uses tear gas or rubber bullets "against a crowd," the officer's appointing agency "shall file a report with the police office standards and accreditation committee detailing all measures that were taken in advance of the event to reduce the probability of disorder and all measures that were taken at the time of the event to de-escalate tensions . . ." The committee "shall review the report and may make any additional investigation" to determine whether the use of the weapon was justified.[24]

REPORTING BEFORE USE

Transparency and public participation should be required when procuring and setting rules for the use of LLWs in the context of crowds. Law enforcement should have to disclose to the public what less lethal weapons they have procured and the rules for their use.[25] When procuring such weapons, they should submit a report detailing their relative safety compared to alternatives, as well as their potential impact on First Amendment rights. Such a report should be submitted to either a legislative or citizen-controlled body for independent oversight.

[23] Seattle Ordinance 126102 (2020)
[24] Massachusetts S 2820 (2020)
[25] Such provisions can potentially be modeled on Community Control Over Police Surveillance legislation. See, ACLU Community Control Over Police Surveillance.

Transparency and Testing Requirements for Manufacturers

Experts, the public, and law enforcement itself still know too little about the actual harm LLWs can cause because of a lack of transparency and testing by manufacturers. Before a law enforcement agency ever uses them, these weapons should go through rigorous and independent testing to assess their safety and ability to perform as recommended by manufacturers. Manufacturers should be required to disclose to the public the components of these weapons, such as the chemicals in a chemical irritant, and their recommended use.

The federal government is particularly well-positioned to legislate these transparency and testing requirements. However, state and local governments can at least require local law enforcement agencies to disclose the recommendations they receive from manufacturers about how these weapons should be used. They can also prohibit law enforcement from purchasing these weapons unless they have gone through independent testing, or at the very least, require law enforcement to report on how they assessed the relative safety of the weapons they procure.

Conclusion

Governments should prohibit the use of these LLWs in the context of First Amendment assemblies, and ban the use of the most dangerous of these weapons for any type of crowd control. When these weapons are deployed for crowd control, in order to protect First Amendment rights and public health, the government should impose a strict set of restrictions on their use as well as reporting and transparency requirements in their use and procurement.

The manufacture and sale of these weapons are poorly regulated. Law enforcement agencies frequently do not understand the risk posed by LLWs. The federal government should require manufacturers to submit these weapons to rigorous and independent testing and be transparent about both their components and recommended use.

Contact Information

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Executive Director

TO: **Nicholas Robinson, Legal Advisor**

FROM: **Taylor Tarnalicki, Research Analyst**

DATE: **October 5, 2020**

SUBJECT: **Anti-Riot Statute**

Presented below is a response to the data request submitted by Nicholas Robinson on behalf of the International Center for Not-For-Profit Law. This response includes an evaluation of both sentencing trends and arrest trends for the District of Columbia's Anti-Riot statue, D.C. Criminal Code Sections 22-1322(b),(c),(d), as well as a data set for each type of data (sentencing and arrest). Each analysis is performed independently given that the Commission is in the early stages of consuming arrest data from the Metropolitan Police Department (MPD), and the limited data currently available impacts the agency's ability to perform a single comprehensive analysis. Details describing each analysis are presented below.

Sentencing Data: January 1, 2012 – August 31, 2020

- Includes data pertaining to all cases filed in D.C. Superior Court between January 1, 2012 and August 31, 2020 where there is at least one (1) anti-riot statute present at any phase of the case, including: 1) the Prosecution Phase, 2) the Indictment Phase, and/or 3) the Court Phase.

Between 2012 and 2020 there were a total of 241 cases filed in D.C. Superior Court where there is at least one count for the anti-riot statute (felony and/or misdemeanor) present at any phase of the case. However, only 23 cases (9.5%) resulted in a conviction for the anti-riot statute; 22 convictions were at the misdemeanor level and one conviction was at the felony level.

Arrest Data: January 9, 2020 – August 31, 2020

- Includes data pertaining to all arrests where the individual was arrested for at least one anti-riot charge.

Between January 9, 2020 and August 31, 2020 there were a total of 110 individuals arrested under the anti-riot statute; 106 individuals (96%) were charged with anti-riot felony, four (4%) were charged with anti-riot misdemeanor.

As stated above, each analysis is performed independently. The sentencing analysis provides an overview of the sentencing trends for the 241 anti-riot cases filed since 2012. Specifically, it addresses the disposition of all counts on the case, the type and length of sentence imposed for counts resulting in a conviction, as well as trends for any additional charges that did not result in a conviction. The arrest analysis identifies the total number of arrests for each type of anti-riot charge (felony vs misdemeanor), as well as any additional offenses included in the arrest.

I. Key Findings

A. Overall – Individual Level

The table below presents data at the individual level. Specifically, it identifies the total number of individuals charged with the anti-riot statute, the total number convicted, as well as the total number arrested. Please note that the sentencing data and arrest data presented in this analysis IS **NOT** LINKED in any way.

		CASE TYPE		
Data Type	**Total Individuals**	**Anti-Riot** *Felony Only*	**Anti-Riot** *Misd Only*	**Anti-Riot** *Felony & Misd*
Sentencing	241 Charged	Charged: 20	Charged: 9	Charged: 212
	23 Convicted	Convicted: 1	Convicted: 4	Convicted: 18[1]
Arrest	110 Arrested	Arrested: 106	Arrested: 4	-

B. Sentencing Data

- Between January 1, 2012 and August 31, 2020 there were a total of 453 anti-riot counts filed (252 felonies, 201 misdemeanors), belonging to 241 cases and 241 offenders.
    - Of these 453 anti-riot counts, only 23 counts (5%) resulted in a conviction, with 22 misdemeanor convictions and one felony conviction.

- There were 23 anti-riot counts that resulted in a conviction. Twenty-one counts received a probation sentence. The average probation sentence to serve was 6.7 months.
    - Two counts did not receive a probation sentence:
        - One count received a six-month incarceration sentence. This case also included an assault on a police officer charge that was dismissed as a part of a plea agreement.
        - One count received a short split sentence[2].

- There were a total of 241 anti-riot cases filed between January 2012 and August 2020. Almost all cases were filed in 2017 (234 cases, 97%).

- In total, there were 1,858 counts filed among all 241 anti-riot cases. Combined, felony and misdemeanor anti-riot counts represented about one-quarter (453, 24%) of all counts filed.
    - The most frequently filed secondary offense was Destruction of Property $1000 or more, which represented over half (1,059, 57%) of all counts filed. However only one of these counts resulted in a conviction, which received a 24-month probation sentence.

- Only 22 cases had a single anti-riot count filed; 21 of which were felonies and one (1) of which was a misdemeanor.
    - Only two of these single count anti-riot cases resulted in a conviction; both were misdemeanors that were pled down from felonies.

[1] All 18 individuals were convicted for the misdemeanor statute

[2] The short split sentence was imposed for the only ant-riot felony conviction; all other anti-riot convictions were misdemeanors.

- Age at offense information is available for 221 individuals, with an average age at offense of 27 years old, and a median age at offense of 26 years.
    - The age at offense could not be determined for 20 individuals due to the cases being sealed.

- The majority (210, 85%) of individuals charged with the anti-riot statute were White. Black individuals only represented 4% of the charged population.
    - Race information was missing for 27 individuals.

- Approximately 34% of individuals charged with the anti-riot statue were female, which is a greater proportion of females compared to other offense types/categories[3]. Of the 22 individuals convicted, 5 (23%) were female.

C. Arrest Data

- Between January 9, 2020 and August 31, 2020 there were 110 unique individuals arrested and charged with the anti-riot statute.
    - The vast majority (106 individuals, 96%) were charged under the felony statute while only four individuals (4%) were charged under the misdemeanor statute.

- Of the 110 individuals arrested, 30 (27%) were also charged with additional offenses. The most common secondary offense was burglary II.
    - 93% of the individuals who were charged with multiple offenses were charged with burglary II

- In this timeframe, there were three "peak" time periods (days) where anti-riot arrests were made:
    - May 31, 2020 28 arrests, 25%
    - June 1, 2020 27 arrests, 25%
    - August 14, 2020 36 arrests, 33%

- Individuals who were between the ages of 22 and 30 at the time of the offense represented 59% of the arrested population. This age group was followed by individuals aged 18-21, who represented 30%.
    - Information for all other age groups is presented in the arrest analysis section on page 8.

- Males represented 70% of the arrested population, compared to females who represented 26%

- The majority of individuals arrested were Black (55%) followed by Whites, who represented 27% of the arrested population.

[3] The D.C. Sentencing Commission 2019 Annual Report indicated that overall, females only accounted for 5.8% of sentences imposed. When examining sentences by offense type, females were most frequently sentenced for Violent and Drug offenses, however they only represented less than 10% of all offenders convicted of these types of offenses. https://scdc.dc.gov/node/1479516

II. Anti-Riot Sentences

A. Overall

The charts below illustrate the sentencing and disposition information for all 241 anti-riot cases (representing 1,858 counts and 241 individuals) that were filed between January 1, 2012 and August 31, 2020. Of the 30 counts that resulted in a conviction, all but two (2) received a probation sentence. The remaining two (2) counts received an incarceration sentence; sentencing information for these convictions is referenced in footnotes three and four.

Total Cases Filed	Total Counts Filed	Total Individuals Charged
241	**1,858**	**241**

1. Total Number of Convictions

The table below identifies the total number of counts filed for each offense, as well as the total number of conivctions for each offense. Please note that one case can have multiple counts. For example, there were 18 total cases that had more than one 'riot act -felony' count filed. Offenses that received at least one conviction are shaded in light blue.

Charged Offense	Counts Filed *1,858*	Convictions *30*
Anti-Riot -Felony	**252**	**1**
Anti-Riot -Misd	**201**	**22**[4]
Destruction of Property $1000 or More	1068	1
Conspiracy	212	-
Assault On A Police Officer	113	3
Resisting Arrest	8	1
Destruction of Property less than $1000	1	-
Shoplifting	1	1
Unlawful Entry - Public Property	1	1
Deface Private/Public Property	1	-

All Convictions (30 counts): The vast majority of convinctions (29, 97%) were the result of a plea agreement; only one conviction (1, 3%) was the result of a bench trial.

All Non-Convictions (1,828 counts): The majority (1,599, 87%) of counts that did not result in a conviction were dismissed, though a handful of counts (56, 3%) were deemed not guilty as the result of a jury trial[5].

[4] 19 of the anti-riot misdemeanor convictions were initially charged as anti-riot felony. All other convictions represented in the table align with the charged offense

[5] Other disposition types for non-convictions include: 1) Acquitted, 2) Dismissed as Part of a Plea Agreement, 3) DWP No Police Officer, and 4) Nulle Prosequi

2. Average Probation Sentence

The table below displays the total number of counts sentenced, and the average probation sentence to serve for each convicted offense. Two convictions resulted in an incarceration sentence, and have been omitted from this analysis. Sentencing information for both these counts can be found at the footnotes at the bottom of the page.

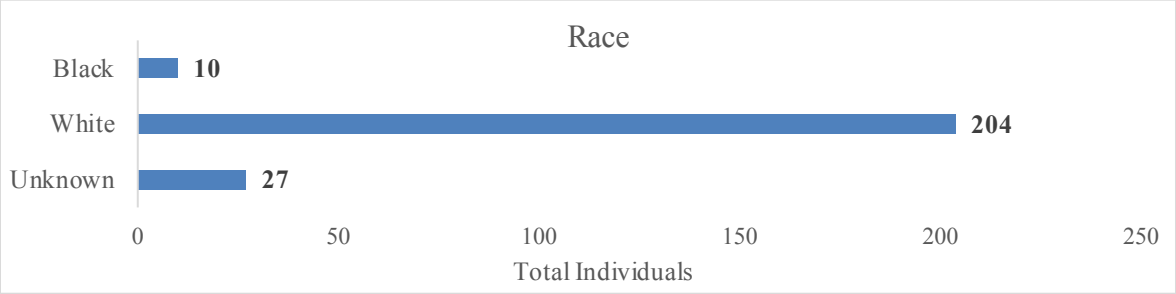
Convicted Offense	Total Counts Sentenced	Average Probation Sentence
Riot Act -Felony	**1**	**Short Split** ***4 months prison*** ***24 months probation***
Riot Act -Misd	**22**	**6.76 months**[6]
Destruction of Property $1000 or More	1	24 months
Assault On A Police Officer	3	24 months[7]
Resisting Arrest	1	24 months
Shoplifting	1	12 months
Unlawful Entry - Public Property	1	12 months

[6] One count received a 6 month incarceration sentence, which is not factored into the average probation sentence calculation
[7] One count received a 2 month incarceration sentence, which is not factored into the average probation sentence calculation

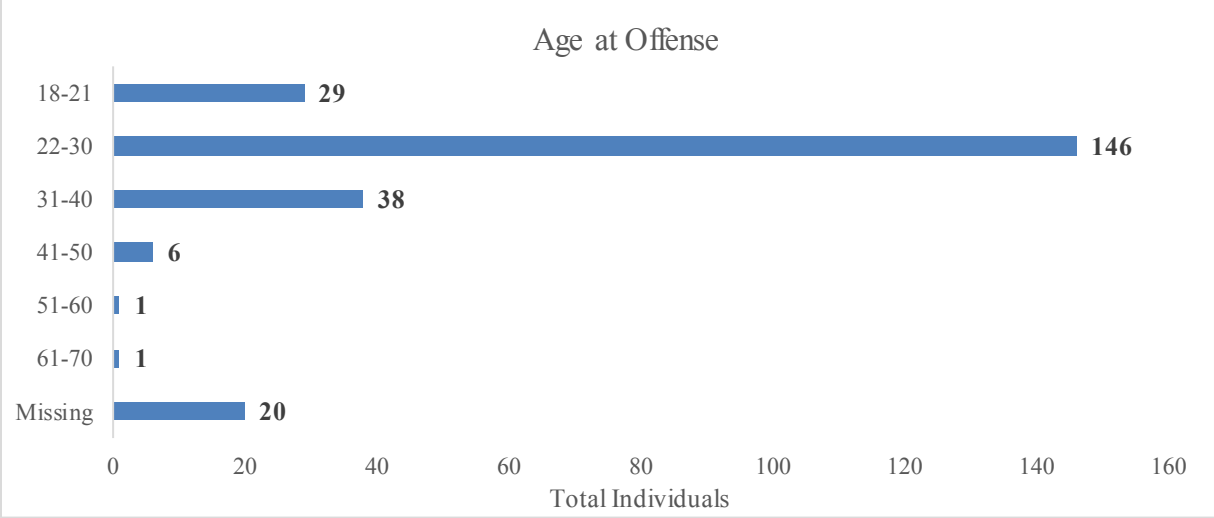
B. Demographics

The tables below identify the demographic trends among the 241 indivduals charged and/or convicted of the anti-riot statute.

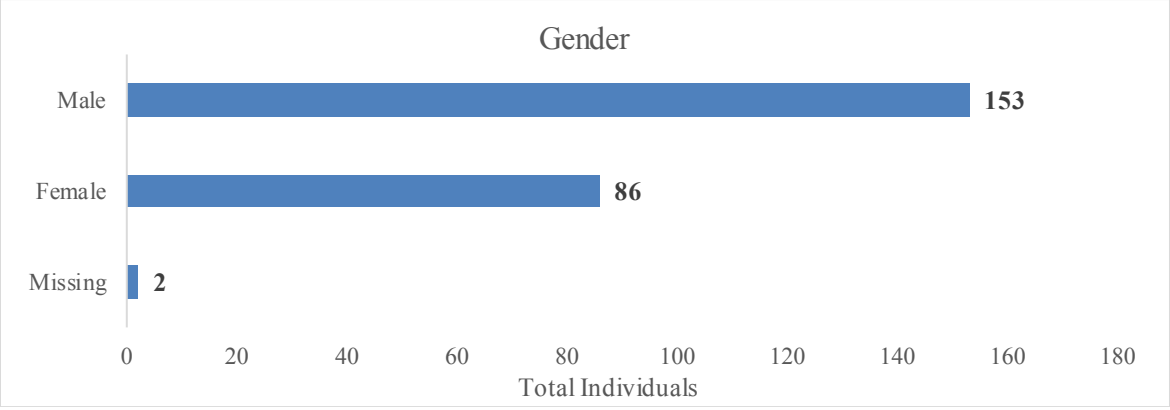
1. Race



2. Age at Offense



3. Gender

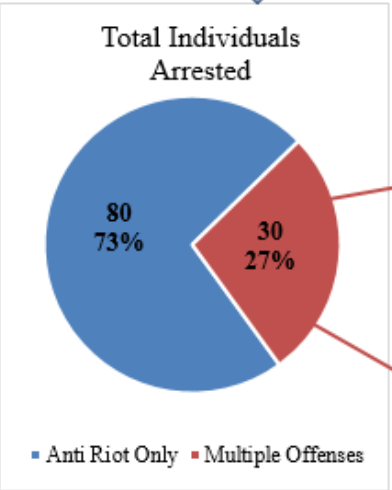


III. Anti-Riot Arrests

A. Overall

Between January 9, 2020 and August 31, 2020 there were 110 individuals arrested and charged with the anti-riot statute, either at the felony or misdemeanor level. Thirty of these individuals (27%) were also charged with additional offenses; there were a total of 154 unique charges among the arrested population[8]. A series of charts/tables detailing this information is presented below.

Total Individuals Arrested	Total Charges
110	154



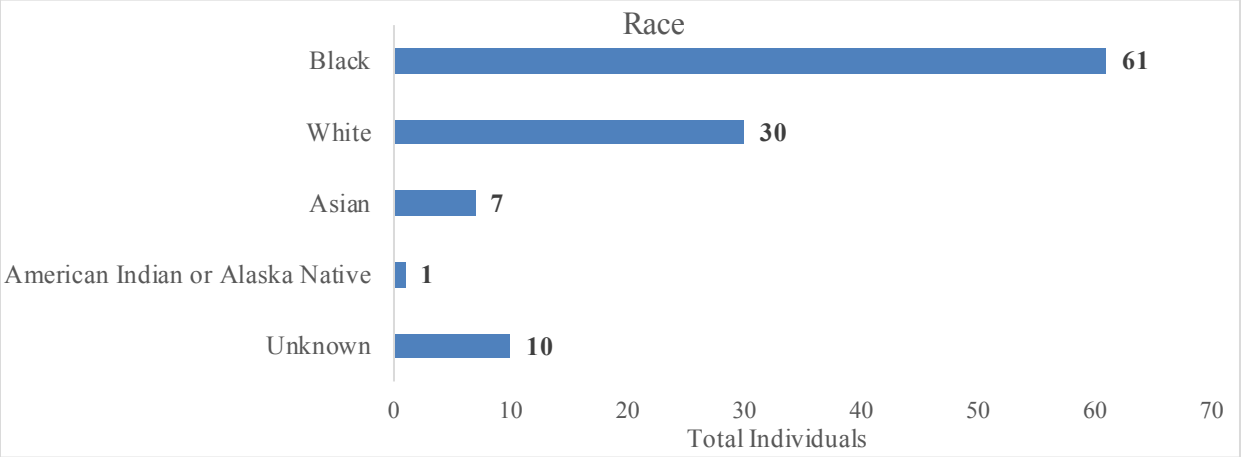
Charge Description	Total # Charges
Anti-Riot -felony	**106**
Anti-Riot -misdemeanor	**4**
Burglary II	28
Curfew Violation	5
Resisting Arrest	4
Unlawful Entry	3
Assault On A Police Officer (simple Assault)	2
Destruction Of Property Less Than $1000	1
Poss Of A Controlled Substance -misd	1
Total	**154**

[8] There were a total of 74 unique charges among the 30 individuals that were arrested for multiple offenses. This is represented in the red slice of the pie chart (30 anti-riot charges – one per individual), as well as the red shaded rows in the corresponding table (44 additional charges).

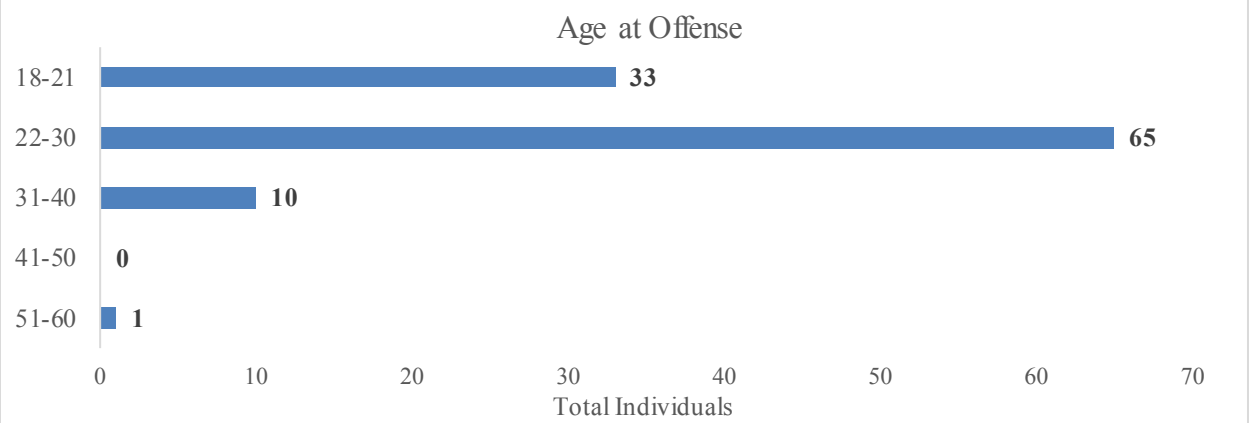
B. Demographics

The tables below identify the demographic trends among the indivduals arrested and charged with the anti-riot statute. Please note that one individual, recorded as a Jane Doe, has been omitted from the following demographic analysis as the demographic characteristics pertaining to that individual cannot be verified.

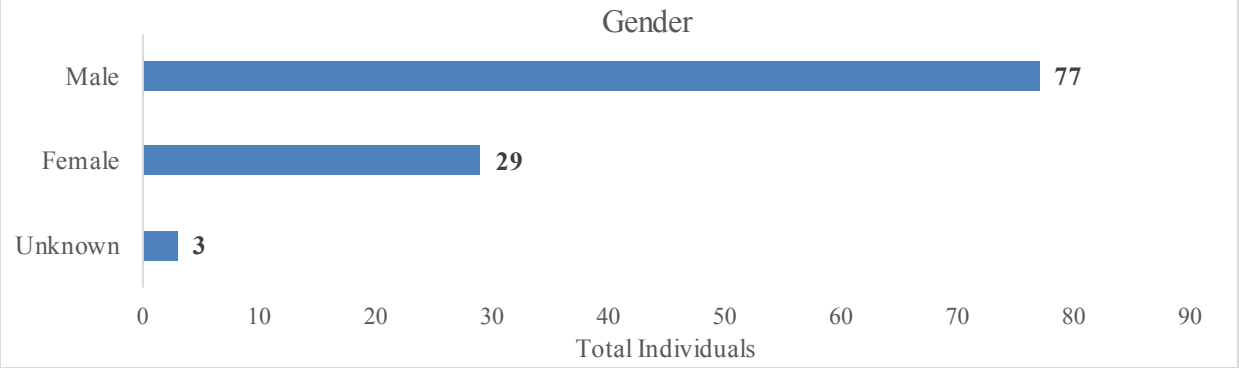
1. Race



2. Age at Offense



3. Gender



DC Council Judiciary and Public Safety Public Hearing

October 15, 2020 - Virtual Hearing 3 Min. Testimony

Good Evening Council,

Thank you for allowing me to provide my oral testimony today.

My name is Beverly Smith. I was born and raised in the District of Columbia. I am currently a Ward 8 resident.

I am glad to see that other kinds of unjust killings besides police shootings are being considered in the "Comprehensive Policing and Justice Reform Act of 2020" such as choke hold restraints, however, it isn't comprehensive enough. The current legislation does not address the knee in the back. My 27 year old son, Alonzo Smith, who was unarmed and did not commit a crime, died in the custody of two Special Police Officers (SPO's) at the Marbury Plaza apartment complex in the District of Columbia (DC), on November 1, 2015. His death was ruled a homicide, compression of the torso, which is knee in the back. No indictment for his murder.

I have been fighting hard for change over the past five years for police and special police reform. There have been several proposed legislations for SPO's in DC after my son's death by Mayor Bowser and Councilmember McDuffie, but like a lot of other proposals there were no final action and no meaningful change.

In 2018, a 36 year old Florida man, Timothy Coffman, died while in police custody from compression of the torso (knee in the back).

In January 2020, a 37 year old Illinois man, Eric Lurry, died in the custody of police after having a baton shoved in his mouth and pinching his nose.

Recently, in May 2020, 46 year old Minneapolis man, George Floyd, died in custody of the police from positional asphyxia restraint (knee pressed in his neck).

There are roughly 7,700 SPO's in DC and about 4,500 are armed. They are regulated and licensed by the Metropolitan Police Department (MPD) with little to no oversight. Some are licensed to carry a firearm with only 40 hours of inadequate training in contrast to MPD who are required to have at least 28 weeks of training before being licensed to carry a firearm. There's a lack of quality and quantity of training for SPO's which put DC residents at high risk of danger. Currently, they are only required to have 40 hours of limited inadequate training before assigned to a post.

Additionally, DC residents do not have any online mechanism to file a complaint against a SPO for excessive use of force or other complaints. Myself, along with Virginia Spatz has created a database for DC residents to report complaints against SPO's at Spodatadc.org.

I currently have a petition to "Disarm and Reform" SPO's in DC at dcjusticelab.org/justice4zo with the following four demands:

1. Disarming special police officers;
2. Increasing the quantity and quality of training required;
3. Passing the "Special Police Officer Amendment Act;" and
4. Prohibiting pursuit beyond property boundaries.

I demand that my legislation "Disarm and Reform" SPO's in DC be introduced without waiting for a consensus on every part of the bill.

Thank you for listening!

Testimony of
Virginia A. Spatz

Ward 6, DC Justice Lab Volunteer

to DC Council Committee on Judiciary and Public Safety
October 15, 2020

Thank you for this opportunity to testify on an issue that affects everyone who lives, works, worships, pursues entertainment, or otherwise visits in the District.

My name is Virginia Spatz. For more than 30 years, my husband and I have lived in Ward 6, in what has become Hill East, where we raised two children, now adults and living away from DC. The four of us are white.

In addition to living in the First and Fifth Police Districts, I have worked, worshipped, and/or protested in every DC police district -- including the Second, around the White House, and the Seventh, east of the river. These details matter because my family's skin-color has had an enormous impact on our interactions with police over the decades. So has the Police District of our surroundings.

FIRST AND FIFTH

When I first moved to DC, in 1988, I lived briefly on the campus of Gallaudet University. My not-yet-husband and I then moved together to an apartment near Eastern High School and to two other apartments in the area before buying a house in 1994. We originally lived in the Fifth District and then the First -- for a time the same address was Fifth District and then the borders shifted.

At that time, gun violence was at a historic high for the city as a whole. Many people I knew who lived in the First District, Black and white, were active in PSA meetings -- before electronic communications were common, folks had to show up at the meetings or otherwise engage in person -- walked with Orange Hats, and tried other forms of community engagement and community-involved policing. These opportunities were either lacking entirely or hidden so well as to be effectively non-existent in the Fifth District.

I participated in 1D activities, like walking with the Orange Hats, while living in 5D: The 1D officer who walked the Orange Hats, and generally saw folks back to their homes at the end of the evening, would have to radio into 5D before crossing Massachusetts to walk me back to my apartment, so as not to interfere with any on-going operations. That was a simple and sensible precaution, of course, but it also underlined the difference in attitude toward the neighborhoods between the two districts:

Broadly summarizing my different experiences back when I first lived here:

- **First District folks** (where white people were far more common), at least the white people and Black people who were active in community policing, were treated as clients -- I think they used to say "patrons" -- to be satisfied;
- **Fifth District folks** (which was overwhelmingly Black) were treated as potential, likely inevitable, victims of crime and/or potential dangers in themselves.

SECOND AND SEVENTH

Much later, but back when Cathy Lanier was still Chief, during Black Lives Matter protests (probably 2015), it happened that I was in the Seventh District for a BLM march one night, while friends were protesting in Northwest:

- **7D, officers RODE MOTORCYCLES INTO** the crowd of marchers -- not hitting anyone, but definitely moving beyond declaring their visibility or throwing around their weight;
- **In NW, police protected protesters** -- this was Lafayette Park and environs, involving both Park Police and MPD), and all was copacetic, even cheerful, I later learned.

OTHER DISTRICTS AND DIFFERENCES

- In the neighborhood, in their 20 years or so in what was primarily 1D, our children were never stopped or even spoken to by police unless they were walking with Black friends.
- In three years (2006-2009) at the soon to be renamed Ward 3 high school, one child saw students of color inside the school subject to all kinds of suspicion and violent treatment, which was rarely visited upon white students; outside, officers worked very hard to ensure that Black students -- assumed to be from outside Ward 3 -- moved along home at dismissal, while white students were told not to block the sidewalk but expected to mill about and enjoy freedom.
- In high school, one spent two years at School Without Walls (2007-2009) housed temporarily near Union Station and two years (2009-2011) at Walls in the new building on the GW campus, reporting vastly different treatment in Northeast and Northwest.
- In both locations, Walls was then -- maybe still is -- the only DCPS high school without metal-detectors and searches at the entrance, making for a VASTLY different experience than friends (and a sibling) at other schools.

Then and Now: A DEADLY DIFFERENCE?

Many years ago, probably 1994, we had just moved into our new home, on the edge of 1D and 5D. Shortly after moving in, our home was broken into. I did call 911 when I came home to find mayhem. But there was some -- very temporary as it turned out -- fiasco with 911, so that it was taking over an hour for calls to even reach dispatch. When officers finally showed up, I was told there was nothing that could be done except filing a report for insurance purposes, laughed at for asking if there was any chance of retrieving any items that were precious to us, and generally treated as an idiot who got what was coming: What could you expect moving into a neighborhood where crime was so rife?

> Flash forward 25 years: Same house; vastly changed neighborhood. I had Black-skinned guests who were going in and out of our front door for several reasons, and one visitor paused to sit on our stoop. Next thing I know there is pounding on the front door and shouts of "Police!"
>
> It turned out that a neighbor -- someone who has known us for decades, a Black man, as it happens, who might have been disgruntled with my guests or perhaps honestly believed I was in trouble -- had called police upon seeing strangers in our yard and our door ajar. Given that my guests were only with me a short time before police showed up, officers must have been dispatched instantly....
>
> ...I remember being very grateful that the sight lines were such that the Black man in my dining room was not visible from the door. I suggested he stay at the table out of sight and went to meet the officers. If I'd been wearing body camera, you would definitely see footage of police officers visibly relaxing when I appeared; if we had a Star Trek tri-corder, you would have a record of blood pressure and other measures of adrenalin dropping....
>
> I still have momentary panic-attacks envisioning what might have happened had officers, who must have been told this was a dire emergency, and were standing in bright sunlight, seen my guest at the end of our dim hallway.

My own experiences and much research suggest that effective police reform must address structural inequities across neighborhoods and demographics -- including age, skin color, gender, and other factors -- and reduce overall police encounters. Otherwise we are just tinkering with dimensions of a few bonfires, while the city burns; describing the fire, but not attempting to put it out.

I join with DC Justice Lab and others in calling for an end to jump outs -- by any name. I urge you to adopt DC Justice Lab proposals to limit search warrants, refine the Miranda doctrine especially as regards children, and eliminate consent searches, as well as reform of other systems that disproportionately impact some communities, bringing regular trauma and risk of physical injury, even death, to some while leaving others largely unscathed. I urge passage of these reforms, separate from this bill, if necessary to speed change.

Legislation must address accountability for officers and for those in command.

We must look beyond weaponry to prohibit para-military training and dismantle any unit or procedure -- including Gun Recovery and surveillance -- which disproportionately terrorizes some groups, without even reducing the homicide rate or otherwise improving District safety.

Demilitarizing weaponry and behavior is also key in protecting First Amendment rights and reducing trauma and injury, for locals and for visitors.

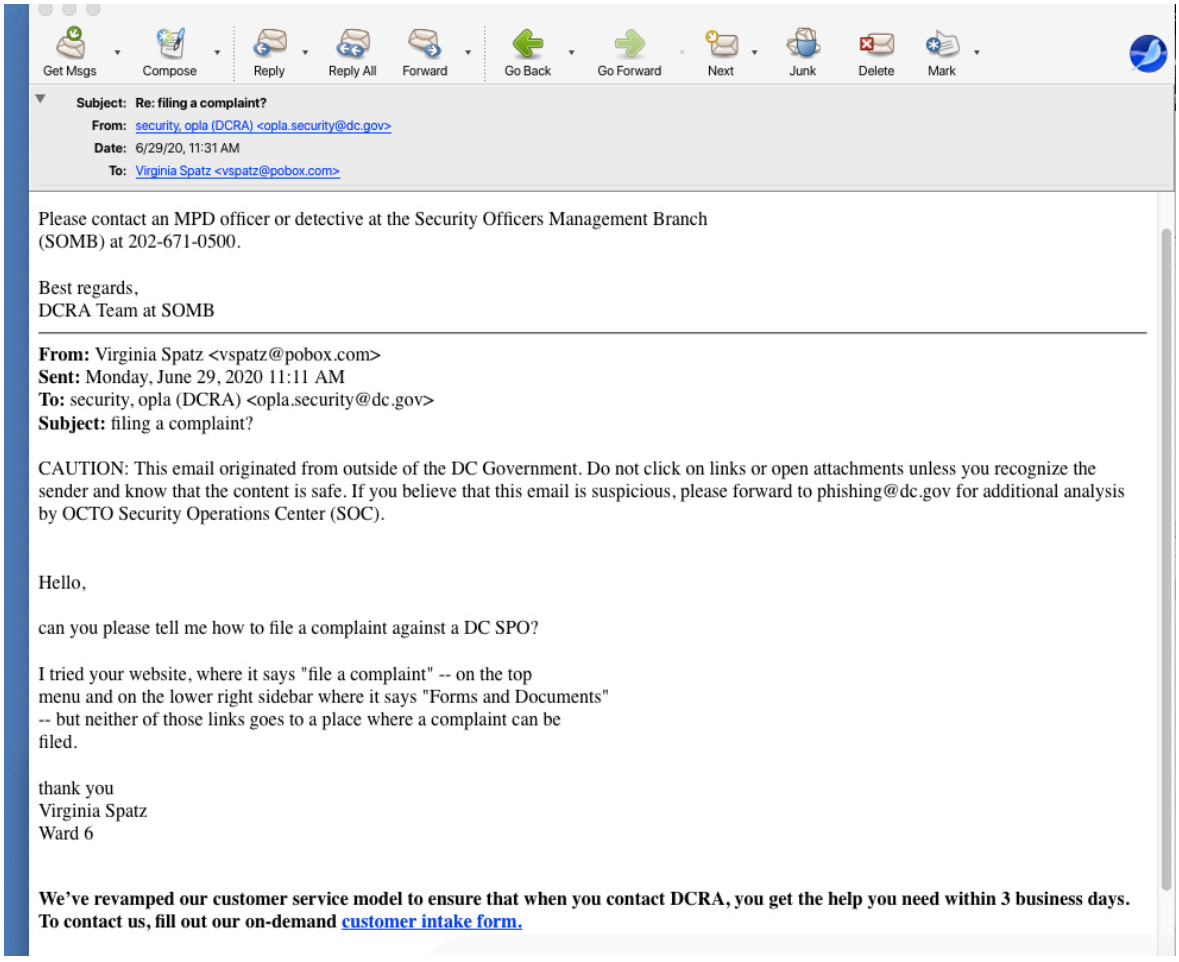
Finally, we need to disarm special police, and it is crucial to address the current dysfunction which makes filing a complaint against a special police officer nearly impossible.

What follows is an explanation of the current complaint-filing situation:

The video at this website shows how the buttons that claim one can "file a complaint" against a Special Police Officer lead to a page with no possibility of fulfilling that action. I made this little video just to show the situation -- https://spodatadc.org/2020/06/29/special-police-and-complaints/ -- that was back in June. I recently checked in October and nothing had changed.

I also inquired of the agencies involved back in June and was given the following answers.

This was the first --



Get Msgs | Compose | Reply | Reply All | Forward | Go Back | Go Forward | Next | Junk | Delete | Mark

Subject: Re: filing a complaint?
From: security, opla (DCRA) <opla.security@dc.gov>
Date: 6/29/20, 11:31 AM
To: Virginia Spatz <vspatz@pobox.com>

Please contact an MPD officer or detective at the Security Officers Management Branch (SOMB) at 202-671-0500.

Best regards,
DCRA Team at SOMB

From: Virginia Spatz <vspatz@pobox.com>
Sent: Monday, June 29, 2020 11:11 AM
To: security, opla (DCRA) <opla.security@dc.gov>
Subject: filing a complaint?

CAUTION: This email originated from outside of the DC Government. Do not click on links or open attachments unless you recognize the sender and know that the content is safe. If you believe that this email is suspicious, please forward to phishing@dc.gov for additional analysis by OCTO Security Operations Center (SOC).

Hello,

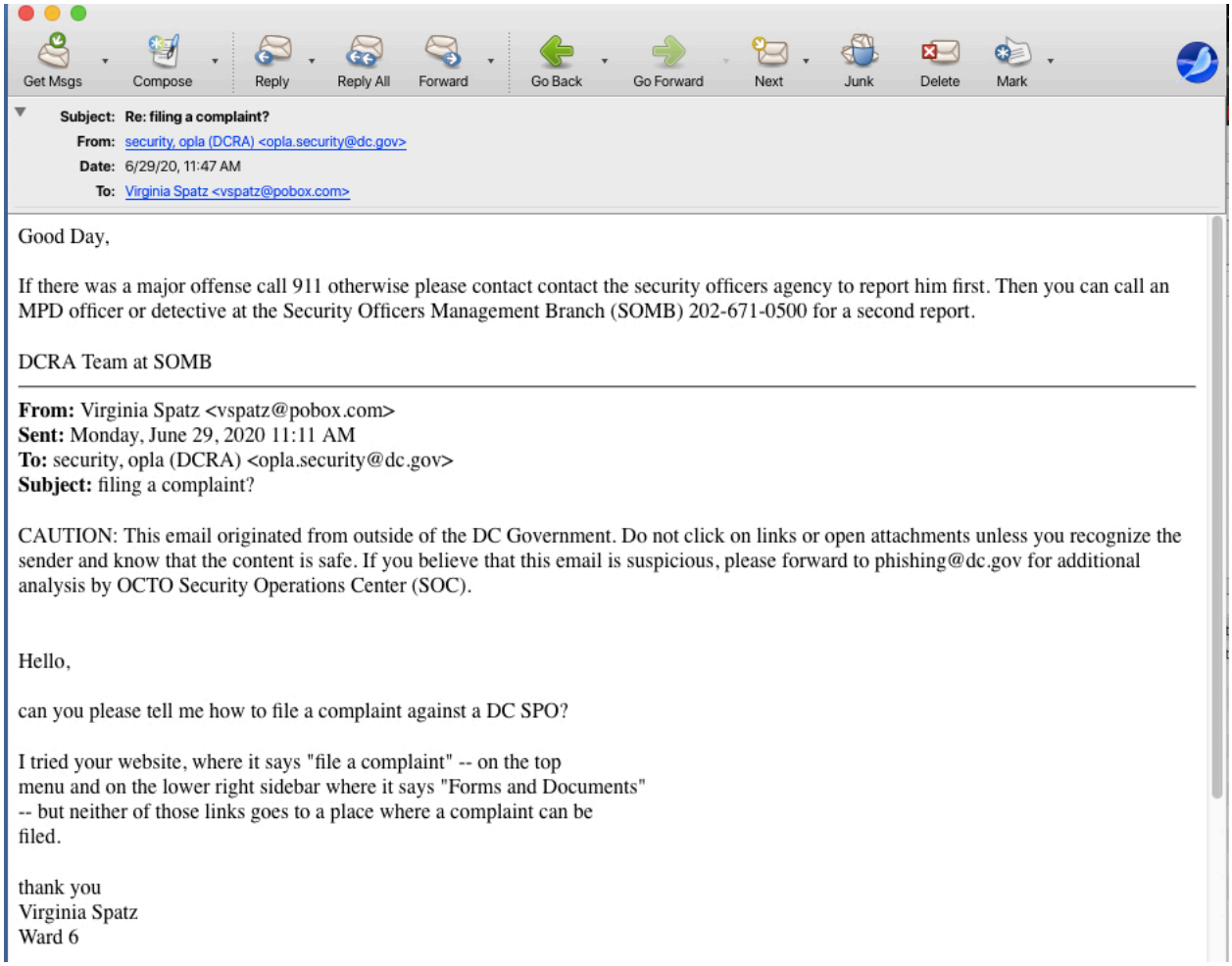
can you please tell me how to file a complaint against a DC SPO?

I tried your website, where it says "file a complaint" -- on the top menu and on the lower right sidebar where it says "Forms and Documents" -- but neither of those links goes to a place where a complaint can be filed.

thank you
Virginia Spatz
Ward 6

We've revamped our customer service model to ensure that when you contact DCRA, you get the help you need within 3 business days. To contact us, fill out our on-demand customer intake form.

About fifteen minutes later, another arrived (next page) --



Get Msgs | Compose | Reply | Reply All | Forward | Go Back | Go Forward | Next | Junk | Delete | Mark

Subject: Re: filing a complaint?
From: security, opla (DCRA) <opla.security@dc.gov>
Date: 6/29/20, 11:47 AM
To: Virginia Spatz <vspatz@pobox.com>

Good Day,

If there was a major offense call 911 otherwise please contact contact the security officers agency to report him first. Then you can call an MPD officer or detective at the Security Officers Management Branch (SOMB) 202-671-0500 for a second report.

DCRA Team at SOMB

From: Virginia Spatz <vspatz@pobox.com>
Sent: Monday, June 29, 2020 11:11 AM
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-- but neither of those links goes to a place where a complaint can be
filed.

thank you
Virginia Spatz
Ward 6

Neither response addresses the dysfunction of the website or the fact that the general public has no way to know what to do based on what information is provided.

Neither responses addresses what might have been the active trauma of someone who'd been abused by an SPO or witnessed such behavior. As it happens, I was just inquiring as part of a sort of research effort -- and maybe the writer could sense that this was not an emergency or a traumatic situation. But I doubt that. So much is in need of overhaul.

Beverly Smith, mother of Alonzo Smith, who was killed by Special Police Officers in the fall of 2015, and I worked together to try to make another portal for collecting information from those who cannot navigate this craziness and/or would not feel safe to report an SPO to MPD.

The fact that there is no way to file a complaint means there is also slim chance for any kind of accountability.

Thank you for the opportunity to testify. I am happy to answer further questions. And I urge the Committee to produce much stronger legislation. Soon.

-#-

Testimony by Diontre Davis
DC Justice Lab
https://dcjusticelab.org/police

To the Council of the District of Columbia, Judiciary Committee
Thursday, October 15, 2020 at 9:00 am John A. Wilson Building, Council Chamber 31350 Pennsylvania Avenue, N.W. Washington, D.C. 20004

On Bill B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

Thank you, Chairman Allen, for allowing me to testify today. My name is Diontre Davis, and I am a volunteer for DC Justice Lab, a Washington, D.C. based non-profit organization of law and policy experts researching, organizing, and advocating for large-scale changes to the District's criminal legal system. In our report, "End Jump Outs," we provide evidence that the DC Metropolitan Police Department (MPD) have been illegally conducting jump-outs in primarily Black communities and have been intentionally covering this up for the last 3 years. As we know, this is most callous form of Stop-and-Frisks and it has already been outlawed by the DC Council, yet MPD has secretly operating in jump-out squads.

Community members in pre-dominantly black neighborhoods have stated specialized paramilitary units such as the Gun Recovery Unit ("GRU") in the Narcotics and Special Investigations Division ("NSID") conduct jump-out tactics. Wards 7 and 8 are the area that have been the most impacted by the jump-outs. These units drive around in unmarked cars, without their uniforms, and "jump out" on African American citizens, telling them to show their waistbands. If a person doesn't show their waist, officers will often accost them by rifling through their pockets and touching their body, looking for contraband.

The majority of MPD denies that these jump-outs are happening. However, community members revealed that officers in the GRU brag about using these practices and wear shirts with an insignia glorifying police violence with the slogan "vest up one in the chamber" and an image of a human skull with a bullet hole in the center. In 2017, the DC Police Chief Peter Newsham acknowledged the existence of these shirts and said they were "disturbing and disgraceful." In the beginning of this year, January 16th to be exact, sergeant Charlotte Djoussou revealed in a DC council hearing on public safety that the MPD are still conducting the jump-outs, targeting minority communities, and violating 4th Amendment rights. She specifically stated, and I quote, "Officers were targeting groups of minority males and violating 4th amendment rights, jumping out."

There is also video evidence of MPD conducting jump-outs. In the beginning of this year, a DC resident, Ryan Morgan submitted a video of an MPD officer demanding to see his waistband without probable cause. In the video, Morgan states he does not consent to any search, yet he is still harassed and intimidated into showing his waistband to prove he is not carrying a gun. I personally spoke with Mr. Morgan earlier this summer and he verified that the jump-outs have been a phenomenon that has been occurring for over 30 years!

Mr. Chairman, I believe that passing The Comprehensive Policing and Justice Reform Amendment Act of 2020 is necessary to resolve these issues. First, officers will be required to work in full uniform and operate in marked police cars as a means of promoting a transparency in appearance. A large component of the jump outs is that they are conducted in a way that brings terror to those harassed because they have no clue it appears a group of people are trying to harm and/or kidnap them.

However, before passing this bill, we believe there should be a slight revision concerning the statute requiring that an officer's justification for the search is based only on the person's consent. We urge the Council to improve upon the Comprehensive Policing and Justice Reform Amendment Act by eliminating consent searches**.** The reason for this is because the warning requirement does not adequately ensure consent searches are voluntary. In our report, Eliminate Consent Searches, we explain that the fear coercion is used on Black citizens as a psychological means of manipulating them to relinquish their rights. The fear of them already being stereotyped as criminals and the reputation that the police have with for punishing individuals who are uncooperative or not sufficiently submissive leaves Black citizens consenting to searches out of fear, not choice. Consent searches are not truly consensual. We urge the DC Council to revise this part of the bill to eliminate the primary mechanism police use to harass and racially profile Black Washingtonians. We recommend that consent searches are only allowed if the person who consents had an opportunity to speak to a lawyer. Using the assistance of an attorney helps the individual knowingly, intelligently, and voluntarily waive their rights.

Thank you and the rest of the DC Council for your time and consideration.

October 15, 2020

MORE THAN A PLAZA

DC JUSTICE LAB

Chairman Allen, and Members of the Committee, thank you for the opportunity to testify today.

I am a Law Student at the University of the District of Columbia, and a volunteer member of the Search Warrants Team at DC Justice Lab.[1]

I was a teenager the first time I learned about No Knock Warrants. It was in the aftermath of 9/11, and the invasion of privacy that followed on Arab-Americans impacted the way I viewed intelligence gathering and surveillance. I witnessed families in my Muslim community torn apart by FBI raids; innocent citizens were accused of terrorist activity and deported without due process. It left a chilling effect in my life.

Breonna Taylor died because of a No Knock Warrant. This practice has little to do with public safety, and instead has torn communities apart and taken many innocent Black and Brown lives.

<u>If the council is serious about reform in the District, it should amend D.C. Code § 23-522-524. I urge the Council to consider five things:</u>

First, The Council should narrow the probable cause standard for MPD officers requesting search warrants by requiring them to show "strong evidence based on reasonable due diligence." In DC, the probable cause standard under the Fourth Amendment requires only a showing of "*a fair probability that evidence of a crime would be found.*" Its' effect has resulted in MPD officers obtaining warrants for incorrect houses, arresting the wrong people, and often police recover no evidence. The Council must raise the bar.

Second, the Council should prohibit search warrants in cases of suspected drug activity or cases based solely on drug activity, because it will minimize the need for law enforcement to engage in drug raids.

[1] DC Justice Lab, *Limit Search Warrants* (September 2020), bit.ly/limit-search-warrants.

Third, the Council should ban no knock warrants. This practice is a legacy of the War on Drugs—a war on poor people and people of color. Adults are not the only ones harmed by no knock warrants—children are too. In 2013, during a nighttime execution of a warrant, MPD officers ransacked the home of Shandalyn Harrison searching for evidence of drug distribution. What they found was a grandmother watching TV with her young granddaughters in the living room. Officers then barged into the bathroom, opened the shower curtain on her 11 year old granddaughter while she stood naked, and pointed a gun at her. Like Breonna Taylor's case, the person they were looking for had not lived in the house for several years. The Council should just ban no knock warrants.

Fourth, the Council should prohibit MPD from handcuffing, pointing guns, and conducting warrantless bodily searches of individuals not subject to the search warrant.

And Finally, the Council should compensate victims for property damage and the unnecessary violence and trauma caused by MPD.

_____

I hope The Council will do the smart and right thing to amend D.C. Code § 23-522-524, with respect to the five reform goals.

Thank you.

MORE THAN A PLAZA

DC JUSTICE LAB +
GEORGETOWN JUVENILE JUSTICE INITIATIVE

DEMANDING A MORE MATURE MIRANDA FOR KIDS

October 2020

Katrina Jackson • Alexis Mayer

Demanding a More Mature *Miranda* for Kids

I. Introduction

In *Miranda v. Arizona*, the Supreme Court held that statements made by an adult during custodial interrogation are inadmissible unless law enforcement officers first administer warnings before questioning and the adult validly waives those rights.[1] Pursuant to the Fifth and Sixth Amendments, *Miranda* warnings inform individuals of: (1) the right to remain silent, (2) that any statement can be used against them, (3) the right to obtain an attorney and to have counsel present during questioning, and (4) the right to be appointed an attorney.[2] To waive these rights, a person must make a voluntary, knowing, and intelligent waiver based on the totality of the circumstances.[3] The Supreme Court emphasized that any statement or confession obtained through an uninformed, coerced, or compelled waiver of these rights must be excluded from any judicial proceeding.[4]

A year later, in *In re Gault*, the Supreme Court recognized that the procedural Constitutional safeguards outlined in *Miranda v. Arizona*, apply to children as well.[5] However, in deciding *Gault*, the Supreme Court extended *Miranda*'s adult framework to youth without the benefit of the wealth of adolescent development research that has been conducted since *Miranda* and *Gault* were decided.[6] As a result, the *Miranda* framework is not a robust, research-driven approach for protecting the rights of youth. Indeed, in *J.D.B. v. North Carolina*, the Supreme Court recognized this shortcoming and held that a child's age is relevant to *Miranda*'s custody analysis because children as a class are different than adults.[7] Notably, *Miranda*, *Gault*, and *J.D.B.* describe only the Constitutional floor of protections that must be afforded to youth in an interrogation context.

These bare minimum *Miranda* protections fail to fully protect children because they do not accommodate for a child's high susceptibility to pressure and limited cognitive ability. Furthermore, Black children are disproportionally affected by the grave insufficiencies of the *Miranda* Doctrine. The current Doctrine fails to consider the unique vulnerabilities of Black youth experience when interacting with the police. As residents, law students, attorneys, and members of the community, we respectfully urge the DC Council to protect children from *Miranda*'s shortcomings by requiring, prior to any custodial interrogation, that (1) law enforcement provide youth with expanded warnings; 2) youth be provided a reasonable opportunity to consult with counsel; and (3) waivers will only be valid if they are knowing, intelligent, voluntary, and made in the presence of counsel.

II. The Insufficiencies of the *Miranda* Doctrine

Although children only account for about 8.5% of arrests, nationally, they account for about one-third of false confessions.[8] This often leads to wrongful convictions and severe dispositions because those who falsely confess are treated harshly throughout the rest of the juvenile or criminal legal process.[9] Youth have difficulty understanding the *Miranda* rights, largely contributing to this high rate of wrongful convictions.

Because children's cognitive abilities are still developing, most children cannot meaningfully understand their *Miranda* rights.[10] More specifically, only 20% of youth adequately understand their *Miranda* rights.[11] Empirical evidence illustrates that adequately comprehending *Miranda* requires at least a tenth-grade reading level.[12] Moreover, understanding two of the *Miranda* warning

protections, the right to remain silent and the right to have an attorney present, requires a college or graduate reading ability.[13] As high as 85% of the youth in the juvenile legal system have disabilities, and children with disabilities inherently have difficulties in understanding the complexity of the *Miranda* doctrine.[14] Due to economic, social, and educational disparities, these necessary reading levels are far beyond the majority of individuals, including adults, who are targets of custodial interrogations.[15]

Furthermore, "[o]verwhelming empirical evidence shows that [youth] do not understand their Constitutional protection against self-incrimination or the consequence of waiving their rights."[16] In particular, many children do not understand that they will not incur consequences or court sanctions if they invoke their rights, such as the right to remain silent.[17] Due to no fault of their own, children do not understand the purpose of an attorney or that an attorney will support them even if they are guilty.[18] Additionally, many children often confuse the term, "interrogation," with an adjudication hearing and, therefore, do not understand that the right to have an attorney present during an interrogation means that they have the right to have an attorney present during questioning.[19] Thus, because youth do not understand *Miranda*'s protections, they cannot fully understand or appreciate the rights they are giving up when they waive them.[20]

In addition to not fully understanding their rights or the consequences of waiving them, children also "lack the psychosocial maturity and cognitive capacity to waive *Miranda* rights."[21] Because a child's prefrontal cortex has not yet matured,[22] children focus on short-term rather than long-term consequences,[23] especially in moments of stress.[24] Thus, children are especially at risk of waiving their rights without considering the consequences in the inherently stressful setting of an interrogation.[25] For example, when an officer tells a child that they can go home if they waive their *Miranda* rights and answer questions, the child is likely to waive their rights based on the short-term reward of going home.[26] Furthermore, even if they could consider the long-term consequences, youth "'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'"[27] As a result, children as young as ten years old waive their *Miranda* rights about 90% of the time without understanding the rights they are giving up,[28] often leading to false confessions and wrongful convictions.[29]

III. Race Implications and Disproportionate Effects of the *Miranda* Doctrine

For decades, tensions have existed between the Black community and the police. In the District of Columbia, police disproportionately stop, search, and arrest Black youth. Black youth are "ten times more likely to get stopped than their white peers," and between July and December of 2019, police searched 738 Black youth and only four White youth.[30] In 2018, 98% of youth committed to the Department of Youth and Rehabilitation Services were Black.[31] In 2015, Black youth made up just under 70% of the District's youth population, but accounted for over 95% of those arrested in the District.[32] Black people continue to be disproportionally arrested, not just in heavily policed, predominantly Black neighborhoods, but also in areas with high concentrations of White people.[33] Furthermore, Black youth's view of the police is often learned and shaped at a very young age.[34] Therefore, "[d]istrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of Miranda waivers."[35]

Moreover, Black men are more likely than White men to feel anxiousness and fearfulness during police encounters and , as a result, engage self-regulatory behavior to counteract any formed stereotypes regarding their guilt.[36] For example, Black men are hyper aware to engage in eye-contact and remain mindful of their body language and word choice.[37] But, despite a Black man's true intentions, "these self-regulatory efforts are interpreted as suspicious by police." Researchers have referred to this phenomenon as "stereotype threat."[38] Although the study was limited to Black men, it can be reasonably inferred that Black youth engage in similar attempts to conform their behavior to the perceived expectations of the officer. As a result, Black youth experience substantially different interactions with the police than their White counterparts, which leaves greater exposed to the shortcomings of the *Miranda* Doctrine.

IV. The Impact on the District of Columbia

The involuntary waiver of *Miranda* rights remains an issue within Washington, D.C.'s juvenile legal system. In 2012, the Metropolitan Police Department ("MPD") arrested a 15-year old child and brought him to a police station, where an MPD detective questioned him around midnight.[39] During the interview, the child's foot was cuffed to the floor, so he was unable to move freely.[40] Before reading the child his *Miranda* rights, the detective said:

> "I know you know why you're up here, so I ain't gonna play the 'I don't know' crap, all right? I'm gonna give you an opportunity to give your version of what happened today, because ... I stand between you and the lions out there .... [W]e have a lot of things going on out there, and they're gonna try and say that you did it all. Okay? And I think what happened today was just a one-time thing. But before I came out here everybody said ... you did a whole bunch of stuff, but in order for us to have a conversation, I have to read you your rights and you have to waive your rights. If you answer no to any of the questions I ask you after I read you your rights, that's all, I mean, I can't have the interview, okay?"[41]

After the officer made these coercive statements to the child, he read the child his *Miranda* rights.[42] The child then waived his rights and confessed.[43] Because the officer's statements implied that invoking his *Miranda* rights would make the situation even worse, the officer made the boy feel helpless, as if he had no choice but to waive his *Miranda* rights and confess. [44] The District of Columbia Court of Appeals found that the officer's statements did not give the child a real choice and that his waiver was, therefore, involuntary.[45] This is just one of many examples that illustrates a child's susceptibility to waiving *Miranda* rights during an inherently coercive police interrogation.

V. A New Approach

To better protect children from the current inadequacies of the *Miranda* doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless (1) the minor was advised of their rights by the interrogating law enforcement official,[46] (2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and (3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any *Miranda* right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Other jurisdictions have already codified protections for youth in custodial interrogations, including (1) requiring children to consult with a counsel during police questioning, (2) not allowing children to waive *Miranda* rights without consulting with an attorney, and (3) making inadmissible any statement made outside the presence of counsel. Specifically, New Jersey requires the assistance of counsel before a child can waive any right, including a *Miranda* right.[47] Additionally, California recently passed legislation that requires all minors to consult with an attorney before waiving any *Miranda* right.[48] Furthermore, Illinois requires counsel at all custodial interrogations for children under 15 who are suspected of committing homicide or another serious offense.[49] Similarly, in West Virginia, statements made by children under 14 during custodial interrogations are not admissible in court unless counsel was present during the interrogation.[50]

States and cities across the United States continue to codify further protections for youth in custodial interrogations. For example, in New York, there is a bill that, if it becomes law, will mandate that children are only interrogated when necessary and only *after* consulting with an attorney.[51] Baltimore City has also taken steps to ensure that a child's constitutional rights are preserved. Specifically, the Maryland State's Attorney's Office has explicitly expressed its plans to develop policy that will make statements made by a minor outside the presence of counsel inadmissible.[52]

Although some states require parents to be present during custodial interrogations as a way to potentially guard against coerced waivers or confessions, this "protection" has proven to be inadequate. Instead, attorneys are best positioned to explain *Miranda* rights to children. Generally, parents do not have the necessary legal knowledge to represent their child's best interest.[53] In fact, "[i]n 24 out of 25 interrogations, the parents either did nothing or affirmatively aided the police" by advising their children to confess or to tell the truth.[54] One notable example of a case where children were wrongfully convicted based on false confessions is the Exonerated Five, where the children's parents encouraged the boys to waive their right to remain silent and further encouraged them to cooperate with the police.[55] The parents, like their children, felt helpless and powerless to resist police pressure during the interrogations. Thus, merely having a parental or custodial guardian present would not adequately preserve *Miranda*'s Constitutional protections.[56]

Moreover, providing minors a more expansive explanation of their *Miranda* rights alone would not be enough to protect youth from involuntarily waiving their rights. To create a fully comprehensive explanation of *Miranda*'s protections that most youth could factually and rationally understand would be both impractical and ineffective. For example, England and Wales created a comprehensive 44-page "easy read" letter of rights for people in custody.[57] However, because it is so unlikely that a child could understand and internalize such a lengthy document under the conditions often associated with custodial interrogation, England and Wales also requires counsel and an appropriate adult when youth are in police custody.[58] "On average, custodial suspects are expected to comprehend 146 words with a range from 49 to 547," and longer pieces are especially challenging.[59] Thus, a comprehensive resource would not effectively communicate the *Miranda* doctrine to youth and would, therefore, not adequately protect against involuntary waivers.

Providing further *Miranda* protections would not only protect youth from falsely confessing but also save the District money that could be allocated to social programs. Detaining a young person can cost upwards of $621 per day and $226,665 per year.[60] These numbers do not account for the long-term indirect costs of detaining youth, including less tax revenue, increased public assistance, and increased crime costs.[61] Additionally, "[b]etween lawsuits and state statutes that award fixed compensation for wrongful convictions, state and municipal governments have paid out $2.2 billion to exonerees."[62]

The District of Columbia should make any statement made to law enforcement officers by any person under eighteen years of age inadmissible in any court of the District of Columbia for any purpose, including impeachment, unless:

- **The child is advised of their rights by law enforcement;**
- **The child is given an opportunity to confer with an attorney; and**
- **The child knowingly, intelligently, and voluntarily waives their rights in the presence of counsel.**

References

[1] *See* 384 U.S. 436, 444 (1966).
[2] *See generally id*.
[3] *Miranda*, 384 U.S. at 444-45; *Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979).
[4] *Miranda*, 384 U.S. at 462.
[5] 387 U.S. 1, 44-55 (1967).
[6] *Id.*
[7] *J.D.B. v. North Carolina*, 564 U.S. 261,272 (2011) (recognizing that "[t]ime and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults; and so on.")
[8] Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 920 (2017).
[9] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920 (2004).
[10] Lapp, *supra* note 8, at 914.
[11] Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1152-53 (1980) (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[12] Anthony J. Domanico et al., Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations, 49 IDAHO L. REV. 1,3 (2012). It is important to note that DC uses the same Miranda Rights Card with both adults and youth. *See* Metropolitan Police Department PD-47 form.
[13] *Id.*
[14] Taryn VanderPyl, *The Intersection of Disproportionality in Face, Disability, and Juvenile Justice*, 15 JUST. POL'Y J. 1, 2 (2018).
[15] *Id.*
[16] Lapp, *supra* note 8, at 914.
[17] Richard Rogers, et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCH., PUB. POL'Y, & L. 63, 67 (2008).
[18] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 11 (2006).
[19] Grisso, *supra* note 11, at 1154 (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[20] Grisso, *supra* note 18, at 11.
[21] Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 431 (2006).
[22] Marco Luna, *Juvenile False Confessions: Juvenile Psychology, Police Interrogation Tactics, and Prosecutorial Discretion*, 18 NEV. L.J. 291, 297 (2017).
[23] Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 405 - 06 (2013).
[24] Grisso, *supra* note 18, at 9.
[25] *J.D.B.*, 564 U.S. at 269 (quoting *Miranda*, 384 U.S. at 467); Grisso, *supra* note 18, at 9.
[26] Grisso, *supra* note 18, at 11. Oftentimes, when officers interrogate a child, they give the child two options: "(1) you did it and if you do not confess I cannot help you so you are going to be punished harshly, or (2) you did it and if you do confess, you are a good person and I can help you." Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004). Based on these limited options and the short-term reward of going home, children almost always waive their *Miranda* rights and confess even if they are innocent. *See generally id.* at 138.
[27] *J.D.B.* 564 U.S. at 272 (quoting *Bellotti v. Baird,* 443 U.S. 622, 635 (1979)).
[28] Lapp, *supra* note 8, at 914 (2017); Barry Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 12 (2013) (finding, in a study of 307 16 through 18-year olds, 92.8 percent of youth waived their *Miranda* rights)

[29] Elizabeth Vulaj, *From the Central Park 5 to the Exonerated 5: Can It Happen Again?*, N.Y. ST. B.J. (2019), at 24-25.
[30] ACLU-DC, RACIAL DISPARITIES IN STOPS BY THE D.C. METROPOLITAN POLICE DEPARTMENT: REVIEW OF FIVE MONTHS OF DATA 8 (2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (last visited Sept. 13, 2020).
[31] Youth Population Snapshot, DEP'T YOUTH REHABILITATION SERV.S, https://dyrs.dc.gov/page/youth-snapshot (last visited Sept. 2, 2020).
[32] *Racial Disparities in D.C. Policing: Descriptive Evidence from 2013-2017*, ACLU DISTRICT OF COLUMBIA, https://www.acludc.org/en/racial-disparities-dc-policing-descriptive-evidence-2013-2017 (last visited Sept. 13, 2020).
[33] *Id.*
[34] Kristin Henning, Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. ___ (expected December 2020).
[35] *Compare* Puzzanchera, C., Sladky, A. and Kang, W., "Easy Access to Juvenile Populations: 1990-2019," at https://www.ojjdp.gov/ojstatbb/ezapop/ (reporting 29,321 Black youth ages 10 to 17 and 42,234 total youth ages 10 -17) *with* MPD FOIA Request Response 2016-05463 (reporting 2928 arrests of Black youth out of 3073 total arrests in 2015) (on file with the Georgetown Juvenile Justice Initiative).
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *In re S.W.*, 124 A.3d 89, 93 (D.C. Ct. App. 2015).
[40] *Id.*
[41] *Id.* at 94.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id*. at 104-05.
[46] These rights include but are not limited to: (a) the right to remain silent, (b) anything they say can be used against them, (c) the right to an attorney, (d) the right to have someone else pay for the attorney, (e) the right to talk to an attorney *immediately* before continuing to answer questions, (f) the refusal to give a statement cannot be used as evidence of guilt, (g) making a statement does not mean they will be released from custody or that they will not be charged, (h) they can be held in pretrial detention for the most minor offenses, and (i) they can be committed until age 21 for the most minor offenses.
[47] N.J. STAT. ANN. § 2A:4A–39(b)(1).
[48] S. 203, 2020 (Cal.)
[49] 705 ILL. COMP. STAT. § 405 / 5-170.
[50] W. VA. CODE § 49-4-701(l).
[51] A6982B, 2019 Leg., Reg Sess. (N.Y. 2019). Emily Haney-Caron & Sydney Baker, *Protecting Youth from Interrogation*, NEW YORK DAILY NEWS, (Aug. 5, 2020), https://www.nydailynews.com/opinion/ny-oped-protecting-youth-from-unfair-interrogation-20200805-yzg33mie6vhkvkmmrfz7jagrwy-story.html, (last visited Sept. 27, 2020).
[52] Marilyn Mosby & Miriam Aroni Krinsky, *The Baltimore Exonerees' Cases Shed Light on the Need for Reforming Youth Interrogations*, WASH. POST (Nov. 27, 2019), https://www.washingtonpost.com/opinions/local-opinions/the-baltimore-exonerees-cases-shed-light-on-the-need-for-reforming-youth-interrogations/2019/11/27/e7e22570-1099-11ea-b0fc-62cc38411ebb_story.html; Jennifer Egan, *Baltimore State's Attorney Should Refuse to Use Child Confessions Taken Without an Attorney Present*, BALT. SUN, Dec. 6, 2019, https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1208-mosby-kid-confession-20191206-jsdhcnsocrcrflo7m2hdkygzui-story.html.
[53] Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions (Winner of American Constitution Society's National Student Writing Competition)*, 20 U. PA. J. CONST. L. 1211, 1232 (2018).
[54] Molly Knefel, *'Making a Murderer,' and the Huge Problem of False Youth Confessions*, ROLLING STONE (Jan 8, 2016), https://www.rollingstone.com/tv/tv-news/making-a-murderer-and-the-huge-problem-of-false-youth-confessions-51948/, (last visited Sept. 27, 2020); Rogers, *supra* note 17, at 66.
[55] Drizin, *supra* note 9, at 896.
[56] Rogers, *supra* note 17, at 66.

[57] HERTFORDSHIRE CONSTABULARY, RIGHTS AND ENTITLEMENTS EASY READ BOOKLET (2009).
[58] *See* Rogers, *supra* note 17, at 185.
[59] *Id.* at 186.
[60] JUSTICE POLICY INSTITUTE, STICKER SHOCK 2020: THE COST OF YOUTH INCARCERATION 3 (2020).
[61] *Id.* at 1.
[62] Radley Balko, *Report: Wrongful Convictions Have Stolen at Least 20,000 years from Innocent Defendants*, WASH. POST: OPINIONS (June 10, 2019), https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/.

Appendix: Proposed Amendments

§ 16–2316. Conduct of hearings; evidence.

(g) A statement made by a person under 18 years of age to a law enforcement officer during a custodial interrogation shall be inadmissible for any purpose, including impeachment, in a transfer hearing pursuant to section 16-2307, in a dispositional hearing under this subchapter, or in a commitment proceeding under Chapter 5 or 11 of Title 21, unless the person under 18 years of age:

(1) Is advised by a law enforcement officer in a developmentally appropriate manner of:

(A) The person has the right to remain silent;

(B) Anything the person says can be used against them in court;

(C) Refusing to make a statement cannot be used as evidence that they were involved in a crime;

(D) Making a statement does not mean they will be released from custody or that they will not be charged with a crime;

(E) The person has the right to an attorney;

(F) The person has the right to have someone else pay for the attorney at no cost to them;

(G) The person has the right to privately speak with an attorney, immediately, before continuing to speak with a law enforcement officer;

(H) The person has the right to be advised by an attorney regardless of whether they committed a crime; and

(2) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and

(3) Through an attorney, knowingly, intelligently, and voluntarily waives their right to remain silent.

Salim Adofo

Commissioner

Single Member District 8C07

Official Testimony to the Council of the District of Columbia

Committee on

Judiciary & Public Safety Public Hearing

Bill 23-882 Comprehensive Policing and Justice Reform

Amendment Act of 2020

October 15, 2020

Salim Adofo
Commissioner
District 8C07

Public safety is a very important issue for the residents of the District of Columbia. As the Commissioner of District 8C07, residents have expressed to me that it is one of their primary concerns. Realizing that the Metropolitan Police Department (MPD) is the primary agency dedicated to the physical security of the residents, it is critical that we understand the historical context of the police and its role in the community.

"How the U.S. Got Its Police Force" is the title of an article in the May 2017 issue of Time Magazine. The article states, "In the South, however, the economics that drove the creation of police forces were centered not on the protection of shipping interests but on the preservation of the slavery system. Some of the primary policing institutions there were the slave patrols tasked with chasing down runaways and preventing slave revolts, Potter says; the first formal slave patrol had been created in the Carolina colonies in 1704. During the Civil War, the military became the primary form of law enforcement in the South, but during Reconstruction, many local sheriffs functioned in a way analogous to the earlier slave patrols, enforcing segregation and the disenfranchisement of freed slaves."

It is important to provide context to the development of law enforcement because it gives an understanding of the origins and intent of the role of police. To be clear, the intent and origin of the police department were to protect the economic interests of White male landowners over the age of thirty - because of these origins, police, crime, and economics will be forever linked in

this society.

As we move into a space to correct historical wrongs, it is my main objective to ensure that MPD fulfills its commitment to the District of Columbia and that is protecting all of its residents and guests. Therefore, on behalf of the residents of District 8C07 I make the forthcoming recommendations on Bill 23-882 Comprehensive Policing and Justice Reform Amendment Act of 2020.

Statements Made by Minors

To better protect children from the current inadequacies of the Miranda doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless:

(1) the minor was advised of their rights by the interrogating law enforcement official,

(2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and

(3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any Miranda right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Stop and Frisk

The most callous example of stop-and-frisk in the District of Columbia is the Metropolitan Police Department's jump-out squads. Specialized paramilitary units such as the Gun Recovery Unit ("GRU") in the Narcotics and Special Investigations Division ("NSID") use tactics often referred to as "jump-outs" by community members because of how they operate in D.C.'s predominantly-Black neighborhoods: Officers jump out of unmarked cars to surround, stop, and search individuals without basis. These routine patrols drive around demanding that people who are doing nothing wrong stop, lift up their shirts, and display their waistbands to prove that they are not carrying firearms. Jump-outs often work in plainclothes with tactical vests, however, a similar tactic has also been observed from marked cars. This unlawful and discriminatory treatment undermines community trust in law enforcement and does not improve public safety. This tactic must be ended immediately to ensure the safety of our community members and to preserve the constitutionality of policing in D.C. MPD's paramilitary units jump-out tactics are in line with a larger culture of celebrating police violence and the idea that D.C. residents from certain neighborhoods should be treated as inherently dangerous. Although D.C. leadership

denies that jump-outs are still a pervasive aspect of Department culture, these units brag about the often-violent practice.

Therefore the District must:

1. Disband existing paramilitary units and reassign those officers.
2. Require officers to work in full uniform and marked police cars, unless they are conducting a justified and targeted undercover operation.
3. Prohibit officers from demanding to see a person's waistband without probable cause.
4. Suppress all evidence seized as a result of "jump outs" and other discriminatory stop and frisk tactics.
5. Disallow the following common pre-textual basis for reasonable articulable suspicion or probable cause:
    - Presence in a high-crime neighborhood;
    - Apparent nervousness around police officers;
    - So-called furtive gestures or movements or running;
    - A generic bulge in a person's clothing; and
    - Time of day.

Salim Adofo
Commissioner
District 8C07

Special Police

D.C. has the most police per capita of any large city. We have no need for armed guards patrolling the same communities that police already oversaturate. These officers lack the training and accountability to safely patrol properties and should be disarmed to protect the community.

To solve this problem, it is recommended that D.C. Council:

• Disarm special police officers;

• Increase the quantity and quality of training required;

• Pass the Special Police Officer Oversight Amendment Act; and

• Disallow pursuit beyond property boundaries.

Salim Adofo
Commissioner
Single Member District 8C07
District of Columbia

Memorandum

TO: Councilmember Charles Allen, Chair, Committee on Judiciary and Public Safety, and Members of the D.C. Council

FROM: Cynthia Lee, Edward F. Howrey Professor of Law, The George Washington University Law School

RE: Written Testimony in Support of the Use of Deadly Force Provisions in B23-0882, The Comprehensive Policing and Justice Reform Amendment Act of 2020

DATE: October 23, 2020

Chairman Allen, Chairman Mendelson, and members of the D.C. Council, I have been a professor at the George Washington University Law School where I teach Criminal Law, Criminal Procedure, Adjudicatory Criminal Procedure, and Professional Responsibility, for the past 19 years. I am also an 18-year resident of Ward 4 in the District of Columbia. I and 1,548 others who have signed a Change.org petition available at http://chng.it/gkj56BvX[1] urge you to make permanent the use of deadly force provisions in the Comprehensive Policing and Justice Reform Amendment Act of 2020.

I respect the difficult and dangerous work that members of our Metropolitan Police Department and law enforcement officers across the nation do to protect our safety. I also recognize the pain and anger that many here in the District of Columbia and across the nation have felt over the deaths of George Floyd, Breonna Taylor, Rayshard Brooks, and others at the hands of police. I believe strong and fair laws that hold police accountable, in conjunction with other measures, have the potential to change the culture of policing and rebuild trust between community members and the police.

The use of deadly force provisions in the Comprehensive Act replicate a model statute I proposed in a 2018 law review article entitled, *Reforming the Law on Police Use of Deadly Force: De-escalation, Pre-seizure Conduct and Imperfect Self-Defense*, 2018 U. Ill. L. Rev. 629. In this written testimony, I explain why the use of

[1] I have provided a list of the individuals who have signed this petition to Councilmember Charles Allen's office.

force provisions in the Comprehensive Act should be made permanent. I also suggest a few ways these provisions can be improved.

Until this summer, Washington, D.C. was one of only ten jurisdictions without a use of force statute in its Criminal Code. By enacting the use of deadly force provisions in the Comprehensive Act, the District of Columbia became the first jurisdiction in the nation to require the beliefs *and actions* of an officer who uses deadly force to be reasonable. D.C.'s is also is the first use of force statute to require the jury to consider, as part of the totality of the circumstances, whether the officer engaged in de-escalation measures prior to using deadly force and whether any conduct by the officer increased the risk of a deadly confrontation.

Today, it is not the only jurisdiction to do so. On July 31, 2020, Connecticut became the first state in the nation to adopt these three key provisions from my model statute, *see* Connecticut HB 6004 (An Act Concerning Police Accountability) and Virginia is poised to become the second state to do so. *See* Virginia SB 5030.

Requiring Both the Officer's Beliefs *and Actions* to be Reasonable

In requiring a finding that both the officer's beliefs *and acts* must be reasonable, D.C.'s use of force statute is a modest change to the use of force law that exists in the vast majority of states where the sole focus is on whether the officer's *beliefs* were reasonable. The problem with focusing solely on beliefs is that once the officer testifies that he feared for his life, the jury will focus on the victim's actions – Was he resisting arrest? Was he reaching for his waistband? Was he attempting to flee?

Requiring the jury to find that the officer's *conduct* was reasonable reminds the jury that the officer, not the victim of his use of deadly force, is the one on trial and that the ultimate question is whether the officer's use of deadly force was justified.

Moreover, in requiring a finding that the officer's actions were reasonable, D.C.'s legislation simply makes explicit what is implicit in other use of force statutes. The ultimate question in cases where an officer is criminally prosecuted for his use of deadly force is whether the officer's use of deadly force was reasonable or excessive.

Finally, as stated in MPD's Executive Order 20-022 (effective July 30, 2020), the use of force provisions in the Comprehensive Act "are largely consistent with existing MPD policy." The provisions merely codify the requirements for the use of deadly force. Codification is important, however, since a violation of a police policy is not enforceable in a court of law.

Requiring the Jury to Consider Whether the Officer Engaged in De-escalation Measures Prior to Using Deadly Force

D.C.'s use of force statute provides more guidance to jurors than most use of force statutes by requiring the jury to consider whether the officer engaged in de-escalation measures and giving the jury some examples of de-escalation (taking cover, calling for backup, trying to calm the suspect, and using less deadly force before using deadly force).

By including de-escalation in the law, D.C.'s use of deadly force provision seeks to influence police behavior before an encounter gets to the point where it is a do-or-die situation. The de-escalation provision also ensures that the jury considers de-escalation when the jury might not think to do so on its own.

Importantly, the law does not direct the jury to find an officer either guilty if the officer failed to engage in de-escalation measures or not guilty if the officer did engage in de-escalation. The law recognizes that each case will present different facts and circumstances and leaves the ultimate decision as to whether the officer's use of deadly force was justified in the hands of the jury.

De-escalation is already required in the Metropolitan Police Department's regulations. MPD General Order RAR 901-07 (Nov. 3, 2017) provides:

> All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to defuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques. Members shall attempt to defuse use of force situations with de-escalation techniques whenever feasible.

Having de-escalation in MPD regulations is good but not the same as having it in the law because an officer's violation of an internal policy or regulation is not enforceable in a court of law. Having de-escalation in the law is more likely to

encourage officers to engage in de-escalation than merely having it in a police regulation because officers will know that if their use deadly force ends up killing someone, the trier of fact (the jury or the judge) will consider whether they engaged in de-escalation measures prior to using deadly force.

Having de-escalation in D.C.'s use of force law can also benefit an accused officer who does engage in de-escalation measures. That officer will be able to argue in court that because he tried to diffuse the situation before using deadly force, the jury should find his actions reasonable.

Requiring the Jury to Consider Whether Any Conduct of the Officer Increased the Risk of a Deadly Confrontation

In addition to requiring the jury to consider whether the officer engaged in de-escalation measures prior to the use of deadly force, D.C.'s use of force statute requires the jury to consider whether any conduct of the officer increased the risk of a deadly confrontation. This is also an important provision.

Currently, there is a split in the lower federal courts over whether jurors in Section 1983 civil rights cases—where the issue often is the same as in criminal prosecutions of officers who used deadly force, i.e., whether the officer used reasonable or excessive force—should focus solely on the moments right before the officer used deadly force or whether the jury should be allowed to consider any pre-seizure conduct[2] of the officer that increased the risk of a deadly confrontation. The U.S. Supreme Court had a chance to resolve this split in 2017, but explicitly left the question open. *See County of Los Angeles v. Mendez*, 581 U.S. ___, n. * (2017) ("We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here").

D.C.'s use of force statute recognizes that conduct of the officer that increased the risk of a deadly confrontation is relevant to the reasonableness of the officer's use of force. Allowing the jury to consider such conduct of the officer makes sense for several reasons.

[2] Since a seizure of the person within the meaning of the Fourth Amendment occurs when an officer, by means by physical force or show of authority, has restrained the liberty of a citizen, California v.Hodari D., 499 U.S. 621 (1991), *pre-seizure* conduct refers to conduct of the officer that occurs prior to the moment that an officer uses deadly force against an individual and thereby restrains that individual's freedom of action.

First, in officer-involved shooting cases, the jury is allowed to consider the actions of the *victim* that increased the risk of a deadly confrontation. If the jury is allowed to consider the victim's actions, it should be allowed to consider the officer's actions as well as a matter of fundamental fairness.

Second, when a civilian uses deadly force and claims self-defense, the jury is allowed to consider the civilian-defendant's actions prior to the moments right before the civilian-defendant pulled the trigger. Since an officer's claim of justifiable force is akin to a civilian's claim of self-defense or defense of others, it makes sense to allow the jury to consider the officer-defendant's actions prior to moments right before the officer pulled the trigger.

Moreover, conduct of the officer that increased the risk of a deadly confrontation is simply part of the totality of the circumstances. It doesn't make sense to exclude such relevant conduct from the jury's consideration when the jury is being told to assess the reasonableness of an officer's beliefs and actions under the totality of the circumstances.

Importantly, D.C.'s use of force statute does not direct the jury to find the officer guilty if the officer's conduct contributed to the risk of a deadly confrontation. An officer's conduct could have increased the risk of a deadly confrontation in some ways and yet the officer's use of deadly force could be deemed reasonable. The law allows the jury to weigh all the facts and circumstances and come to its own conclusion about whether the officer's use of deadly force was or was not justified.

Why the Law Should Not Require Absolute Necessity

Some may be pushing the D.C. Council to change the use of force provisions that the D.C. Council approved this past summer to require absolute necessity rather than reasonable necessity. In other words, they may be asking that the law require the officer to be correct in his or her assessment of the threat. Under their view, if the officer is incorrect, then the officer should go to prison.

The current legislation does not require the officer to be correct in his or her assessment of the threat. If an officer believed the victim was armed and it turns out the victim was unarmed, this does not necessarily mean the officer was unjustified in using deadly force. The legislation requires a finding that the

officer's beliefs and actions were reasonable, not that the officer was right. This makes sense because law enforcement officers are human beings and human beings are fallible. They are not omniscient or all-knowing. An officer facing an individual with a gun in hand who waits until the individual raises his arm and starts to pull the trigger is likely to get shot. This is because there is a time lag between perception of a threat and one's ability to act on that threat.

No other use of force statute of which I am aware requires absolute necessity. Even California's recently enacted use of force statute, which was publicized before and upon its passage in 2019 as requiring necessity as opposed to reasonableness for police use of deadly force, see Jorge L. Ortiz, *New California law tightens rules for police use of force to only when necessary*, USA Today (Aug. 19, 2019) ("Gov. Gavin Newsom on Monday signed Assembly Bill 392, which changes the standard for police officers' justified use of deadly force from instances when it's "reasonable'' to when it's "necessary''), does not require absolute necessity.

If one looks at California's use of force statute in Section 835a(a)(2) of the California Penal Code, the preface provides that "it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life," but later in subsection (c) where the actual requirements for the use of deadly force are set forth, the statute provides:

> Notwithstanding subdivision (b), a peace officer is justified in using deadly force upon another person only when the officer *reasonably believes*, based on the totality of the circumstances, that *such force is necessary* for either of the following reasons:
>
> (A) to defend against an imminent threat of death or serious bodily injury to the officer or to another person.
>
> (B) to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer *reasonably believes* that the person will cause death or serious bodily injury to another unless immediately apprehended. . . . (emphasis added).

In other words, California's use of force statute, like the vast majority of use of force statutes in the states that have a use of force statute, requires only a

reasonable belief that deadly force was necessary, not that the officer was correct in his or her assessment of the threat. The legislative intent is for officers to only use force when necessary, but the requirements for the use of force turn on a reasonable belief standard.

The Justice in Policing Act introduced by the U.S. House of Representatives (the Democrats' policing bill) this summer is another example of police reform legislation that has been advertised as requiring absolute necessity but does not actually require necessity. Page 4 of the Explanatory Addendum to the Act prepared by Chair Karen Bass and Senators Cory Booker, Kamala Harris and Jerrold Nadler, states that under Section 364 - Police Exercising Absolute Care with Everyone Act ("PEACE Act"): "The bill would change the use of force standard from reasonableness to only when necessary to prevent death or serious bodily harm," which leads the reader to believe that the bill would require actual necessity. However, if one goes to Section 364 in the Justice in Policing Act, the word "necessary" is defined in such a way that requires a reasonable belief that the force used was necessary. The word "necessary" is defined as follows: "The term 'necessary' means that another reasonable Federal law enforcement officer would objectively conclude, under the totality of the circumstances, that there was no reasonable alternative to the use of force." In other words, even the Justice in Policing Act does not require necessity rather than reasonableness even though it has been promoted as requiring necessity. Given the definition of necessity is Section (b) (1) (E) on page 69 of the Act, the Act only requires that a reasonable law enforcement officer would objectively conclude that the force used was necessary, not that the officer who used the force was in fact correct about the need to use force. I would be happy to provide copies of these two documents upon request.

Recommended Changes to the Use of Force Provisions

While I wholly support the use of deadly force provisions in the Comprehensive Act, I would recommend just a few changes to improve these provisions:

1. On page 22, line 509, after "the law enforcement officer," I would insert the words "honestly and" before "reasonably believes that deadly force is immediately necessary . . ."

Rationale: Requiring that the officer honesty and reasonably believed ensures that an officer who does not actually believe he needs to immediately use deadly force to protect himself or another from the threat of death or serious bodily injury is not allowed to escape criminal liability.

Say, for example, a very confident officer shoots and kills a civilian and later boasts to another officer that he intentionally killed the person simply because he didn't like the person and not because he felt his life was threatened. If that officer were to be charged with murder and could show that the average officer in his shoes would have feared for his or her life, under the use of force provisions as currently written, that officer could be found not guilty.

While the Supreme Court has often said the subjective motivations of the officer are irrelevant in Fourth Amendment law, *see, e.g., Whren v. United States*, 517 U.S. 806 (1996), this has had the detrimental effect of allowing pretextual stops to serve as a cover for racial profiling. Individual states and the District of Columbia can and should go further than the minimum baseline provided by the Supreme Court. Requiring an officer to *honestly and reasonably believe* it was immediately necessary before using deadly force protects the residents of the District of Columbia more than simply requiring a reasonable belief.

2. On page 23, line 527, I would insert the words "if feasible" after "or using non-deadly force prior to the use of deadly force" so the clause would read "or using non-deadly force prior to the use of deadly force, if feasible."

Rationale: Sometimes it will not be feasible for the officer to use non-deadly force prior to using deadly force. The law should remind the jury to take this into consideration. D.C.'s use of force statute does this where it states that a law enforcement officer shall not use deadly force unless all other options have been exhausted *or do not reasonably lend themselves to the circumstances*, but it does not do so in this section where it provides examples of de-escalation. In order to be fair to the officer who faces criminal charges in the use of deadly force, it is important to remind the jury that using non-deadly force prior to using deadly force is something we would expect a law enforcement to do only if it was feasible to do so.

Without "if feasible" language added to this section, a jury might impose criminal liability on an officer who failed to use non-deadly force prior to using deadly force even if it really wasn't feasible for the officer to do so. For example, an officer could come across an armed individual suspected of criminal activity involving violence. A person holding a gun can—within mere seconds—shoot and kill with that gun. If the officer were to try using less deadly force, e.g. his baton or a taser, prior to using deadly force in such a situation, that officer might get shot and killed.

3. On page 22, line 526, I would insert "calling for mental health service workers to assist if the officer knows or has reason to believe the subject is mentally impaired" in between "taking cover" and "waiting for back-up."

Rationale: This is an important example of how an officer can engage in de-escalation that the jury might not think of on its own.

4. On page 22, lines 520-524, I would delete the text at lines 520-524 which require the jury to consider whether the injured or deceased person had or appeared to have a deadly weapon and refused a lawful order by the officer to drop it.

Rationale: This is an obviously relevant factor. The jury in an officer-involved shooting case is likely, on its own and without such direction, to consider whether the victim had or appeared to have a deadly weapon and refused to drop it. To streamline the legislation and make it as simple as possible for the jury, I recommend including only two factors that the jury must consider: (1) whether the officer engaged in de-escalation measures, and (2) whether any conduct of the officer increased the risk of a deadly confrontation. These two factors are factors that the jury would not think to consider on its own. The jury can consider any facts and circumstances it deems relevant. The statute simply tells the jury that it *must* consider the listed factors.

For all of the foregoing reasons, I believe D.C.'s use of force legislation is sound policy and should be made permanent law. Please make these comments part of the hearing record.

Thank you for your consideration.

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Testimony of Qubilah Huddleston, Education Policy Analyst
at the Hearing on the
Comprehensive Policing and Justice Reform Amendment Act of 2020
Committee on the Judiciary and Public Safety
October 15, 2020

Chairperson Allen and other members of the committee, thank you for the opportunity to testify. My name is Qubilah Huddleston and I am a Policy Analyst at the DC Fiscal Policy Institute (DCFPI). DCFPI is a nonprofit organization that promotes budget choices to address DC's racial and economic inequities through independent research and policy recommendations.

I'm here today to highlight how the police free schools movement directly relates to the DC Council's efforts to reform or reimagine policing. **I'm recommending that this committee amend the Comprehensive Policing and Justice Reform Amendment Act of 2020 to include the elimination of the School Safety Division within the Metropolitan Police Department (MPD) and realign the division's funds to increase mental health and other school-based alternatives that support positive student behavior and healthy school climates.**

First, however, I would like to thank Chairperson Allen for introducing the Comprehensive Policing and Justice Reform Amendment Act of 2020 as an effort to answer community advocates' calls to make DC residents safer and the District more just. It is an important first step to curtailing the disproportionate harm that current policing policies and practices have on Black residents. Still, the DC Council should pass future legislation and budgets that dismantle long-standing systems of oppression and promote reparative justice and healing.

Police Presence in Schools Causes More Harm Than Good

Black residents and communities deserve to feel safe and respected, not overpoliced—this includes Black children who make up two-thirds of the public school population in DC. Although school resource officers (SROs) have been lauded as keeping students and schools safe, the presence of police in schools has resulted in Black students and students with disabilities being disproportionately harmed by their presence. In DC, 92 percent of school-based arrests in the 2018-19 school year were Black students; 31 percent were students with disabilities.[1]

Existing national research on the effectiveness of school police has often relied solely on self-reported measures from students, educators, and officers rather than rigorous research methods.[2] DC policymakers recently passed a budget that includes $14 million to fund 127 SROs across the city—a 22 percent increase over the fiscal year 2020 budget (adjusted for inflation). It is concerning that policymakers continue to fund a "student safety" model that is generally supported by weak or conflicting evidence while underfunding evidence-based and community-preferred alternatives such as school social workers and violence interrupters.

Racist History of Policing Should Compel Policymakers to Reconsider Approach to Student Safety

If this committee and the council as a whole are serious about anti-racist policymaking and closing the racial gap in student learning outcomes, you all must seriously acknowledge the racist roots of policing and the fact that Black people in this country have a rightfully fraught relationship with the police. The very first public police forces in this country were slave patrols—organizations of white men paid to capture Black people who fled

from enslavement and who used terror and corporal punishment to deter revolt and maintain order and discipline on plantations. What kind of message is the District sending to Black children in the 21st century when policymakers and education officials prioritize policing and policing infrastructure in schools while failing to adequately or equitably fund resources that actually make students feel safe and help them thrive, such as transformative justice programs and mental health supports?

The Black Burden of the Health Pandemic and Protests Against Police Violence Require Radical Changes to Student Safety—Starting with Eliminating the School Safety Division

The unequal burden of coronavirus on Black residents coupled with life-saving disruptions to students' academic and social lives means that Black children are at an even higher risk of exposure to stress and traumatic experiences compared to their non-Black peers. Further, Black children are facing greater race-based trauma as videos of Black people being murdered by police officers and the violent reactions from police to protests against this violence have become a part of our regular news cycle and social media feeds.

And, despite the long-held, anti-Black beliefs that in order for Black children to learn and "act right" they must be surveilled, policed, and punished—research and Black folks' lived experiences shows us that what is truly needed is empathy and resources that help not harm; and root causes addressed, rather than symptoms. Eliminating the School Safety Division in favor of a community-driven process to reallocate funding and staffing away from school policing is a great and necessary place for policymakers to begin adequately promoting Black students' safety and healing.

Thank you for the opportunity to testify and I am happy to answer any questions.

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[1] Office of the State Superintendent of Education, "2019 DC School Report Card," 2019.
[2] Barbara Raymond, "Assigning Police Officers to Schools," U.S. Department of Justice, Office of Community Oriented Policing Services, *Problem-Oriented Guides for Police Response Guides Series No. 10,* April 2010.

Council of the District of Columbia

Committee on Judiciary and Public Safety

Councilmember Charles Allen, Chairperson

B23-0882 - the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

October 15th, 2020

Testimony of:

Dawn Dalton – Deputy Director

DC Coalition Against Domestic Violence

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The DC Coalition Against Domestic Violence (DCCADV/ The Coalition) would like to thank Councilmember Allen and members of the Committee on the Judiciary and Public Safety for the opportunity to provide testimony regarding the Comprehensive Policing and Justice Reform Bill.

The Coalition is the federally-recognized statewide coalition of domestic violence service providers in the District of Columbia. DCCADV's members include domestic violence housing providers, legal service, and culturally specific organizations serving: African-American; Latino; Asian and Pacific Islander; Immigrant; and LGBTQ survivors of domestic violence. Our members also serve teens, youth, and survivors who are Deaf and Hard of Hearing.

The following organizations have read and signed on to this testimony: Amara Legal Center, Ayuda, Community Family Life Services (CFLS), DC SAFE, House of Ruth, Network for Victim Recovery of DC (NVRDC), and Safe Sisters Circle. Our testimony and recommendations reflect years of experience as domestic violence service providers listening to and supporting survivors, as well as the lived experiences of advocates at these organizations who identify as people of color. For many of the survivors that we serve, safety is defined as a safe home and for others it means to be with family and friends who love them. However, we have heard that systems' intervention, because of their disparate impact on marginalized communities, can and has been harmful. In short, Black and Brown

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survivors of domestic violence have consistently reported a hesitancy to contact law enforcement and other systems, even at the expense of their own safety.

While the temporary policing and justice reform bill was passed in response to the horrific murder of George Floyd, this bill is just a start at an attempt to correct one piece of our nation's history of brutal violence and deliberate discriminatory policies that were implemented to dehumanize and control Black and Brown communities. Whether it's police policies, or discriminatory housing or employment practices, this country has never reckoned with its racist origins and continues to double-down on its assault on Black and Brown bodies.

For many Black and Brown survivors, the physical, mental, financial, emotional and psychological abuse from their partners is just a continuation of the many injustices they face daily in this country. Most of the survivors that our member programs and partner organizations serve are living in communities that are surveilled, targeted, and over-policed. While seeking safety in their own homes, these survivors are also then forced to depend on systems that have historically mistreated victims; minimized the harm they experience; not believed them; branded them as angry or hostile; and/or victimized them. Sometimes it is easier for survivors to choose not to engage.

Even before the DC Council passed the temporary police reform bill in June, the Domestic Violence community had listened to survivors share about their interactions with local law enforcement and we continued to have those conversations over the summer.[1] While some survivors stated that they felt safe with the police and commended MPD for doing a good job, some survivors

[1] Between July and September, DCCADV held four listening sessions with domestic violence survivors to discuss their interactions and experiences with MPD and law enforcement in the District.

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discussed the pain and shock they felt after turning to the police following a domestic violence incident. Some were called liars, threatened with deportation, given inaccurate information, ridiculed and some even assaulted, and their experiences and recommendations have informed this testimony.

Because of this treatment, many Black and Brown women fear involving systems, even at the expense of their own safety. According to a 2015 study on Intimate Partner Violence, 53.8% of Black women had experienced psychological abuse, while 41.2% of Black women had experienced physical abuse.[2] However, these survivors remain reluctant to call the police because they are afraid of the law enforcement response. We acknowledge the complexity of these discussions as domestic violence is a serious crime that, at times, requires police intervention. Yet, survivors continuously state that it is critical for them to have options that support their safety and do not require that they engage with systems that, in the end, may add harm to an already dangerous reality.

This new bill will only work if MPD and law enforcement agencies are truly held accountable when violation of these policies occur. Performative politics and empty promises do nothing for communities who live in constant fear of deportation, retaliation, stop and frisk, over-policing, and surveillance. Real reform means actively engaging Black and Brown communities in decisions and policies which have impact on their lives. Additionally, we must dismantle the structures that were built to keep certain communities connected to abusive systems.

[2] https://www.ncjrs.gov/ovc_archives/ncvrw/2017/images/en_artwork/Fact_Sheets/2017NCVRW_IPV_508.pdf

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In partnership with the domestic violence community, the Coalition has developed the following recommendations for the bill and added additional considerations as this committee moves forward with additional reforms:

Subtitle B – Improving Access to Body Worn Cameras: Any additional Body Worn Camera measures should ensure that survivors are aware of their rights and that their privacy and confidentiality under Federal law will be maintained throughout the process.

Subtitle C – Office of Police Complaints: In expanding OPC's power to investigate MPD violations, there needs to be more clarity around the process. Many survivors are afraid to involve the police and have stated that involving the police only made the situation worse. Survivors should be informed regarding any OPC investigations and should be not be forced or coerced to participate in investigations.

Subtitle F – limits on consent searches: While the bill states that MPD must provide interpretation services, we have heard, and previously testified, that MPD currently violates this policy. In addition to providing interpretation services, there needs to be additional oversight in place to ensure that professional and qualified interpretation services are actually being provided.

Subtitle K – Amending minimum standards for police officers: In addition to the requirements proposed in the bill, if an applicant has been convicted of an Intrafamily offense (IFO), or a comparable domestic violence offense in another jurisdiction, this would make that individual ineligible from being a sworn officer for the District. For current sworn officers, there should be standards put into place for officers who choose violence in their homes. (See links for research and

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data on domestic violence within law enforcement communities).[3] Thus, this subtitle should also bar current officers who have been convicted of an IFO in the District or comparable domestic violence offenses since becoming sworn MPD officers.

Additional recommendations:

- We recommend that the city fund the development of a multi-pronged plan that includes both short and long-term strategies to address systemic racism.
- We recommend putting more money into housing and services that specifically help survivors.
- We recommend the immediate revision of policies that require survivors of domestic violence survivors to report and/or certify their victimization with law enforcement and other governmental systems in order to gain access to financial and housing resources.
- Invest in community-based or violence prevention programs that are run and led by survivors.
- Invest in culturally-specific programming that is by and for Black and Brown communities and centers the unique realities of the communities they represent.
- Remove MPD officers from DC Public Schools and shift resources to fully fund the School Safety Act.
- Shift from investing in paramilitary style policing to community intervention and violence prevention programming – which include anti-domestic violence, sexual assault, and trafficking programs.

Thank you for the opportunity to testify and we welcome any questions from the Committee.

[3] https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/; https://www.nytimes.com/projects/2013/police-domestic-abuse/index.html

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THE BLACK SWAN ACADEMY
Making the exception...the Rule

Testimony of Samantha P. Davis, Executive Director
Comprehensive Policing and Justice Reform Amendment Act of 2020
Committee on the Judiciary and Public Safety

October 15, 2020

Good morning Councilmember Allen and members of the committee. I am Samantha Davis, the Founder and Executive Director of the Black Swan Academy (BSA). BSA is a racial justice and advocacy organization building a pipeline of Black youth civic leaders, committed to improving themselves and their communities through advocacy and organizing. We unapologetically lead with racial equity, fight for systemic change, and trust and invest in youth leadership.

While the council is deliberating what policing and justice looks like in D.C., I charge you all to move with greater urgency to address the unique ways in which Black youth experience policing and criminalization. For if the recent months, leading up to the murder of 18 year old, Deon Kay, has proved anything - it is that delayed action has harmful, life altering and fatal consequences. We know that the same police in our communities that handcuff Black and Brown children, harass, and kill Black youth, use fear tactics to silence the voices of young people exercising their right to protest- are the same police in our schools. That is why among other much needed youth justice reforms, I stand with thousands of D.C students, parents, educators, and organizers in demanding Police-Free Schools.

Our demand is that you amend this legislation to include the elimination of the School Safety Division of the Metropolitan Police Department and redirect funds in true harm reduction, violence prevention initiatives like community violence interrupters and to bringing in experts who can address the trauma our Black youth are holding and the equitable resources necessary for all youth to learn.

We deeply believe that Black youth deserve to be protected from harm, that Black youth deserve dignity and love. We believe that Black youth deserve to learn in an environment that doesn't assume they are criminals, that doesn't rely on invoking fear or trauma through the presence of police. We believe that Black youth deserve us to challenge the status quo and the systemic racism that keeps us from investing fully in their humanity, in their development, their health and well-being. The continued investment in policing youth is contradictory to this belief and keeps us from achieving this vision of a new, safer, healthier and more equitable world.

The actions of Black youth that we often rely on police for, tend to be acts of survival, normal expressions of adolescent behavior or responses to trauma. The difference is in white affluent schools those same actions are met with resources versus cops. Schools with a majority Black student population, are three times more likely than majority white schools to have more

security staff than mental health personnel. This focus on policing vs equitable resources means schools are forced to rely on police for incidence of sexual violence, when services for students with special needs are unavailable, when students are having a bad day and need to met with love not harm. Our reliance on police in our schools, compounds the fear, violence and trauma that Black youth experience every day. “Instead of maintaining a good environment for kids, they make us scared and escalate situations. Students spend so much of their time in school, they deserve to be comfortable and not afraid." - Tamika, 14

The presence of police in schools puts youth who are at the margins of the margins in harms way and drastically impedes on their ability to thrive. We must acknowledge the reality of our undocumented youth, homeless youth, systems-involved youth. According to recent data, this past school year, in the midst of a pandemic, there were nearly 70 school-based arrest. Of those arrest the second most common offense were for “release violations/fugitive arrests”. While this council has taken steps to address the school to prison pipeline, that work is for naught if our most marginalized youth are being deterred from even entering the building for fear of encountering police. Schools should be a place of sanctuary, not an easy target to surveille, interrogate or arrest students. "Police in schools create the bridge from the school to the prison pipeline. That's an experience that no child should have." - Raven, 18 years old. When police are in our schools, students of color are more likely to be pushed out, arrested and experience violence. We cannot end the school to prison pipeline without burning the bridge between schools and prisons.

This demand is not solely about reducing the role & power of police in our schools and society more broadly. It is an invitation to challenge the status quo that has consistently failed us and a call for us to invest in true safety. The pandemic places us in a unique position to do this, given that our schools are forced to reimagine every aspect of their operation. Conversations around reopen that are rooted in the safety and well-being of students and educators as it pertains to the fear of contracting COVID-19, must also include the very real fear and trauma that police presence invokes for young people- especially now with the heightened visibility of racial injustice. Viral videos of police killing Black people is traumatic and our young people have been consumed with those images. Research has shown that this exposure is detrimental to the mental health of Black youth- especially Black girls, resulting in increased levels of Post-Traumatic Stress Disorder (PTSD) and depressive symptoms. Just as advocates have argued that fear and trauma brought on by covid-19 negatively impacts cognition, the same is true in regard to the fear and trauma brought on by police presence. In this moment, we must move forward, not backwards. That progression includes:

1. The elimination of the schools and safety division and have a community-driven process to reallocate funding and staffing away from school policing and towards educational resources.
2. Prohibit police officer from carrying weapons if called to schools’ grounds
3. Disarm special police officers
4. Prohibit officers from making arrests on school grounds (especially for non-school related offenses)

5. Reform consent searches for youth and Miranda policy
6. Create a non-police crisis response system

Thank you.

For further information:
https://www.blackswanacademy.org/policefree-schools

Samantha Paige Davis
Executive Director
Black Swan Academy

Testimony of Eduardo R. Ferrer
Policy Director, Georgetown Juvenile Justice Initiative*
Visiting Professor, Georgetown Juvenile Justice Clinic*
***Titles and organizational affiliation for identification purposes only.**

Committee on the Judiciary and Public Safety Public Hearing on
on Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"; Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"; and Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

Thursday, October 15, 2020

Good morning, Chairman Allen and members of the Committee on the Judiciary and Public Safety. My name is Eduardo Ferrer. I am a Ward 5 resident and, for identification purposes, the Policy Director at the Georgetown Juvenile Justice Initiative and a Visiting Professor in the Georgetown Juvenile Justice Clinic. The views expressed are based on my research and experience and not given on behalf of Georgetown University. Thank you for the opportunity to testify today.

I would like to start by commending Chairperson Allen for his continued leadership on justice reform issues in the District. Given the breadth of the three bills, this testimony will focus specifically on the area of youth justice reform. Unfortunately, while this bill proposes many important reforms that would apply equally to youth and adults alike, the bill does not propose any reforms specific to the manner in which youth are policed in the District. This is not an oversight of the Committee, but the result of the fact that so much of criminal procedure – particularly concerning 4th and 5th amendment jurisprudence, which forms the backbone for many of the constraints on police power – is based upon the constitutional floors set by the Courts, not by optimal, developmentally-responsive social policy. As a result, the courts have often developed one-size-fits-all policies that fail to account for the evidence-based and common-sense material differences between youth and adults. To remedy this failure, the Committee should make two amendments to the Comprehensive Policing and Justice Reform Amendment Act prior to mark up. First, as others have also proposed, the Committee should amend DC Code to create a more mature *Miranda* policy for the District that guarantees youth the right to consult with counsel prior to waiving their right to remain silent. Second, the Committee should go further than requiring *Miranda*-like warnings prior to a "consent" search of an individual under the age of 18 and make inadmissible the fruits of any such "consent" search involving a youth.

Additionally, making policing fairer and more developmentally-appropriate alone will not remedy the fact that our Black youth are over-policed in the first place. As a result, we recommend that this legislation also eliminate the School Safety Division at the Metropolitan Police Department. Now that DCPS will be resuming control of the management of its school security, the need for this unit is significantly lower and the money currently allocated to this unit can be better invested at the school level to ensure the adoption and implementation of a holistic approach to safety in our schools and communities.

The Need for a More Mature Miranda Policy

The District's approach to youth interrogations is one example where policing is out of step with adolescent development, social science, and fundamental fairness. Although most people probably could not describe any of the facts of *Miranda v. Arizona* from TV shows and movies, many people would recognize the warnings that police are supposed to give someone before they start interrogating them.[1] The point of these now-familiar warnings is to inform someone that they have certain rights before they talk to the police.[2] However, merely informing someone of their rights does not mean they actually understand those rights, understand the implications of waiving those rights, or feel like they can actually avail themselves of those rights. This is particularly true when it comes to young people being interrogated by police. It is here where DC is failing to provide for the youth of DC, and why it is time to enact a more mature *Miranda* policy in the District.

The *Miranda* framework of reading a suspect his or her *Miranda* rights and asking for a waiver was designed with *adults* in mind. To understand standard *Miranda* warnings someone must have the working memory capable of holding all the warnings in his or her mind at once, processing their meaning, and also formulating a response.[3] He or she has to understand what an attorney is, what kinds of questions the police will be expected to ask, and what it means to have their responses "used" against them (which further requires general knowledge of the criminal legal system).[4] Studies have found that some warnings, such as the right to be appointed an attorney and the right to silence, require a post-high school reading ability in order to read and comprehend.[5] In order to make a knowing, intelligent, and voluntary waiver, someone has to possess the requisite cognitive ability (if they are under 16 years old), knowledge base, and psycho-social maturity.

In DC, MPD officers are supposed to read to all suspects a standard set of Miranda warnings before interrogating them, whether they are an adult or a child. But this ignores advancements in our understanding of adolescent development, which have demonstrated that young people as a class cannot effectively waive their *Miranda* rights just by being informed of them by the police. In the decades since 1965, when *Miranda* was decided, study after study has confirmed what we have long intuitively understood about children: they are different than adults. The research shows that youth undergo dramatic changes during adolescence. Indeed, we now know that adolescence is the second-most important period of brain development, after the first three years of life.[6] For instance, in adolescence, pathways of the brain that are not used as

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[1] *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[2] *See id.* at 445.

[3] *See* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 432 (2006).

[4] *See id.* at 432–33.

[5] Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White, *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 14 (2012).

[6] *See* Kerstin Konrad, et al., *Brain Development During Adolescence*, 110(25) DEUTSCHES ARZTEBLATT INT'L 425, 426–27.

often are pruned back while the pathways of the brain that are being used are reinforced, resulting in a period of increased malleability and capacity for change.[7] Additionally, the limbic system – the part of the brain that controls emotions – develops during the earlier part of adolescence whereas the prefrontal cortex – which is situated at the front of the brain and controls reasoning, decision-making, and impulse control – does not fully develop until the end of adolescence.[8]

As a result of this differential in the timing of development of the different parts of the brain, youth as a class lack the psycho-social maturity that adults possess. Specifically, adolescents are not as capable in making well-reasoned decisions, especially under intense stress or fear such as in an interrogation setting.[9] Moreover, adolescents tend to focus on short-term rewards rather than long-term risks, which makes them especially vulnerable to waiving their *Miranda* rights without considering the long-term consequences.[10] For example, if an officer tells an adolescent during interrogation that if they waive their rights they can go home, the short-term reward of going home can induce an adolescent to waive their *Miranda* rights no matter what the long-term consequences may be.[11] Youth still lack the tools to truly evaluate the impact of that choice on the rest of their life.[12] Thus, the current *Miranda* framework is ineffectual for youth as it less likely that they can execute a truly knowing, intelligent, and voluntary waiver under the circumstances typical to most custodial interrogation situations.

In addition to adolescents' psycho-social immaturity, there is also the fact that adolescents may lack the cognitive ability to even understand the *Miranda* warnings. In one study, a researcher asked 400 delinquent youth and 200 criminally and non-criminally involved adults a series of questions designed to gauge the participant's understanding of *Miranda* rights. Controlling for age, IQ, and other variables, what he found was that *fifty-five percent* of youths clearly misunderstood one or more of the *Miranda* warnings, compared to just twenty-three percent of adults.[13] Youths in this study misunderstood that the right to remain silent meant they could choose to not speak with the police officer, which was at odds with their experience that they need to talk to adults if asked.[14] Some youths understood that if they have an attorney the attorney is supposed to be "on their side," but believed that the attorney will help them only if they are innocent.[15] Even though after age 15 adolescents generally have the same cognitive

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[7] *See id.*

[8] *See* Jennifer Woolard, *Adolescent Development*, 19.

[9] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 9 (2006).

[10] *Id.* at 8–9.

[11] Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004).

[12] *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011).

[13] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 10 (2006).

[14] *Id.*

[15] *Id* at 11.

abilities as adults,[16] because of their lack of familiarity with the *Miranda* rights and psycho-social maturity they still "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[17]

Demanding a more mature *Miranda* policy for the District is also critical as a matter of racial justice. Black youths have their views of police officers and law enforcement shaped by historical police violence and contemporary coverage of police brutality against Black people.[18] Their views are also shaped by their own experiences of police harassment with police officers, as well as those of their friends and families.[19] Too often, Black youth feel compelled to be deferential to police officers to avoid risking more severe harassment, injury, or death.[20] The backdrop of police violence against Black people, their own experiences of police harassment, and the developmental immaturity of youth previously describe create a powerful force undermining the voluntariness of any *Miranda* waiver Black youths may make. They may waive their *Miranda* rights just so they could get out of the interrogation room. In this respect, for Black youth *Miranda* warnings do not serve as an effective deterrent against the coerciveness of police interrogation.

To illustrate the futility of the current *Miranda* doctrine as it applies to DC youth, consider the following recent case. This young man was taken into the police station and read his *Miranda* rights. When asked if he wanted an attorney, he said that he already had an attorney and that he would like to talk to her. The police told him that this meant they would have to leave, which was true. They then remained in the room, staring at him, until he said he would talk to them. The police continued reading him his rights, and he again said he wanted an attorney. They stopped again and waited again until he had agreed to talk to them. Then, upon being read his *Miranda* rights and invoking his right to silence, he was told by the detective that he marked the wrong box. While on paper, this whole charade may have observed the niceties of the *Miranda* warning and waiver system, in no way could this be a model of justice. This is not just a fault of the police officers that day, but of the system that did not take into consideration the developmental stage of the youth being interrogated and how that affected any waiver he could give.

Miranda represents the bare minimum of what is required under the Constitution to advise a child of their rights; but that does not make it sound policy. It is time that DC goes beyond the bare minimum, uses the advances in adolescent development research over the last 30 years, and creates a legal framework that is developmentally appropriate when it comes to adolescents being interrogated by police officers. The way to do this is change the law so that statements in custodial interrogation made by youth under 18 are inadmissible unless 1) the youth is read their *Miranda* rights by a law enforcement officer in a developmentally appropriate

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[16] *Id.* at 11–12.

[17] *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

[18] Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. ___ (forthcoming December 2020).

[19] *Id.*

[20] *Id.*

manner; 2) the youth has the opportunity to consult with counsel before making a waiver; 3) and, in the presence of their attorney, the youth makes a knowing, intelligent, and voluntary waiver of their rights.[21] Studies show that having the opportunity to consult with counsel before making any decision about waiving *Miranda* rights helps adolescents make a more informed choice, even if they are particularly young or have poor cognitive abilities otherwise.[22] A more mature *Miranda* doctrine for youths in DC that includes the right to counsel before they make a waiver decision preserves the rights of children, cuts down on coerced confessions, and protects the purpose that animated *Miranda* in the first place.

Recommendation 1: Statements made by youth under 18 during custodial interrogation should be inadmissible unless 1) the youth is read their *Miranda* rights by a law enforcement officer in a developmentally appropriate manner; 2) the youth has the opportunity to consult with counsel before making a waiver; 3) and, in the presence of their attorney, the youth makes a knowing, intelligent, and voluntary waiver of their rights.

The Need for Consent Search Reform for Youth in Particular

The District's approach to "consent" searches of youth is another example where policing is out of step with adolescent development, social science, and fundamental fairness. While we applaud the important step taken by the proposed legislation to provide *Miranda*-like warnings prior to "consent" searches, these warnings will not be sufficient to protect youth from the effects of police coercion (and may not be sufficient to protect adults either). Requiring law enforcement officials to deliver *Miranda*-like warnings to individuals before they consent to a search represents an improvement from a baseline of no protections for adults. However, expecting these *Miranda*-like warnings to improve a youth's ability to consent to be searched invokes the same issues as expecting the current *Miranda* doctrine to protect youth from the coercive atmosphere of custodial interrogation.[23] Holding youth and adults to the same standard ignores decades of research confirming what experience and common sense tell us[24] – that the differences between children and adults in experience, susceptibility to peer pressure, and perception of authority[25] require different treatment under law. It further ignores that children are conditioned to obey adults, particularly adults in positions of authority, and that children of color are often taught by their parents to comply with the demands of police officers to avoid being the next child whose death or disability is caught on camera.[26] Thus, as the proposed legislation

[21] Katrina Jackson & Alexis Mayer, Demanding a More Mature Miranda for Kids, D.C. Justice Lab & Georgetown Juvenile Justice Initiative, at bit.ly/mature-miranda.

[22] Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29(6) LAW AND HUMAN BEHAVIOR 723, 737 (2005).

[23] *See J.D.B.*, 564 U.S. at 273.

[24] *Id.* at 272.

[25] *Id.* at 273.

[26] *See, e.g.* Sam Sanders & Kenya Young, A Black Mother Reflects On Giving Her 3 Sons 'The Talk' ... Again And Again, NATIONAL PUBLIC RADIO (June 28, 2020), https://www.npr.org/2020/06/28/882383372/a-black-mother-reflects-on-giving-her-3-sons-the-talk-again-and-again.

recognizes, unconstrained "consent" searches may be constitutional, but they are not good policy given their inherent power imbalance and the reasonable fear that many people of color have of the police.[27] For youth, this imbalance cannot be corrected with warnings alone. Therefore, we suggest that the final legislation prohibit the fruits of *any* "consent" searches of youth from being introduced as evidence against them in a criminal or delinquency matter.

The legal standard for consent invites the consideration of age in both its objective and subjective analyses. Consent must be "freely given," meaning that it is not valid if it's the result of express or implied coercion, or if the person searched did not know they could refuse.[28] The government must prove that the person's consent was valid under the totality of the circumstances, analyzing both objective and subjective factors.[29] More than the facts of the incident, the consent analysis requires the court to consider the facts of the person, their knowledge of their rights, and their personal and cultural experiences with law enforcement.

The importance of considering age is rooted in precedent such as *Roper* and its progeny, which held that children are less culpable for their actions and choices due to the decades of research which show that they are less mature and capable of making informed decisions.[30] From this research, we know adolescents are more impulsive, sensation-seeking, likely to make decisions based on "immediate" rather than "long-term" consequences, and sensitive to social pressure than adults.[31] Adolescents are also less aware of their "legal rights" than adults.[32] These factors create the perfect storm for consent searches predicated on implicit coercion. Youth are both more likely not to know that there are no legal consequences for refusing to be searched, and more sensitive to extralegal, short-term consequences.[33] They are also more likely to answer the officer impulsively and change their answer in response to cues in the officer's body language, tone, and demeanor.[34]

Other factors affecting youth such as race and personal and cultural experience with policing intensify our concerns with the proposed remedy to the fundamental power imbalance in consent searches. A study on the effects of police interactions on adolescents found that youth with more exposure to law enforcement officials report more emotional distress after each

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[27] *See, e.g. Dozier v. United States,* 220 A.3d 933*,* 944 (D.C. 2019) ("An African-American man facing armed policemen would reasonably be especially apprehensive… fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant to whether there was [consent]")

[28] *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048 (1973).

[29] *Id.* at 229.

[30] *See Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1195 (2005)

[31] Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop'*, 64 AM. PSYCHOL. 583, 592 (2009).

[32] Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513, 1536-1537 (2018).

[33] *See id.* at 1537.

[34] *See id.*

interaction.[35] This trauma is aggravated if the encounter took place in public due to feelings of "embarrassment" and "stigmatization,"[36] and if the youth is African American or Latino/a.[37] Similarly, African American youth who live in neighborhoods with a greater police presence report more trauma and anxiety symptoms.[38] The severity of these symptoms is associated with the number and intrusiveness of their interactions with police.[39] Young Black males living in highly-policed areas who have watched friends, family members, or even complete strangers get searched by police officers report symptoms consistent with secondary trauma.[40] Exposure to these incidents on social media had a similar effect.[41] Further studies have found that these feelings of fear, embarrassment, and helplessness affect how young people develop into young adulthood; injuring their self-concept and permanently damaging their trust in law enforcement.[42]

Informing a young person that they can refuse to be searched with no legal consequences will not address these concerns. The proposed policy asks youth to weigh the type of long-term consequences they have the most difficulty judging, particularly when under stressful conditions, and does not address the short-term concerns that inform their decisions. It also tests a youth's attention and ability to learn a legal concept in a high-stress situation that adults find difficult to navigate. For African American and Latino/a children, it contradicts the warnings of their parents not to resist the requests of police officers and often their lived experience that saying no to them is dangerous and futile.[43]

In the District of Columbia, consent searches are the second most common type of search by MPD's NSID.[44] Although the number of consent searches was tracked along with the number

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[35] *See* Dylan B. Jackson et. al, *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 Journal of Adolescent Health 627, 629,

[36] *Id.*

[37] Dylan B. Jackson et. al, *Low self-control and the adolescent police stop: Intrusiveness, emotional response, and psychological well-being*, 66 Journal of Criminal Justice, 2020, at 1, 8.

[38] Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am. Journal of Pub. Health 2321, 2324 (2014).

[39] *Id.*

[40] Nikki Jones, "The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men, *in* Pathways to Adulthood for disconnected young men in low-income communities. New Directions in Child and Adolescent Development, 33, 45 (K. Roy & N. Jones 2014).

[41] B.M. Tynes et al., Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color, 65 Journal of Adolescent Health 371, 376 (2019).

[42] Jones, *supra* at 52.

[43] *See, e.g.* Ben Crump (@AttorneyCrump), TWITTER (October 6, 2020), https://twitter.com/attorneycrump/status/1313681956870205441?s=21, Virginia Bridges, *City council members 'disturbed' by video of NC police officer searching Black teen*," THE NEWS & OBSERVER (July 28, 2020), https://www.newsobserver.com/news/local/counties/durham-county/article244437062.html, and *The Guardian, Exclusive: police fail in attempt to tase Ahmaud Arbery during 2017 incident*, YOUTUBE (May 18, 2020), https://www.youtube.com/watch?v=1v7o_6uI9R0&ab_channel=GuardianNews.

[44] National Police Foundation, Metropolitan Police Department Narcotics and Specialized Investigations Division: A Limited Assessment of Data and Compliance from August 1, 2019 - January 31, 2020, 17 (2020).

of stops after the implementation of the NEAR Act, the reasons for those consent searches have not been as closely analyzed. We do know that between July and December 2019, 90% of the people and 89% of the adolescents searched by police officers in the District were African American.[45] And our African American clients report the same feelings of fear and powerlessness when interacting with the police as documented on a national scale.[46] In fact, our clients have reported that they will often lift up their shirts and display their waistbands unprompted when they see an officer to avoid harassment. Police officers have literally conditioned them to "consent" without even being asked. This conditioning is something that an officer in the Seventh District bragged about on a t-shirt just a few years ago.[47]

As the legislation recognizes by proposing Miranda-like warnings prior to "consent" searches, the current legal framework for "consent" is merely a constitutional floor. D.C. can and should implement a policy that further protects adults and youth from police coercion in the "consent" search context. For youth, the protection should make any evidence seized as the result of the consent search of any individual under the age of eighteen inadmissible in criminal or delinquency proceedings. Excluding evidence obtained through searches justified by the consent of a minor in court would also address the reality acknowledged by the Supreme Court and operationalized by jurisdictions such as California and West Virginia[48] that minors "lack the experience, perspective and judgment,"[49] to interact with the criminal justice system as adults and therefore require special legal protections.

Recommendation 2: Any evidence seized as a result of a search is inadmissible in any criminal or delinquency proceedings against the individual from whom the evidence was seized if: 1) the subject of the search is an individual under the age of 18; 2) the justification for a search by sworn members of a District of Columbia law enforcement agency is consent; and 3) the search is not executed pursuant to a warrant or another exception to the warrant requirement. The foregoing should apply even when law enforcement officers did not know the age of the individual when they searched.

The Need for Police Free Schools & Realignment of DC Resources

For Fiscal Year 2021, the budget for the School Safety Division of the Metropolitan Police Department is nearly $14 million dollars.[50] This budget is meant to support 127 FTEs in the Division for FY2021, which represents an increase from 24.7 in FY2019 and 110 in

[45] Katrina Jackson & Alexis Mayer, Demanding a More Mature Miranda for Kids, D.C. Justice Lab & Georgetown Juvenile Justice Initiative, at bit.ly/mature-miranda.

[46] ACLU-DC & ACLU Analytics, *supra* at 8.

[47] Monique Judge, *DC Cop Under Investigation for Wearing Shirt With KKK Symbol While on Duty*, THE ROOT (July 28, 2017), https://www.theroot.com/d-c-cop-under-investigation-for-wearing-a-shirt-with-a-1797354445

[48] Henning & Omer, *supra*.

[49] *J.D.B.*, 564 U.S. at 273 (2011) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

[50] Metropolitan Police Department, FY2021 Approved Budget, at https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fa_mpd_chapter_2021a.pdf.

FY2020.[51] This increase comes despite the fact that MPD is no longer responsible for managing the security contract for DCPS and the absence of evidence that a floating patrol of school resource officers makes youth or schools safer. Indeed, the District is spending this money despite research demonstrating that the harms caused by the presence of school resources officers[52] and the over-policing of youth.[53] This money would be better invested at the school or community level to keep schools safe, provide additional support services proven to reduce "juvenile victimization" and "delinquent behaviors."[54]

Recommendation 3: Eliminate the School Safety Division at the Metropolitan Police Department and reallocate that money for use in developing and implementing a more holistic approach to school safety and youth development in the District.

Conclusion

As we consider policing reform in the District, it is critical that we account for the differences between youth and adults in our new policies and practices. As a result, the Committee should make three amendments to the Comprehensive Policing and Justice Reform Amendment Act prior to mark up. First, the Committee should amend DC Code to create a more mature *Miranda* policy for the District that guarantees youth the right to consult with counsel prior to waiving their right to remain silent. Second, the Committee should make inadmissible the fruits of any such "consent" search involving a youth. Third, to ensure that we end the over-policing of Black youth in the District, the Committee should amend DC Code to eliminate the School Safety Division at the Metropolitan Police Department. The $14 million budgeted for this division should instead be invested in the adoption and implementation of a holistic, public health approach to safety in our schools and communities.

[51] *Id*.

[52] *See The Presence of School Resource Officers (SROs) in America's Schools*, The Justice Policy Institute, July 9, 2020.

[53] *See* Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent black and Latino Boys*, 116 PNAS, 8261 (2019) (finding that adolescent black and Latino boys who were stopped by police reported more frequent engagement in delinquent behavior six, twelve, and eighteen months later than boys who were not stopped by the police (independent of prior delinquency).

[54] MPD describes the purpose of the School Safety Division as "safeguard[ing] and provid[ing] services to students and staff at District of Columbia Public Schools and Public Charter Schools [as well as] striv[ing] to reduce juvenile victimization and delinquent behavior through a variety of programs." MPD, FY2021 Approved Budget, at https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fa_mpd_chapter_2021a.pdf

MORE THAN A PLAZA

DC JUSTICE LAB +
GEORGETOWN JUVENILE JUSTICE INITIATIVE

DEMANDING A MORE MATURE MIRANDA FOR KIDS

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Katrina Jackson • Alexis Mayer

Demanding a More Mature *Miranda* for Kids

I. Introduction

In *Miranda v. Arizona*, the Supreme Court held that statements made by an adult during custodial interrogation are inadmissible unless law enforcement officers first administer warnings before questioning and the adult validly waives those rights.[1] Pursuant to the Fifth and Sixth Amendments, *Miranda* warnings inform individuals of: (1) the right to remain silent, (2) that any statement can be used against them, (3) the right to obtain an attorney and to have counsel present during questioning, and (4) the right to be appointed an attorney.[2] To waive these rights, a person must make a voluntary, knowing, and intelligent waiver based on the totality of the circumstances.[3] The Supreme Court emphasized that any statement or confession obtained through an uninformed, coerced, or compelled waiver of these rights must be excluded from any judicial proceeding.[4]

A year later, in *In re Gault*, the Supreme Court recognized that the procedural Constitutional safeguards outlined in *Miranda v. Arizona*, apply to children as well.[5] However, in deciding *Gault*, the Supreme Court extended *Miranda*'s adult framework to youth without the benefit of the wealth of adolescent development research that has been conducted since *Miranda* and *Gault* were decided.[6] As a result, the *Miranda* framework is not a robust, research-driven approach for protecting the rights of youth. Indeed, in *J.D.B. v. North Carolina*, the Supreme Court recognized this shortcoming and held that a child's age is relevant to *Miranda*'s custody analysis because children as a class are different than adults.[7] Notably, *Miranda*, *Gault*, and *J.D.B.* describe only the Constitutional floor of protections that must be afforded to youth in an interrogation context.

These bare minimum *Miranda* protections fail to fully protect children because they do not accommodate for a child's high susceptibility to pressure and limited cognitive ability. Furthermore, Black children are disproportionally affected by the grave insufficiencies of the *Miranda* Doctrine. The current Doctrine fails to consider the unique vulnerabilities of Black youth experience when interacting with the police. As residents, law students, attorneys, and members of the community, we respectfully urge the DC Council to protect children from *Miranda*'s shortcomings by requiring, prior to any custodial interrogation, that (1) law enforcement provide youth with expanded warnings; 2) youth be provided a reasonable opportunity to consult with counsel; and (3) waivers will only be valid if they are knowing, intelligent, voluntary, and made in the presence of counsel.

II. The Insufficiencies of the *Miranda* Doctrine

Although children only account for about 8.5% of arrests, nationally, they account for about one-third of false confessions.[8] This often leads to wrongful convictions and severe dispositions because those who falsely confess are treated harshly throughout the rest of the juvenile or criminal legal process.[9] Youth have difficulty understanding the *Miranda* rights, largely contributing to this high rate of wrongful convictions.

Because children's cognitive abilities are still developing, most children cannot meaningfully understand their *Miranda* rights.[10] More specifically, only 20% of youth adequately understand their *Miranda* rights.[11] Empirical evidence illustrates that adequately comprehending *Miranda* requires at least a tenth-grade reading level.[12] Moreover, understanding two of the *Miranda* warning

protections, the right to remain silent and the right to have an attorney present, requires a college or graduate reading ability.[13] As high as 85% of the youth in the juvenile legal system have disabilities, and children with disabilities inherently have difficulties in understanding the complexity of the *Miranda* doctrine.[14] Due to economic, social, and educational disparities, these necessary reading levels are far beyond the majority of individuals, including adults, who are targets of custodial interrogations.[15]

Furthermore, "[o]verwhelming empirical evidence shows that [youth] do not understand their Constitutional protection against self-incrimination or the consequence of waiving their rights."[16] In particular, many children do not understand that they will not incur consequences or court sanctions if they invoke their rights, such as the right to remain silent.[17] Due to no fault of their own, children do not understand the purpose of an attorney or that an attorney will support them even if they are guilty.[18] Additionally, many children often confuse the term, "interrogation," with an adjudication hearing and, therefore, do not understand that the right to have an attorney present during an interrogation means that they have the right to have an attorney present during questioning.[19] Thus, because youth do not understand *Miranda*'s protections, they cannot fully understand or appreciate the rights they are giving up when they waive them.[20]

In addition to not fully understanding their rights or the consequences of waiving them, children also "lack the psychosocial maturity and cognitive capacity to waive *Miranda* rights."[21] Because a child's prefrontal cortex has not yet matured,[22] children focus on short-term rather than long-term consequences,[23] especially in moments of stress.[24] Thus, children are especially at risk of waiving their rights without considering the consequences in the inherently stressful setting of an interrogation.[25] For example, when an officer tells a child that they can go home if they waive their *Miranda* rights and answer questions, the child is likely to waive their rights based on the short-term reward of going home.[26] Furthermore, even if they could consider the long-term consequences, youth "'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'"[27] As a result, children as young as ten years old waive their *Miranda* rights about 90% of the time without understanding the rights they are giving up,[28] often leading to false confessions and wrongful convictions.[29]

III. Race Implications and Disproportionate Effects of the *Miranda* Doctrine

For decades, tensions have existed between the Black community and the police. In the District of Columbia, police disproportionately stop, search, and arrest Black youth. Black youth are "ten times more likely to get stopped than their white peers," and between July and December of 2019, police searched 738 Black youth and only four White youth.[30] In 2018, 98% of youth committed to the Department of Youth and Rehabilitation Services were Black.[31] In 2015, Black youth made up just under 70% of the District's youth population, but accounted for over 95% of those arrested in the District.[32] Black people continue to be disproportionally arrested, not just in heavily policed, predominantly Black neighborhoods, but also in areas with high concentrations of White people.[33] Furthermore, Black youth's view of the police is often learned and shaped at a very young age.[34] Therefore, "[d]istrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of Miranda waivers."[35]

Moreover, Black men are more likely than White men to feel anxiousness and fearfulness during police encounters and , as a result, engage self-regulatory behavior to counteract any formed stereotypes regarding their guilt.[36] For example, Black men are hyper aware to engage in eye-contact and remain mindful of their body language and word choice.[37] But, despite a Black man's true intentions, "these self-regulatory efforts are interpreted as suspicious by police." Researchers have referred to this phenomenon as "stereotype threat."[38] Although the study was limited to Black men, it can be reasonably inferred that Black youth engage in similar attempts to conform their behavior to the perceived expectations of the officer. As a result, Black youth experience substantially different interactions with the police than their White counterparts, which leaves greater exposed to the shortcomings of the *Miranda* Doctrine.

IV. The Impact on the District of Columbia

The involuntary waiver of *Miranda* rights remains an issue within Washington, D.C.'s juvenile legal system. In 2012, the Metropolitan Police Department ("MPD") arrested a 15-year old child and brought him to a police station, where an MPD detective questioned him around midnight.[39] During the interview, the child's foot was cuffed to the floor, so he was unable to move freely.[40] Before reading the child his *Miranda* rights, the detective said:

> "I know you know why you're up here, so I ain't gonna play the 'I don't know' crap, all right? I'm gonna give you an opportunity to give your version of what happened today, because ... I stand between you and the lions out there .... [W]e have a lot of things going on out there, and they're gonna try and say that you did it all. Okay? And I think what happened today was just a one-time thing. But before I came out here everybody said ... you did a whole bunch of stuff, but in order for us to have a conversation, I have to read you your rights and you have to waive your rights. If you answer no to any of the questions I ask you after I read you your rights, that's all, I mean, I can't have the interview, okay?"[41]

After the officer made these coercive statements to the child, he read the child his *Miranda* rights.[42] The child then waived his rights and confessed.[43] Because the officer's statements implied that invoking his *Miranda* rights would make the situation even worse, the officer made the boy feel helpless, as if he had no choice but to waive his *Miranda* rights and confess. [44] The District of Columbia Court of Appeals found that the officer's statements did not give the child a real choice and that his waiver was, therefore, involuntary.[45] This is just one of many examples that illustrates a child's susceptibility to waiving *Miranda* rights during an inherently coercive police interrogation.

V. A New Approach

To better protect children from the current inadequacies of the *Miranda* doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless (1) the minor was advised of their rights by the interrogating law enforcement official,[46] (2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and (3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any *Miranda* right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Other jurisdictions have already codified protections for youth in custodial interrogations, including (1) requiring children to consult with a counsel during police questioning, (2) not allowing children to waive *Miranda* rights without consulting with an attorney, and (3) making inadmissible any statement made outside the presence of counsel. Specifically, New Jersey requires the assistance of counsel before a child can waive any right, including a *Miranda* right.[47] Additionally, California recently passed legislation that requires all minors to consult with an attorney before waiving any *Miranda* right.[48] Furthermore, Illinois requires counsel at all custodial interrogations for children under 15 who are suspected of committing homicide or another serious offense.[49] Similarly, in West Virginia, statements made by children under 14 during custodial interrogations are not admissible in court unless counsel was present during the interrogation.[50]

States and cities across the United States continue to codify further protections for youth in custodial interrogations. For example, in New York, there is a bill that, if it becomes law, will mandate that children are only interrogated when necessary and only *after* consulting with an attorney.[51] Baltimore City has also taken steps to ensure that a child's constitutional rights are preserved. Specifically, the Maryland State's Attorney's Office has explicitly expressed its plans to develop policy that will make statements made by a minor outside the presence of counsel inadmissible.[52]

Although some states require parents to be present during custodial interrogations as a way to potentially guard against coerced waivers or confessions, this "protection" has proven to be inadequate. Instead, attorneys are best positioned to explain *Miranda* rights to children. Generally, parents do not have the necessary legal knowledge to represent their child's best interest.[53] In fact, "[i]n 24 out of 25 interrogations, the parents either did nothing or affirmatively aided the police" by advising their children to confess or to tell the truth.[54] One notable example of a case where children were wrongfully convicted based on false confessions is the Exonerated Five, where the children's parents encouraged the boys to waive their right to remain silent and further encouraged them to cooperate with the police.[55] The parents, like their children, felt helpless and powerless to resist police pressure during the interrogations. Thus, merely having a parental or custodial guardian present would not adequately preserve *Miranda*'s Constitutional protections.[56]

Moreover, providing minors a more expansive explanation of their *Miranda* rights alone would not be enough to protect youth from involuntarily waiving their rights. To create a fully comprehensive explanation of *Miranda*'s protections that most youth could factually and rationally understand would be both impractical and ineffective. For example, England and Wales created a comprehensive 44-page "easy read" letter of rights for people in custody.[57] However, because it is so unlikely that a child could understand and internalize such a lengthy document under the conditions often associated with custodial interrogation, England and Wales also requires counsel and an appropriate adult when youth are in police custody.[58] "On average, custodial suspects are expected to comprehend 146 words with a range from 49 to 547," and longer pieces are especially challenging.[59] Thus, a comprehensive resource would not effectively communicate the *Miranda* doctrine to youth and would, therefore, not adequately protect against involuntary waivers.

Providing further *Miranda* protections would not only protect youth from falsely confessing but also save the District money that could be allocated to social programs. Detaining a young person can cost upwards of $621 per day and $226,665 per year.[60] These numbers do not account for the long-term indirect costs of detaining youth, including less tax revenue, increased public assistance, and increased crime costs.[61] Additionally, "[b]etween lawsuits and state statutes that award fixed compensation for wrongful convictions, state and municipal governments have paid out $2.2 billion to exonerees."[62]

The District of Columbia should make any statement made to law enforcement officers by any person under eighteen years of age inadmissible in any court of the District of Columbia for any purpose, including impeachment, unless:

- **The child is advised of their rights by law enforcement;**
- **The child is given an opportunity to confer with an attorney; and**
- **The child knowingly, intelligently, and voluntarily waives their rights in the presence of counsel.**

References

[1] *See* 384 U.S. 436, 444 (1966).
[2] *See generally id*.
[3] *Miranda*, 384 U.S. at 444-45; *Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979).
[4] *Miranda*, 384 U.S. at 462.
[5] 387 U.S. 1, 44-55 (1967).
[6] *Id.*
[7] *J.D.B. v. North Carolina*, 564 U.S. 261,272 (2011) (recognizing that "[t]ime and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults; and so on.")
[8] Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 920 (2017).
[9] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920 (2004).
[10] Lapp, *supra* note 8, at 914.
[11] Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1152-53 (1980) (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[12] Anthony J. Domanico et al., Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations, 49 IDAHO L. REV. 1,3 (2012). It is important to note that DC uses the same Miranda Rights Card with both adults and youth. *See* Metropolitan Police Department PD-47 form.
[13] *Id.*
[14] Taryn VanderPyl, *The Intersection of Disproportionality in Face, Disability, and Juvenile Justice*, 15 JUST. POL'Y J. 1, 2 (2018).
[15] *Id.*
[16] Lapp, *supra* note 8, at 914.
[17] Richard Rogers, et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCH., PUB. POL'Y, & L. 63, 67 (2008).
[18] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 11 (2006).
[19] Grisso, *supra* note 11, at 1154 (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[20] Grisso, *supra* note 18, at 11.
[21] Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 431 (2006).
[22] Marco Luna, *Juvenile False Confessions: Juvenile Psychology, Police Interrogation Tactics, and Prosecutorial Discretion*, 18 NEV. L.J. 291, 297 (2017).
[23] Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 405 - 06 (2013).
[24] Grisso, *supra* note 18, at 9.
[25] *J.D.B.*, 564 U.S. at 269 (quoting *Miranda*, 384 U.S. at 467); Grisso, *supra* note 18, at 9.
[26] Grisso, *supra* note 18, at 11. Oftentimes, when officers interrogate a child, they give the child two options: "(1) you did it and if you do not confess I cannot help you so you are going to be punished harshly, or (2) you did it and if you do confess, you are a good person and I can help you." Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004). Based on these limited options and the short-term reward of going home, children almost always waive their *Miranda* rights and confess even if they are innocent. *See generally id.* at 138.
[27] *J.D.B.* 564 U.S. at 272 (quoting *Bellotti v. Baird,* 443 U.S. 622, 635 (1979)).
[28] Lapp, *supra* note 8, at 914 (2017); Barry Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 12 (2013) (finding, in a study of 307 16 through 18-year olds, 92.8 percent of youth waived their *Miranda* rights)

[29] Elizabeth Vulaj, *From the Central Park 5 to the Exonerated 5: Can It Happen Again?*, N.Y. ST. B.J. (2019), at 24-25.
[30] ACLU-DC, RACIAL DISPARITIES IN STOPS BY THE D.C. METROPOLITAN POLICE DEPARTMENT: REVIEW OF FIVE MONTHS OF DATA 8 (2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (last visited Sept. 13, 2020).
[31] Youth Population Snapshot, DEP'T YOUTH REHABILITATION SERV.S, https://dyrs.dc.gov/page/youth-snapshot (last visited Sept. 2, 2020).
[32] *Racial Disparities in D.C. Policing: Descriptive Evidence from 2013-2017*, ACLU DISTRICT OF COLUMBIA, https://www.acludc.org/en/racial-disparities-dc-policing-descriptive-evidence-2013-2017 (last visited Sept. 13, 2020).
[33] *Id.*
[34] Kristin Henning, Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. ___ (expected December 2020).
[35] *Compare* Puzzanchera, C., Sladky, A. and Kang, W., "Easy Access to Juvenile Populations: 1990-2019," at https://www.ojjdp.gov/ojstatbb/ezapop/ (reporting 29,321 Black youth ages 10 to 17 and 42,234 total youth ages 10 -17) *with* MPD FOIA Request Response 2016-05463 (reporting 2928 arrests of Black youth out of 3073 total arrests in 2015) (on file with the Georgetown Juvenile Justice Initiative).
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *In re S.W.*, 124 A.3d 89, 93 (D.C. Ct. App. 2015).
[40] *Id.*
[41] *Id.* at 94.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id*. at 104-05.
[46] These rights include but are not limited to: (a) the right to remain silent, (b) anything they say can be used against them, (c) the right to an attorney, (d) the right to have someone else pay for the attorney, (e) the right to talk to an attorney *immediately* before continuing to answer questions, (f) the refusal to give a statement cannot be used as evidence of guilt, (g) making a statement does not mean they will be released from custody or that they will not be charged, (h) they can be held in pretrial detention for the most minor offenses, and (i) they can be committed until age 21 for the most minor offenses.
[47] N.J. STAT. ANN. § 2A:4A–39(b)(1).
[48] S. 203, 2020 (Cal.)
[49] 705 ILL. COMP. STAT. § 405 / 5-170.
[50] W. VA. CODE § 49-4-701(l).
[51] A6982B, 2019 Leg., Reg Sess. (N.Y. 2019). Emily Haney-Caron & Sydney Baker, *Protecting Youth from Interrogation*, NEW YORK DAILY NEWS, (Aug. 5, 2020), https://www.nydailynews.com/opinion/ny-oped-protecting-youth-from-unfair-interrogation-20200805-yzg33mie6vhkvkmmrfz7jagrwy-story.html, (last visited Sept. 27, 2020).
[52] Marilyn Mosby & Miriam Aroni Krinsky, *The Baltimore Exonerees' Cases Shed Light on the Need for Reforming Youth Interrogations*, WASH. POST (Nov. 27, 2019), https://www.washingtonpost.com/opinions/local-opinions/the-baltimore-exonerees-cases-shed-light-on-the-need-for-reforming-youth-interrogations/2019/11/27/e7e22570-1099-11ea-b0fc-62cc38411ebb_story.html; Jennifer Egan, *Baltimore State's Attorney Should Refuse to Use Child Confessions Taken Without an Attorney Present*, BALT. SUN, Dec. 6, 2019, https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1208-mosby-kid-confession-20191206-jsdhcnsocrcrflo7m2hdkygzui-story.html.
[53] Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions (Winner of American Constitution Society's National Student Writing Competition)*, 20 U. PA. J. CONST. L. 1211, 1232 (2018).
[54] Molly Knefel, *'Making a Murderer,' and the Huge Problem of False Youth Confessions*, ROLLING STONE (Jan 8, 2016), https://www.rollingstone.com/tv/tv-news/making-a-murderer-and-the-huge-problem-of-false-youth-confessions-51948/, (last visited Sept. 27, 2020); Rogers, *supra* note 17, at 66.
[55] Drizin, *supra* note 9, at 896.
[56] Rogers, *supra* note 17, at 66.

[57] HERTFORDSHIRE CONSTABULARY, RIGHTS AND ENTITLEMENTS EASY READ BOOKLET (2009).
[58] *See* Rogers, *supra* note 17, at 185.
[59] *Id.* at 186.
[60] JUSTICE POLICY INSTITUTE, STICKER SHOCK 2020: THE COST OF YOUTH INCARCERATION 3 (2020).
[61] *Id.* at 1.
[62] Radley Balko, *Report: Wrongful Convictions Have Stolen at Least 20,000 years from Innocent Defendants*, WASH. POST: OPINIONS (June 10, 2019), https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/.

Appendix: Proposed Amendments

§ 16–2316. Conduct of hearings; evidence.

(g) A statement made by a person under 18 years of age to a law enforcement officer during a custodial interrogation shall be inadmissible for any purpose, including impeachment, in a transfer hearing pursuant to section 16-2307, in a dispositional hearing under this subchapter, or in a commitment proceeding under Chapter 5 or 11 of Title 21, unless the person under 18 years of age:

(1) Is advised by a law enforcement officer in a developmentally appropriate manner of:

(A) The person has the right to remain silent;

(B) Anything the person says can be used against them in court;

(C) Refusing to make a statement cannot be used as evidence that they were involved in a crime;

(D) Making a statement does not mean they will be released from custody or that they will not be charged with a crime;

(E) The person has the right to an attorney;

(F) The person has the right to have someone else pay for the attorney at no cost to them;

(G) The person has the right to privately speak with an attorney, immediately, before continuing to speak with a law enforcement officer;

(H) The person has the right to be advised by an attorney regardless of whether they committed a crime; and

(2) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and

(3) Through an attorney, knowingly, intelligently, and voluntarily waives their right to remain silent.

Committee on the Judiciary and Public Safety
Public Hearing on
Rioting Modernization Amendment Act of 2020 (B23-0723)
Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 (B23-0771)
Comprehensive Policing and Justice Reform Amendment Act of 2020 (B23-0882)

Hi, my name is Lauren Spokane, I'm a DC resident and homeowner in Ward 4. I live in Petworth with my husband and 9 month old son. I serve on the board of Jews United for Justice, and I'm also the board chair of the New Synagogue Project, a justice-centered Jewish community in DC.

Like my JUFJ colleagues and the coalition of Black organizers and allies leading the fight to end racist police violence in DC and to defund MPD, I support the recommendations put forward by ACLU-DC, Black Lives Matter DC, DC Justice Lab, DC Working Families Party, Defender Impact Initiative, HIPS, Metro DC DSA, and others, and I strongly urge the Council to adopt them. As such, I support the reforms being put forward in the bills today, but feel they must go much further to get closer to justice and safety in our city. The bills should include measures such as eliminating stop and frisk, banning no-knock search warrants, banning the use of military weapons and harmful surveillance methods, along with the other recommendations made by the coalition.

As I look ahead to the years to come as my son Jacob grows up, I imagine lots of possibilities for him, and lots of rich learning from growing up in a diverse city and neighborhood. I will teach him not to call the police, because of the impact it may have on our Black and Brown neighbors when police arrive. I will be grateful that I don't have to have a different talk with him, about how to behave in front of police, or just when walking down the street or driving a car or on a bike, to try to avoid being harassed or far worse. But no one should have to have that talk with their children. We need more accountability, yes, but we also need public safety practices and structures that actually create safety, not that criminalize our Black and Brown residents and perpetuate violence.

We are one of the most heavily policed cities in America, and it's not making us safer. I support defund asks popularized by Stop Police Terror Project DC, Black Swan Academy, and other groups in DC's Movement for Black Lives, such as reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls, and moving funding for school resource police officers to pay for mental health care and trauma-informed services. Money should be reallocated from MPD's budget to cover essential human needs and interventions that make us healthier and safer.

Real safety comes from building a society - and a city - where everyone has the resources they need to live in health and wholeness, not from policing its residents. Violence in our city has risen and fallen over the years while the number of police in DC has held relatively steady, reinforcing what decades of research shows - violence is a result of failures to invest in and support communities by making sure people's needs are met. Safe and secure housing, quality childcare

and education, reliable healthcare, access to food, and well paying jobs are and will always be more important in preventing violence and building safe and thriving communities than policing.

I call on all of you as leaders of our city to take bold action not just to reform policing practices, but to invest in alternatives to policing that have far greater potential to result in true public safety. The bills being discussed today are a good first step, and they must go further.

Thank you for the opportunity to testify today.

JEWS UNITED FOR JUSTICE

Committee on the Judiciary and Public Safety
Public Hearing on
Rioting Modernization Amendment Act of 2020 (B23-0723)
Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 (B23-0771)
Comprehensive Policing and Justice Reform Amendment Act of 2020 (B23-0882)

Sarah Novick, JUFJ DC Senior Organizer
October 15, 2020

Thank you Councilmember Allen for holding this hearing. My name is Sarah Novick and I'm the DC Senior Organizer with Jews United for Justice, a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. In the midst of an uprising led by Black organizers against systemic racism and following the killing of Deon Kay by the DC police, we ask that members of the DC Council do everything in your power to end the police violence against Black residents, hold police accountable, bring urgently needed transparency to police processes, and defund the MPD.

Jewish tradition teaches that destroying one single life, the killing of just one person, is akin to destroying a whole world. In DC, as around the country, police violence has destroyed worlds. And yet, too many of our laws protect police rather than our residents. That is why JUFJ is following the lead of and supporting the recommendations put forward by ACLU-DC, Black Lives Matter DC, DC Justice Lab, DC Working Families Party, Defender Impact Initiative, HIPS, Metro DC DSA, and others, and strongly urges the Council to adopt them.

The bills being discussed today are a critical step in the direction of police reform and JUFJ supports them. For example, we support the prohibition of the use of neck restraints, expanding the role and reach of the Office of Police Complaints, increasing the number of people on the Police Complaints Board while removing the seats held by law enforcement, and enfranchising eligible District residents incarcerated for felony convictions. All of these are important steps toward police accountability and increased rights for civilians.

That said, DC can and must do so much more to keep Black and Brown people from being terrorized and killed by the police. The DC Council should ban the use of stop and frisk,

no-knock search warrants, and military weapons, and end qualified immunity and qualified privilege for police officers. The public should have expanded access to body-worn camera footage. Police disciplinary processes should be strengthened and moved completely outside of MPD. Each of these changes, and others like them, will help end the inequitable policing that has been taking place in DC for far too long.

JUFJ also supports the recommendations to remove policing from the District's public safety practices, and instead replace policing with trauma-informed approaches. Educating individual police officers on racism and white supremacy as this legislation calls for is necessary, but far from sufficient to address the institutional racism of a deeply flawed system. This is even more so when it comes to our city's young people. Following the lead of Black Swan Academy, the Council should remove police from our schools. Research shows that placing police in schools does not increase safety, but leads to the criminalization of ordinary student behavior, especially targeting Black students and students with disabilities - thus destroying the worlds of many children of color. We also support the call for creating a crisis response system that does not involve police, expanding the role of violence interruption programs, and overhauling the District's criminal code to decrease penalties and decriminalize offenses.

We must couple these changes with a transition away from a reliance on police. Following the lead of BLM, Stop Police Terror Project, and the Defund MPD movement, JUFJ supports the call to defund the police in order to increase investments in Black and Brown communities and alternatives to policing. There are nearly 4,000 MPD officers as well as thousands of additional officers from other law enforcement agencies in DC. Violence in DC has risen and fallen over the years while the number of police has held relatively steady, reinforcing what decades of research shows: violence is a result of failures to invest in and support communities by making sure people's needs are met. To have safe and thriving communities we need secure housing, quality childcare and education, reliable healthcare, access to food, and well paying jobs rather than a reliance on police.

As a white person, I can't know or understand the terror and pain my Black friends, colleagues, and neighbors have experienced at the hands of the police. But I hear them, and I trust them. The Comprehensive Policing and Justice Reform Amendment Act must go further to protect the very lives of our community members. The recommendations being made by advocates and activists and people directly impacted by these policing practices are critical steps toward

dismantling entrenched racism and preserving life in our city. Thank you for the opportunity to submit testimony.

Committee on the Judiciary & Public Safety
October 15, 2020
Alana Eichner, Ward 1

My name is Alana Eichner and I live in Ward 1. I am a member of Jews United for Justice, which works to advance social, racial, and economic justice in DC.

Part of why I organize with Jews United for Justice is because my faith informs my commitment to fight for a more just world. Jewish communities often talk about tikkun olam, which is the value of repairing our broken world. If that value is to be real, remaining silent in the face of injustice is not an option. There is far too much injustice occurring at the hands of police in the District of Columbia. We won't have a repaired world until all of us are able to live free from fear and violence.

Today I am asking that the DC Council take decisive action to protect DC residents by holding police accountable, creating transparent policing processes, and divesting from police and investing in true safety for our communities.

Thanks to the work of Black organizers, since May our nation and city have increasingly grappled with the long history and present reality of violence toward Black communities at the hands of police. I urge the DC Council to seize this moment as an opportunity for transformative policy change. I support the recommendations made by Black Lives Matter DC, ACLU-DC, DC Justice Lab, DC Working Families Party, HIPS, Metro DC DSA, Defender Impact Initiative, and others, and urge the Council to adopt them.

As a white woman, I have not experienced police harassment or terror at the hands of the police. This matters to me because no one should be harassed and terrorized, especially by agents of their own government. Many times I've encountered someone on the street who, it appeared, might benefit from help or support. But I have been unsure about what to do or who to call, knowing it is not safe to call the police because too often that ends in violence toward Black individuals. I have repeatedly seen Metropolitan Police Department (MPD) officers mistreat Black teenagers on the streets of DC in the neighborhood where I live. It's shameful that it's nearly impossible to live in most parts of DC and not have witnessed or experienced this.

The three bills being discussed today, the Rioting Modernization Act of 2020, the Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020, and the Comprehensive Policing and Justice Reform Amendment Act of 2020 are meaningful steps in the right direction but they do not go far enough.

One additional necessary reform is for MPD to change its approach to gun recovery. Deon Kay, who was shot and killed by an MPD officer last month, will not have the opportunity to build his future because of DC's failed approach to gun recovery. What we have now is an approach that escalates violence in Black communities and is ineffective at finding weapons. Instead, we need solutions that address the underlying roots of community violence that do not involve the police. MPD's current use of overly aggressive, blunt-force tactics are only leading to more fear, more shootings, more death, and more trauma.

This trauma also exists in our schools, where the presence of police officers leads to Black students being arrested at disturbingly high rates. Creating an environment that criminalizes the normal behavior of young people and teenagers makes our entire community less safe. I urge you to follow the recommendation popularized by Black Swan Academy to remove police officers from schools, which is a necessary step to creating a supportive learning environment for all students in DC.

While these reforms are urgent and necessary, we know that reform alone is insufficient. In cities across the country, some of the reforms proposed today have been in place and still Black people have been murdered by police. I want to echo the call to defund MPD, which is being led by Black Lives Matter DC, Stop Police Terror Project DC and other groups in the Defund MPD Coalition. We must re-prioritize our money by decreasing funding allocated to the police department and instead use that money to meet human needs -- by investing in safe housing, quality child care, direct financial assistance and healthcare access. This is what real safety looks like.

Thank you Councilmember Allen and members of the committee for your time and the opportunity to present my testimony. I urge the Council to listen to the voices you have heard today and take meaningful steps to ensure the safety and dignity of all of the District's residents.

Committee on the Judiciary and Public Safety
October 15, 2020 Public Hearing
Rebecca Ennen, Ward 4

My name is Rebecca Ennen and I live in Petworth in Ward 4. I have been involved in DC local issues since I moved here in 2010 through Jews United for Justice, both on staff and as a volunteer. I have watched for the last decade as this city has struggled to be a city for all its residents, not just the wealthy. In particular I have watched the Council and Mayor, every year, go through a budget process where various programs that are critical to the well-being of our residents were defunded and only sometimes refunded. In all those years our budget for policing has grown steadily with no hint of change.

I support the recommendations made by Black Lives Matter DC, ACLU-DC, DC Justice Lab, DC Working Families Party, HIPS, Metro DC DSA, Defender Impact Initiative, and others, and urge the Council to adopt them. I specifically thank Stop Police Terror Project and Black Swan Academy for their detailed and visionary work. I am not an expert and can only add my voice to theirs.

I am an upper middle class white woman. I have two children, one a DCPS student and one a baby. I want what my neighbors across this city want, whether we're Black, white, or brown: to have a vibrant, generous, connected community where everyone is safe and cared for. The police who are entrusted to serve and protect us all, are not doing that. They target, detain, harass, and kill Black residents. Meanwhile, people like me are fed a lie: that we are unsafe without police. Specifically, the subtext is that we are not safe from Black people without police.

I reject this lie and I see through it to the people earning money off white fear and the brutalization of Black people and communities: the private prison profiteers, the sellers of military weapons and surveillance technology, and the politicians and government officials they buddy up with to keep our tax dollars flowing to their pockets. They are relying on white people like me to believe that Black people are inherently dangerous and should be brutally controlled by police. I'm not buying it and I will not be divided from my multiracial family, community, and city. Instead, I want to talk about the joyful, connected, safe future we can all have in our city - that you as elected officials and your hard-working staffers have the power to lead us towards.

Like many of you I am a religious person. I believe that every person is made in God's image, uniquely precious and deserving of full respect and dignity. My tradition calls me to believe in and work for a just and loving society. The prophet Micah speaks of this vision of peace and

abundance, when he says that we shall beat our swords into plowshares, no one will be afraid, and each person sit under her own vine and fig tree. Every person's safety is precious and it is inextricably linked to their freedom from fear and from deprivation. We absolutely must stop and defund policing that harms the unique, wonderful people of this city. Beating swords into plowshares means defunding the police and funding the housing, childcare, schools, health, food, and more, that our residents need.

Near where I live, on 14th Street, there is a span of several blocks where you can go any day and see what deprivation and despair look like. There are about two dozen people who seem to have substance abuse and/or mental health issues, who are regularly hanging out, using alcohol and drugs, panhandling, or passed out on the sidewalk. Almost all of them are Black and brown, victims of decades and centuries of policies that treat them and their families as expendable and unworthy of opportunity or care. They are my neighbors, and most of the time they are friendly and have kind words for my kids and me.

When I regularly see police on 14th Street I am deeply afraid for my neighbors' safety. Many times I've waited down the block or across the street while police questioned or detained these neighbors. I'm not even sure why I hang around - to be a witness? To act as a check on police violence, implying by my mere presence that someone who's white and middle class cares about the safety of my neighbors? I am afraid to call 911 when I see someone clearly in need of medical help. I am afraid that one day someone will get shot by a cop.

We need to get police out of public safety and crisis response. There should be someone that our neighborhood could call on for help - someone that would show up with resources and care, not the implicit threat of a gun. I believe that every one of these people deserves a good life and help with their serious struggles - not to be punished and criminalized.

Imagine a city where schools taught and practiced restorative justice, instead of in-school police harassing Black and brown children and funneling them into the prison industrial system. Imagine a city where people with drug issues or in crisis could get help. Let's stop putting money into policing and controlling Black and brown people, find ways to deal with violence and crisis that do not further harm and traumatize people, and make sure that every single person in our city has their needs met. I know that the elected leaders here today would like to see our city leading the way towards that future, away from the cycles of fear and violence that terrorize Black and brown communities and line the pockets of the corporations that profit from our spending on police, weapons, and jails.

We are coming together across our city to demand liberty and justice for all. Let's stop buying swords, and start planting vines and fig trees.

Dear DC Council Judiciary Committee,

Thank you, and thank you for this hearing.
My name is Hannah Weilbacher and I'm a Ward 1 resident. I am testifying today because Black lives matter.

I'm a member of Jews United for Justice, a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. As our city grapples with the systemic and institutional racism recently highlighted by the uprising this summer and the killing of Deon Kay, I also ask that the DC Council do everything in your power to protect Washington residents, to hold police accountable, create transparent police processes, and defund MPD and instead invest in programs, policies, and practices that *truly* keep people safe. The Council should implement the common sense recommendations being made by community-led institutions such as ACLU-DC, Black Lives Matter DC, and DC Justice Lab.

I'm in support of the bills on the table today, as they are important pieces of legislation to increase community safety by limiting police powers, but they need to go further. I appreciate the addition of Black Lives Matter DC and other community representatives to the Police Reform Commission. I also support the ask to ban no-knock warrants, and to ban jump outs. Proposed changes to the Police Complaints Board and the Standards Board are important, if incomplete, changes, but there is more to be done in reallocating responsibilities away from MPD and towards other essential services that address the root causes of crime. Police reform is not the end; I am also asking that MPD be defunded. **I support the call to divest from the police because the MPD continues to inflict harm, and instead invest in human needs and violence prevention that will actually make all of us safer.**

I worked with the Paid Family Leave campaign which passed the Universal Paid Leave Act in 2016 which, Councilmembers, you know well and Councilmember Allen you helped champion. This July, finally, we have seen people now able to take paid time away to be with their family during the most intensive times in their lives.

As members of the Council know well, the primary, coordinated, corporate-backed opposition from frankly right-wing opponents even within the Democratic party was: "DC cannot afford a paid family and medical leave program." Considering the $600 million budget of the District's dangerous, unchecked, racist police force, it's clear that there was and is *always* money to support DC families, but the precious resource lacking is political will.

Today, as you listen to many testimonies from your Washington, DC neighbors who are bringing forward specific, researched, data-driven recommendations, I hope that each Councilmember sees that the hard work of researching and proposing viable options has been done, and the political will -- your action -- is what's needed.

MPD's budget hovers around $600 million, and we are one of the most heavily policed cities in America. Money should be reallocated from MPD's budget to cover essential human needs. I

echo the asks highlighted today by Stop Police Terror Project DC, Black Swan Academy, and other groups in DC's Movement for Black Lives, such as reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls, and moving funding for school resource police officers to pay for mental health care and trauma-informed services.

Safe and secure housing, quality childcare and education, reliable healthcare, access to food, and well paying jobs are and will always be more important in preventing violence and building safe and thriving communities than the absence or presence of police.

Real safety comes from building a society where everyone has the resources they need to live in health and wholeness, not from policing its residents. There are nearly 4,000 MPD officers as well as several dozen other law enforcement agencies making up thousands of additional officers in DC. Violence has risen and fallen over the years while the number of police has held relatively steady, reinforcing what decades of research shows- violence is a result of failures to invest in and support communities by making sure people's needs are met.

So, I ask the Council to show true leadership in the DC government by fighting for common-sense policies that can directly address the racism and violence we see today:

1. Maintaining and **increasing** funding for the Office of Neighborhood and Safety Engagement and violence interrupter programs.
2. Reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls.
3. Cutting funding for school resource officers and reallocating that funding to pay for mental health care and trauma-informed services in DC public schools, along with technological support for remote learning.
4. Increased services for formerly incarcerated DC residents including housing, education, and job assistance.
5. Maintaining a permanent budget item for public housing repairs. This year, the council should put $60 million to repair public housing.
6. Increasing the availability of high-quality childcare.
7. Maintaining and increasing funding for vital nutrition and food access programs.
8. Suspending rent and mortgage payments in DC until the COVID-19 crisis is over
9. Providing COVID-19 relief funding to all DC residents, including undocumented residents.

Thank you for this hearing and for listening to our testimonies. I sincerely hope the testimonies of many DC residents — particularly those most threatened by policing — will persuade the Council that our communities want and need non-police resources to keep each other safe.

Sincerely,
Hannah Weilbacher, Ward 1

WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS

Testimony of the Washington Lawyers' Committee for Civil Rights and Urban Affairs[1]

Concerning

B23-0882, The Comprehensive Policing And Justice Reform Amendment Act of 2020

October 15, 2020

The Comprehensive Policing and Justice Reform Amendment Act of 2020 is an important step to address injustice in our system of policing, but it is only one-step. Enactment of this legislation will make permanent critical reforms that the Council enacted earlier this year.

This Council has in recent years demonstrated a commitment to addressing the inequity and injustice of policing practices in the District. Long before the economic crisis created by COVID-19 and the public attention to policing that was brought about by the national uprising in response to the in-custody deaths of George Floyd and others, the Council enacted the Neighborhood Engagement Achieves Results Act and engaged in serious oversight of the Metropolitan Police Department.

While these reforms are important, they are by themselves insufficient and leave unaddressed fundamental injustices. This bill is an important milestone in re-envisioning policing in the District but should not be the end of the journey. In coming months, the Council will receive recommendations from the Police Reform Task Force, the Task Force on Justice and Jails, and the Criminal Code Review Commission. We urge that those recommendations serve as the basis for further comprehensive action by the Council.

The Washington Lawyers' Committee Supports this Legislation

The Washington Lawyers' Committee supports this bill. There are, however, several provisions that should be strengthened. A brief discussion of those provisions is set forth below:

Body-worn camera policy: We support the proposal to improve access to body-worn camera recordings. Body-worn cameras provide transparency and give the community a view into how MPD polices its community.

For years, community members voiced concerns about the difficulty in gaining access to body-worn camera footage. In 2019, this Council passed a law granting family members who

[1] The Washington Lawyers' Committee was founded in 1968 to address racial and economic injustice through litigation and other advocacy. The Committee has a long history of working to address discrimination in housing, employment, criminal justice, education, public accommodation and against persons with disabilities. We work closely with the private bar to bring litigation and pursue policy initiatives.

lost loved ones to law enforcement access to body-worn camera footage. However, family members continue to have issues with the program. Family members are not given the opportunity to view all the footage prior to its release, nor were they given adequate notice of the release of the footage. In order to strengthen the body-worn camera policy and improve transparency, we recommend the following provisions.

- Within 48 hours after a police involved shooting or serious use of force incident, MPD will ensure that the next of kin has had the opportunity to view all unedited footage the department plans to be released.

- Within 48 hours after family members view the footage, a representative from the City should call the next of kin informing them of the release date and time. The representative would ask the family members consent to release.

- In the interest of transparency, the Chief of Police should be required to consult with a community advocacy group or civil rights group on the release of footage of shootings or uses of force that have resulted in media coverage, protest, or raised concerns by community leaders.

- When the MPD declines to release footage, including videos of significant public interest, MPD should provide a written justification for denial within seven days.

- Additional accountability measures must be put in place for failure to adhere to the policy.

Consent Searches: The Washington Lawyers' Committee urges the Council to prohibit all consent searches. The uneven power between officers and residents is inherently coercive.[2] Stops are stressful experiences, and individuals who have been stopped have a reasonable anxiety for their safety and the consequences of declining to agree to be searched.[3]

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[2] *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (Consent is determined by an examination of the "totality of circumstances.")

[3] Legal commentators have called into question whether the "totality of circumstances" analysis articulated by the Supreme Court for determining whether consent is freely given fairly accounts for the coercive effect of police encounters. See, e.g., B. Sutherland, Whether Consent To Search Was Given Voluntarily: A Statistical Analysis Of Factors That Predict The Suppression Rulings Of The Federal District Courts, New York University Law Review (2006); https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-81-6-Sutherland.pdf.

If the Council does not prohibit consent searches outright, in order to protect the critical constitutional right to be free from unreasonable searches and seizures, we recommend additional provisions:

- The detention to request a consent search can last no longer than the time that it takes to provide the advisements required by law and receive an answer from the person being detained. Overly long detentions or repeated requests should vitiate the consent.[4]

- Given the inherently coercive quality of stops and detention and the high value in ensuring the consent is freely given, if the consent is not in writing or on body-worn camera video, the presumption of inadmissibility should be irrebuttable.

- Officers should be required to complete a report on every consent search or request to conduct a consent search that includes a narrative describing the justification for seeking to conduct the search. Officers should be required to provide a justification that is specific and individualized to the circumstances, and canned or form language should be prohibited.

- We would favor requiring officers to obtain the permission of a supervisor before seeking to conduct a consent search. The requirement that officers justify the search to a supervisor before seeking consent will reduce searches that are pretextual or motivated by bias.

- The Department should be required to report on a quarterly basis the number of consent searches sought, the number conducted, the location of each consent search sought, the location of each consent search conducted, and the age, gender, and race of the person searched or sought to be searched.

Training and the Police Officers Standards and Training Board: The proposal to increase and mandate additional training on bias-free policing is important. While there is some dispute on the effectiveness of implicit bias training,[5] that may have more to do with the course delivered than the concepts involved. In order to make bias free policing training effective, we strongly recommend that the bill require that the City engage people and organizations from

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[4] *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015)(Police cannot extend a traffic stop longer than necessary to write the ticket in order to conduct a search in the absence of probable cause that would justify the additional detention and search).

[5] https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior

impacted communities in the development and delivery of the training to officers, including people of color, people living in poverty, youth, LGBT persons, persons with disabilities, returning citizens, non- and limited-English speakers, and others.

Organizations led by people most likely to be policed should be compensated to be part of the design and delivery of training. Compensation of these participants will not only appropriately recognize their expertise, but will ensure that their contributions are valued.

In addition, this section of the bill requires training for officers on the obligation to report misconduct by other officers. This is a critical step, but it should be strengthened. We strongly encourage the Council to mandate that the City adopt a formal bystander intervention program by expanding the Active Bystander for Law Enforcement Project that is currently being piloted by MPD.[6]

Deadly Force: The proposed changes to use of force practices in the pending legislation are important but incomplete. Critical omissions are the requirement that officers avoid force when possible and that de-escalation is mandatory. This can be accomplished by strengthening Sections 119 (b)(2) & (3) and (c)(2)(B) & (C). De-escalation should not be just a "factor," but mandatory. Moreover, this section should be expanded to all uses of force, not just deadly force.

Police officers are among the few public officials authorized to use force, including deadly force, in their official capacity. The execution of stops and arrests "necessarily carries with it the right to use some degree of physical coercion or threat thereof to affect it."[7] The authority to use force, while broad, is not unlimited. The Fourth Amendment establishes the right of "people to be secure in their persons" and to be protected from "unreasonable searches and seizures."[8] It has long been understood that the Fourth Amendment places limits on the use of force by law enforcement. Force, to be constitutional, must be objectively reasonable.[9] Objective reasonableness is determined by a series of factors, including: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[10]

The legal standard sets a very low bar. Even when the force used is constitutional, it can be contrary to the values of the community or the policies of a department, and even a small percentage of unnecessary or excessive uses of force can undermine trust and legitimacy. There

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[6] https://www.msn.com/en-us/news/us/we-have-to-police-ourselves-dc-program-trains-officers-to-intervene-and-prevent-harm/ar-BB1a11z8. *See also*, Ethical Policing is Courageous program in New Orleans, http://epic.nola.gov/home/.
[7] *Terry v. Ohio*, 392 U.S. 1, 22 (1968).
[8] U.S. Const. amend. IV.
[9] *Graham v. Connor*, 490 US 386 (1989).
[10] *Id.* at 396.

is often a very large gap between what is "lawful" and what is "right" in the use of force. Therefore, community members, and this Council, should expect that police officers will make every effort to avoid and minimize the use of force.[11]

Forward looking police departments have included the LEED Model (Listen and Explain with Equity and Dignity) in their policies to ensure that force avoidance and de-escalation become part of the policing culture. The LEED model is described in Principles of Procedurally Just Policing from the Justice Collaborative at Yale Law School as follows: [12]

> Principle 30:
>
> De-escalation tactics—whether verbal or physical—should be used where possible.
>
> - In order to de-escalate a situation, officers should attempt to use one or more of the following techniques, in addition to any other techniques, words, or actions reasonably intended to slow down an encounter and engage the individual(s) in the encounter:
>
> **Verbal de-escalation**:
>
> Use the Listen and Explain with Equity and Dignity (LEED) framework:
>
> - *Listen*—allow people to give their side of the story; give them voice
> - *Explain*—officers should explain what they are doing, what the individual can do, and what will happen
> - *Equity*—officers should explain why they are taking action; the reason should be fair and show that the individual's statements and input were taken into account
> - *Dignity*—officers should act with dignity and leave the individual with their dignity
>   - Echo back the individual's statements to show that the officer is listening
>   - Communicate using verbal persuasion, including advisements
>
> **Physical de-escalation**:

[11] See e.g., Mourtgos & Adams, Assessing Public Perception of Police Use-of-Force: Legal Reasonableness and Community Standards, Justice Quarterly (October 2019), https://www.tandfonline.com/doi/abs/10.1080/07418825.2019.1679864.

[12] https://law.yale.edu/sites/default/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf:

- Avoid physical confrontation, unless immediately necessary to prevent direct harm to others or to stop behavior that may result in serious harm to others
- Use physical de-escalation techniques, including:
    - moving temporarily to a safer position
    - communicating from a safe position
    - decreasing exposure to potential threat using distance or cover

In addition, officers should be given significantly more guidance on when and how to exercise discretion not to engage in an enforcement action. There are many occasions when an officer may have the authority to take someone into custody, but circumstances dictate that there is little or no public safety benefit to doing so and the safer and better course is to withdraw. This is especially true in the context of minor offenses that do not threaten public safety.[13]

While de-escalation and force avoidance could be addressed in policy, given the seriousness of these issues and the record of conduct of the MPD, it is important that they be codified in law.

Provisions Regarding Police Response to First Amendment Activity: The proposed limitations on the use of force and other responses to First Amendment activity are important, but the exception to use riot gear for an "immediate risk to officers of significant bodily injury" is overbroad and subject to interpretation. The use of riot gear is perceived by demonstrators as oppressive, rather than defensive, and as a consequence it has a significantly escalating effect.[14] The role of police should be to facilitate First Amendment exercise and not engage in tactics that are intimidating or appear to be retaliatory.

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[13] *See*, for example, the policy of the Saint Paul Minnesota Police Department. https://www.stpaul.gov/books/40400-tactical-disengagement.

[14] *See, e.g.*, after action of response to Ferguson demonstrations. https://www.policefoundation.org/wp-content/uploads/2018/08/After-Action-Assessment-of-the-Police-Response-to-the-August-2014-Demonstrations-in-Ferguson-Missouri.pdf.

> FINDING 17. Many community members perceived law enforcement using the standard protective equipment worn by officers, such as helmets, external vests, and shields, for offensive and not defensive measures... Officers wearing defensive and tactical equipment should be staged out of sight during peaceful demonstrations.

It is telling that this section addresses the "deployment" of officers in riot gear, which by definition is a planned event, even if the period of planning is brief. We urge that the section be modified to require prior notification, except in exigent circumstances, to the Deputy Mayor for Public Safety, the Chair of the City Council and the Chair of the Council's Judiciary Committee. The notifications should contain a detailed description of the conditions that justify the use of riot gear.

In addition, we recommend that the Council define "riot gear." Leaving this term open may create varying interpretations inconsistent with the Council's intent. Moreover, "First Amendment" activity may be too narrow to capture all of the contexts that the Council is seeking to address. A term like "mass gatherings" might be more effective.

Metro police: We strongly support the recommendation to create civilian oversight of the WMATA Police Department, but it is not enough. We urge that the bill be amended to require that Metro Police be:

- Subject to open records laws;
- Required to publish its policies on line; and
- Required to comply with the policies of the MPD.

Although Metro Police is a public agency, it is extremely difficult to learn anything about how it operates. It makes almost nothing public. Beyond daily crime reports that show the time and location of arrests, reports and citations, it does not post any data on its website. It also does not post any of its policies. In short, Metro Police is incredibly opaque.

There is no other police jurisdiction in this region that is subject to such limited oversight or for which there is such limited transparency. The Metro Police has a critical impact on the community and should be subject to the same rules as MPD.

The Need to Continue to Address Policing Beyond this Bill

The reforms in this Bill are important. However, the issues concerning policing in the District run deep and require a re-examining of fundamental questions about the role and function of law enforcement. As the Council moves forward with further reform efforts, and engages in the discussion of re-imagining policing, we urge you to keep the following principles in mind:

First, transforming policing requires that race equity be at the core of every consideration. Involvement with the criminal legal system is a major driver of inequality in the District of Columbia. The District has a high rate of incarceration that disproportionately affects African American men, women and families. Ninety percent of the District's prison population is

African American and only four per cent is white despite that the City is almost half white and half Black. The District has one of the highest rates of incarceration in the nation.

The disparities in the District's criminal system involvement cannot be explained by the often asserted canard that there are behavior differences between whites and African Americans. Police enforce the laws one way in white communities and a different way in Black communities - Black people get arrested when white people do not for the same conduct.[15] Systemic racism is built into the structure and practices of policing.

Second, the over policing and underserving of Black and Brown communities not only create racial disparity in criminal legal system involvement but also are dangerous and contrary to public safety. Every unnecessary encounter is dangerous, and that danger compounds. Philando Castile is a far too common experience. He had been stopped 49 times for minor traffic and equipment violations before he was shot and killed by a Minnesota police officer.[16]

Urgent steps to reduce police interaction are essential. The Council should build on the practices implemented during COVID to reduce custodial arrests and make those practices permanent. Additional strategies should be employed by expanding violence interrupter programs, strengthening restorative justice models, and supporting community-based, impacted community led organizations.

The safety of Black and Brown communities are undermined, not served by many police practices, as Judge Schiendlin wrote in the New York stop and frisk litigation:

> [I]t is important to recognize the human toll of unconstitutional stops. While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are

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[15] Among the many studies belying the assertion of higher rates of "criminality" in the Black community is a report of the United States Department of Health and Human Services, which found "significantly higher likelihood of having ever been arrested among blacks, when compared to whites, even after accounting for a range of delinquent behaviors. Importantly, after controlling for racial composition of the neighborhood, these disparities were no longer present, suggesting the importance of neighborhood context in influencing racial/ethnic disparities in arrests." Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School and Community Characteristics; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5509345/.

[16] https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html.

> overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police.[17]

These issues are just as urgent in the District as in New York, Minnesota and across the nation. In a study conducted by the Consortium of Legal Services Providers of 590 District residents living under 200% of poverty, 27.8% reported being stopped by the police for no reason, 15.1% reported that police did not take them seriously when they called for assistance, another 14.3% reported that police responding to a call made them feel at fault for the crime that had victimized them, and more than 10% reported police asking them inappropriate questions. The majority of those surveyed felt that the police were indifferent, at best, to the issues in their community.[18]

The ACLU recently released a study analyzing MPD's stop data that validated the experience reported by District residents. The data showed that Black people made up 72 percent of MPD's stops despite only making up 46.5 percent of the D.C. population. These disparities suggest a racial bias in MPD's stop practice. Even more alarming, nearly 90 percent of the stops and searches that resulted in no warning, ticket, or arrest were Black people.[19] Despite claims from MPD that jumpouts, a stop and frisk tactic where plainclothes officers come out of unmarked vehicles to randomly pat-down pedestrians, do not exist, residents in Ward 7 and 8 report the fear they feel when officers jump out cars to search them.

We cannot conflate arrests and patrols with public safety and we must look beyond policing. Reimagining policing requires a holistic look at what police do and how they do it as well as other factors that render communities unsafe. Police violence is not the only form of violence meted out on communities of color in the District. Inequity in education, lack of opportunity for safe and affordable housing, food insecurity, inadequate wages and employment, unequal access to recreation and culture are all forms of violence. Addressing these concerns is a public safety imperative.

Third, fundamental to addressing the issues in policing is changing police culture. Fundamental to culture change is meaningful internal and external accountability based in policy, law, and the values of the community. External accountability builds trust and

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[17] *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).
[18] Report of the Community Listening Project; https://www.lawhelp.org/dc/resource/community-listening-project.
[19] https://www.aclu.org/press-releases/aclu-analysis-dc-stop-and-frisk-data-reveals-ineffective-policing-troubling-racialcite.

transparency with the community. The Council should create an independent civil rights inspector general for MPD. The inspector general would be given staff and resources to review both incidents of potential civil rights violations and current and future policies, procedures, practices, and tactics of the department.

In addition to external mechanisms, the Council should improve the department's internal investigation process. In 2016, the Office of District of Columbia Auditor conducted a review of MPD's policies and practices related to use of force. That report found serious issues with the quality of Internal Affairs investigations. The report found that use of force investigators were insufficiently trained, conducted inadequate use of force investigations, and produced unsatisfactory investigative reports.[20]

Fourth, changing policing is not enough. While police are often the face of the criminal legal system, inequity is a product of the criminal laws, prosecutorial decisions, prison and jail conditions, and discrimination against those convicted of a crime. Truly comprehensive reform legislation would look at the spectrum of systems actors.

Fifth, the Council must remove police from our schools. Transferring the function from MPD to the school system is not enough. Instead, the City should make significant investments in non-law enforcement programs that improve school safety and promote the learning environment.

The presence of police in schools means that Black students are more likely to be arrested. In DC, 92% of school-based arrests are of Black youth.[21] Higher discipline rates for Black youth are not due to higher rates of misbehavior.[22] Rather, Black students are more likely to be arrested because they are more likely to encounter police and because those police view their normal, adolescent behavior as more criminal than the same behavior in white students.[23]

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[20] http://dcauditor.org/reports/durability-police-reform-metropolitan-police-department-and-use-force-2008-2015.

[21] 2019 School Report Card indicates that there were 338 total arrests of students across the District – 312 of the arrests were of Black students and 26 of the arrests were of Latino students. (104 of the arrests were for students with disabilities).

[22] *See, e.g.*, Russell J. Skiba, et al. "The Color of Discipline: Sources of racial and gender disproportionality in school punishment." Urban Review, 34, 317-342 (2002).

[23] *See, e.g.,* Goff, P.A., Jackson, et.al. "The Essence of Innocence: Consequences of Dehumanizing Black Children," Journal of Personality and Social Psychology (February 2014); Epstein, Rebecca, Jamilia J. Black & Thalia Gonzalez. "Girlhood Interrupted: The erasure of Black Girls' Childhood," Georgetown Law Center on Poverty and Inequality (2012), available at http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/girlhood-interrupted.pdf.

In addition to furthering the gross racial disparities in the criminal legal system and in academic achievement, school police are ineffective and expensive. Over the last school year, our city spent about $25 million dollars a year on school security within DCPS alone, and about another $10 million on MPD officers to patrol DCPS and charter schools.[24] There is no clear empirical research that school police reduce crime or increase safety in schools.[25] In fact, some studies suggest the opposite. Students are less likely to misbehave, including engaging in criminal behavior, in schools where they feel valued, respected, and listened to – in other words, where the students are part of a community.[26] DC's students deserve investment in programs that help them thrive and not in those designed to criminalize. At this moment, in particular, we must strengthen our mental health infrastructure and ensure our young people have increased access to mental health professionals to address the trauma caused by COVID-19, police violence, and racism.

Conclusion

Thank you for moving this legislation and for this hearing. We look forward to working with the Council to continue to help make the District of Columbia a more just place for all to live and work.

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[24] DC Public Schools Responses to FY2019 Performance Oversight Questions, Q11, at https://dccouncil.us/wp-content/uploads/2020/02/dcps_Part1.pdf("The DCPS school security contract for security officer personnel in FY2020 is projected to be $23,458,808.27. The non-personnel costs in FY2020 are projected to be $1,619,061.00"); MPD FY2021 Proposed Budget Plan, Table FA-04, Division 2300. Total budget for that division is for FY2020 was $34 million but approx. $23 million is the DCPS security contract.

[25] ACLU Pennsylvania, "Summit on School Policing: Research on the Impact of School Policing," https://www.endzerotolerance.org/schoolpolicingsummit (July 2019). *See also* Matt Barnum, "Do police keep schools safe? Fuel the school-to-prison pipeline? Here's what research says," Chalkbeat (June 23, 2020), https://www.chalkbeat.org/2020/6/23/21299743/police-schools-research.

[26] ACLU Pennsylvania, "Summit on School Policing: Research on the Impact of School Policing," https://www.endzerotolerance.org/schoolpolicingsummit (July 2019).

To: Committee on the Judiciary and Public Safety, Council of the District of Columbia

From: Yasmin Vafa and Rebecca Burney

Re: Rights4Girls Comments on the Comprehensive Policing and Justice Reform Amendment Act of 2020

Date: October 23, 2020

Rights4Girls is a human rights organization dedicated to defending the rights of marginalized young women and girls in the U.S. Based in Washington, D.C., we work at the intersection of racial justice, juvenile justice, and violence against women and girls at the federal, state, and local levels, and engage in youth development, coalition-building, public awareness campaigns, research, and training and technical assistance. Over the past several years, we have been actively involved in the passage of multiple federal laws aimed at reforming systems to improve our response to marginalized girls and providing increased funding and services to survivors of sexual violence and exploitation. We have also worked at the national and local levels to shed light on the widespread criminalization of girls of color through the publication of reports like *The Sexual Abuse to Prison Pipeline: The Girls' Story* and *Beyond the Walls: A Look Inside D.C.'s Juvenile Justice System*.

We are committed to promoting youth engagement and advocacy through our series of youth workshops and sit on a number of local coalitions including the Youth Justice Project coalition, the D.C. Coalition to End Sexual Violence, the Advisory Board of the Young Women's Initiative, and we co-lead the D.C. Girls Coalition with our partners at Black Swan Academy. In addition, in 2011, we co-founded the Girls at the Margin National Alliance—a coalition of over 200 national, state, and local organizations working across systems and disciplines to center the voices and experiences of marginalized young women and girls in policy conversations at the local, state, and federal levels.

In 2018, we published a report in partnership with the Georgetown Juvenile Justice Initiative entitled, *Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System*, that discusses the gendered pathways leading D.C. girls into the juvenile justice system and highlights the disproportionate impact our policies have on girls of color in the District. Some of the major findings in that report were: i) Girls' arrests in D.C. have increased 87% over the past decade; ii) 97% of girls committed to the Department of Youth Rehabilitative Services (DYRS) custody are Black; iii) 86% of arrests of girls in D.C. are for non-violent, non-weapons offenses; and iv)

60% of girls arrested in D.C. are under age 15.[1]

Today, we submit this testimony to urge you to amend Bill 23-0882, the *Comprehensive Policing and Justice Reform Amendment Act of 2020* (the "Act") to include provisions that directly address the manner in which youth are policed in the District. While the Act includes many essential reforms that will benefit both youth and adults, it does not propose any specific reforms that take into consideration youth development or the unique needs of girls. This is particularly concerning due to countless stories we have heard from youth about being harassed, intimidated and at times physically harmed by members of the Metropolitan Police Department (MPD). As such, we recommend the following amendments to the Act that we believe will be more developmentally responsive to the needs of young people.

First, we recommend expanding MPD's continuing education requirements beyond the proposed new topics to include training on gender bias, trafficking, youth development and trauma. Second, in order to address the over-policing of youth of color in D.C., we recommend that this legislation also eliminate the School Safety Division at the Metropolitan Police Department. Finally, we join with our juvenile justice colleagues in the recommendation put forth to amend the D.C. Code to create a more mature *Miranda* policy for the District that guarantees youth the right to consult with counsel prior to waiving their right to remain silent.

1. **In addition to requiring additional police training on racism, white supremacy, limiting the use of force, and de-escalation techniques, it is vital that MPD also receive continuing education on gender bias, trafficking, youth development and trauma.**

We have worked extensively with girls of color in the District to help elevate their experiences and make sure that their needs are represented in policy decisions, while also providing the tools necessary for them to be their own advocates for change. The number one point that trafficking survivors have expressed to us is that the police need culturally competent, survivor-led trainings about trafficking as well as training to address the racism, sexism, and implicit bias in the police department. Washington, D.C. has one of the largest disproportionate rates of incarcerated Black people. According to a report from the ACLU, from 2013 to 2017, Black individuals composed 47% of D.C.'s population, but 86% of its arrestees, and were arrested at 10 times the rate of white people.[2] The racial disparities are even more troubling when you look at the youth population. In D.C., Black girls are arrested at rates 30 times that of white girls and white boys.[3]

Both nationally and locally, girls are overwhelmingly involved in the juvenile justice system through non-violent and misdemeanor offenses.[4] Those arrests make up 86% of girls in the D.C. juvenile justice system.[5] Girls are far more likely than boys to be arrested for status offenses such

[1] Yasmin Vafa, Eduardo Ferrer, et. al, Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System, Rights4Girls & Georgetown Law Juvenile Justice Initiative (2018).
[2] *Racial Disparities in D.C. Policing: Descriptive Evidence from 2013-2017,* ACLU District of Columbia (May 2019).
[3] Vafa, *supra* note 1.
[4] *Id.*
[5] *Id.* at 27.

as truancy and running away.[6] Often, these behaviors are in response to traumatic experiences, home instability, or feeling unsafe at school. Many of these issues derive from sexual exploitation or abuse.[7] In one study, three fourths of justice-involved girls reported that their first instance of abuse was at age 13,[8] making it unsurprising though alarming that arrests of 13 to 15-year-olds is a primary driver of girls into D.C.'s juvenile justice system.[9]

Girls involved in the juvenile justice system experience adverse childhood experiences or ACEs at incredibly high rates. Further, system-involved girls experience more of these issues than their male counterparts with 45% of girls experiencing five or more ACEs.[10] Black girls, who represented 97% of newly committed youth to DYRS between 2007 and 2015, reported the highest rates of single and multiple ACEs.[11] Seventy-three percent of girls who end up in courts have histories of physical or sexual violence.[12] Girls in the juvenile justice system are more than four times more likely than boys to have been sexually abused.[13] Given the tremendous amount of trauma that girls who are interacting with MPD have experienced, it is not surprising that police officers are ill-equipped to handle their significant mental health needs and would benefit from additional training.

When asked about their experiences with MPD officers, one youth said that she "hasn't had any positive experiences since she turned 18." Another young girl described an instance where MPD officers handled her so aggressively at school that they dislocated her shoulder. Trafficked youth and especially girls have told us that police often do not understand the dynamics and trauma associated with trafficking and especially familial trafficking. Youth report that MPD are rarely sympathetic to those over 18 who are engaged in the sex trade even if they are being exploited. As one young woman said, police are "not understanding that trauma makes youth not trusting or reluctant to cooperate." All of the youth we work with described numerous negative experiences with police ranging from harassment to physical assault, and felt that police should be required to have regular trainings to help address this behavior.

In addition to training, there need to be more meaningful accountability measures for police officers who use excessive use of force even if their actions do not result in arrest, death, or serious bodily harm. Several young people said "Police use too much force on children" and that they "restrain children too aggressively." This problem is clearly illustrated through an incident one survivor had with a police officer when she was in 8th grade. She vividly described how a police officer tripped her so that she fell to the ground and then handcuffed her while she was face down in the dirt. Even though she was restrained, the officer then threatened to use a taser if she attempted to get up off of the ground. What was her crime? She was a 13-year-old trafficking survivor who ran away from an abusive home.

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[6] *Id*. at 7.
[7] Malika Saada Saar, Rebecca Epstein, et. al, *The Sexual Abuse to Prison Pipeline: The Girls' Story*, Rights4Girls, Georgetown Law Center on Poverty and Inequality, & Ms. Foundation (2015), p. 4.
[8] *Id*. at 7.
[9] Vafa, *supra* note 1, at 31.
[10] *Id*. at 35.
[11] *Id*. at 36.
[12] Francine T. Sherman, *Pathways to Juvenile Justice Reform: Detention Reform and Girls Challenges and Solutions*, Annie E. Casey Foundation (2005).
[13] Saar, *supra* note 7, at 8.

The interactions between the MPD officers and trafficking survivors demonstrate how vulnerable young people are often subjected to appalling, dehumanizing, and sometimes exploitative treatment by police officers due to stigma and victim blaming of those in the sex trade. Sadly, this is a common trend throughout the country. A recent Nevada study on the interactions between police and commercially sexually exploited youth found that most of the survivors were arrested and transported to juvenile detention for processing rather than given services afforded to victims of a crime.[14] Numerous young people in the study experienced violence and threats from arresting officers and results of the study suggest that an officer's perception of the youth influenced how they were treated, with those who did not fit the narrative of a "perfect victim" experiencing far more negative police interactions.[15] Several studies have identified the need for regular survivor-centered and trauma informed police officer trainings on trafficking, and we encourage the Council require these important trainings in addition to continuing education on racism and white supremacy.

2. **Eliminate the School Safety Division at the Metropolitan Police Department and reallocate that money for use in developing and implementing a more holistic approach to school safety in the District.**

Police reform and additional trainings will not remedy the fact that our Black youth are over-policed in the first place. As a result, we also recommend that this legislation eliminate the School Safety Division at the Metropolitan Police Department and reallocate that money for use in developing and implementing additional support services proven to reduce violence as well as innovative programming to ensure youth safety in our schools and communities. Now that DCPS will be resuming control of the management of its school security, the need for this unit is significantly lower.[16] The money currently allocated to this unit should be invested in our most vulnerable young people and we must focus our efforts and funding on scaling up community-based programs and services for youth that are gender responsive, trauma-informed, culturally competent and developmentally appropriate.

Girls are often overlooked in critical conversations around the school-to-prison pipeline and the racial achievement gap in education. However, girls of color suffer from many of the same problems as boys of color and struggle with sexism, systemic poverty, racial bias, gender violence, and trauma. In particular, Black girls[17] are increasingly being referred to the juvenile justice system as a result of school discipline policies that criminalize them for normal

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[14] Alexa Bejinariu , M. Alexis Kennedy & Andrea N. Cimino, "*They said they were going to help us get through this …": documenting interactions between police and commercially sexually exploited youth*, Journal of Crime and Justice (2020), p.12.

[15] *Id*.

[16] For Fiscal Year 2021, the budget for the School Safety Division of the Metropolitan Police Department is nearly $14 million dollars despite the fact that MPD is no longer responsible for managing the security contract between DCPS and an outside vendor.
https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/fa_mpd_chapter_2021a.pdf

[17] According to the 2018-2019 report on school discipline by OSSE, among those who were expelled, Black/African-American students make up 95 percent of the population even though they are only 67 percent of the entire student population. Thus, it is essential to look at the racial dynamics in D.C. and the impact disciplinary procedures have on Black girls. *State of Discipline: 2018-2019 School Year*, D.C. Office of the State Superintendent of Education, p. 1.

adolescent behavior, for expressing themselves,[18] or for minor misbehaviors that could be addressed within the school system. Girls of color and especially Black girls are often disciplined for dress code or behavior violations that result from implicit and explicit gender bias on the part of teachers, administrators, and school resource officers.[19] They are also affected by additional factors such as sexual harassment and violence at or on the way to or from school, pregnancy, caretaking responsibilities, and undiagnosed learning disabilities that all contribute to truancy and school pushout.[20] Because schools can act as an important protective buffer for youth, exclusionary discipline renders girls especially vulnerable to abuse, sexual exploitation, and juvenile justice involvement.[21]

Police officers are not trained to handle trauma experienced by youth in D.C. and their involvement in altercations and routine disciplinary measures often escalate the situation. Youth need more counselors and social workers in schools who can help them work through any challenges they may be experiencing, not more police. Police officers in schools can also make schools feel unsafe and unwelcoming for girls and can contribute to truancy. It is essential that we invest in the well-being and continued development of D.C. educators to practice social-emotional learning and shift from a reliance on police officers to a transformative justice approach. We must also invest in our most vulnerable young people and focus our efforts and funding on scaling up community-based programs and services for youth that are gender responsive, trauma-informed, culturally competent and developmentally appropriate.

We support youth leaders across the city who have called for Police Free Schools and believe that we need to move away from a culture that criminalizes youth of color for normal adolescent behavior and shift to a culture that promotes accountability, safety and youth agency. Studies have shown that police in schools do not make Black youth feel safer.[22] Rather than fund the School Safety Division, MPD should commit to working with students, teachers, school leaders, and parents to improve police interactions with youth in the community and move towards creating Police Free Schools.

3. **Amend the D.C. Code to create a more mature *Miranda* policy for the District that guarantees youth the right to consult with counsel prior to waiving their right to remain silent.**

Youth interrogations by police is another area in which the District has failed to account for the impact that systemic racism, trauma, and limited cognitive development has on young people. In *Miranda v. Arizona*, the Supreme Court held that statements made during a custodial

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[18] *Dress Coded: Black girls, bodies, and bias in D.C. schools*, National Women's Law Center (2018).

[19] Monique Morris, *Pushout: The Criminalization of Black Girls in Schools* (The New Press, 2015), pp. 120-32.

[20] *Id*. at 49; Karen Schulman, Kayla Patrick, & Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls with Disabilities*, National Women's Law Center (2017), p. 1; Kelli Garcia & Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls who are Pregnant or Parenting*, National Women's Law Center (2017), p. 1.

[21] Morris, *supra* note 19, at 101; Francine T. Sherman & Annie Balck, *Gender Injustice: System Level Juvenile Justice Reform for Girls* (2015), p. 16; Kimberlé Crenshaw, Priscilla Ocen & Jyoti Nanda, *Black Girls Matter: Pushed Out, Overpoliced, and Underprotected*, African American Policy Forum and Center for Intersectionality and Social Policy Studies (2014), pp. 10, 24.

[22] Claire Bryan, *Police don't make most black students feel safer, survey shows*, Chalkbeat (Jun. 8, 2020).

interrogation are inadmissible unless law enforcement officers administer warnings prior to questioning and the adult validly waives those rights. These warnings include the right to remain silent, that any statement made can be used against them, the right to have an attorney present during questioning, and the right to be appointed an attorney.[23] However, it is well documented that children cannot meaningfully understand their *Miranda* rights because their cognitive abilities are still developing. One study found that only 20% of youth adequately understood their *Miranda* rights and empirical evidence shows that sufficiently comprehending *Miranda* requires at least a tenth-grade reading level.[24] Thus, we join with our juvenile justice colleagues in urging the D.C. Council to adopt a more mature *Miranda* policy.

The inability of children to fully comprehend their *Miranda* rights has disastrous consequences and often leads to wrongful convictions and severe dispositions. Nationally, children account for only 8.5% of arrests but account for nearly one-third of false confessions.[25] In D.C., where Black youth are disproportionately stopped, searched, and arrested by police, our current *Miranda* policy has racial justice implications as well. Decades of racialized policing, contemporary media coverage of police brutality against Black people, and personal experiences of police harassment and violence, shapes the views that Black youth have towards police. As a result, this "distrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of *Miranda* waivers."[26] Youth may waive *Miranda* simply to get out of the interrogation room or to end interactions with a police officer. Thus, *Miranda* warnings alone are not effective in limiting the coerciveness of a police interrogation.

Girls in particular would benefit from a more mature *Miranda* policy due to the excessive amount of trauma most have experienced prior to arrest and interrogation. As described previously, girls involved in the juvenile justice system experience adverse childhood experiences or ACEs at incredibly high rates. Research has shown that when a child faces repetitive trauma and toxic stress, their brain develops behaviors necessary for survival. Over time, these behaviors biologically alter the brain and the parts controlling fear and anxiety grow while the parts controlling logic and critical thinking shrink.[27] Trauma not only makes youth more susceptible to health problems such as asthma, but it impairs cognitive development and the capacity to fully understand one's *Miranda* rights. Additionally, the coercive and aggressive nature of police interrogations can be triggering for girls who have experienced significant trauma or suffer from Post-Traumatic Stress Disorder (PTSD).

While there are limited studies on how girls are impacted by police interrogations and the likelihood of waiving *Miranda*, most of the research found no differences between males and females' understanding and/or appreciation of their *Miranda* rights.[28] However, justice personnel

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[23] *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).
[24] Katrina Jackson & Alexis Mayer, *Demanding a More Mature Miranda for Kids*, D.C. Justice Lab & Georgetown Juvenile Justice Initiative (2020), p.1.
[25] *Id*.
[26] *Id*. at 2.
[27] Nadine Burke Harris, *The Deepest Well: Healing the Long-term Effects of Childhood Adversity,* (Houghton Mifflin Harcourt Publishing Company, 2018); Deborah Lee Oh, et. al., *Systematic review of pediatric health outcomes associated with childhood adversity*, BMC Pediatrics (2018) 18:83.
[28] Barry C. Feld, *Questioning Gender: Police Interrogation of Delinquent Girls*, 49 WAKE FOREST L. REV.

describe significant gender differences while in the interrogation room. In one Minnesota study, police often described girls as "more likely to talk, less likely to invoke their rights."[29] One officer even stated that, "I don't think I've ever had a female refuse to talk to me. They always want to say something, even if it's a denial."[30] Police officers often ascribe negative attributes to girls in the juvenile justice system and view them as emotional, confrontational, manipulative, and verbally aggressive.[31] Trafficking survivors also report that officers refer to them using offensive language and racial slurs. Given the hostility girls in the justice system face, it is not surprising that they often have a greater likelihood to talk due to the presence of an authority figure and the power dynamics at play. These coercive factors make them less likely to invoke their *Miranda* rights as they try to cooperate with police officers.[32]

We encourage the D.C. Council to go beyond the bare minimum requirements of *Miranda* and institute a policy for police interrogations that incorporates research on adolescent brain development and the impact of trauma on cognitive development. One way to achieve this is to change the law so that statements made by youth under 18 during custodial interrogation are inadmissible unless 1) the youth is read their *Miranda* rights by a law enforcement officer in a developmentally appropriate manner prior to interrogation; 2) the youth has the opportunity to consult with counsel before making a waiver; 3) and, in the presence of their attorney, the youth makes a knowing, intelligent, and voluntary waiver of their rights.[33] These recommendations are in line with the codified protections that other jurisdictions have provided for youth in custodial interrogations. For example, New Jersey requires the assistance of counsel before a child can waive any right, including a *Miranda* right, and California passed legislation requiring all minors to consult with an attorney before waiving any *Miranda* right.[34] Adopting a more mature *Miranda* doctrine in the District of Columbia will help preserve the rights of children, cut down on coerced confessions, and account for the unique vulnerabilities of Black youth, and girls in particular, when interacting with police.

At Rights4Girls, we believe it is imperative to address the specific needs of girls and survivors in the community who often come in contact with the MPD in order to best support them. As the Council makes difficult decisions about how to create meaningful police reform, we encourage you to center the voices of youth in the District who have called for additional training of law enforcement, Police Free Schools, and help understanding and affirming their *Miranda* rights during police interrogations. We thank the Committee on the Judiciary and Public Safety for its commitment to supporting our city's most vulnerable youth and we look forward to continuing to work with the Committee to serve D.C.'s girls and survivors. Should members of the Committee have any questions regarding this testimony, please contact Yasmin Vafa, Executive Director, Rights4Girls at yasmin@rights4girls.org.

105(2014), p. 1087.
[29] *Id*. at 1100.
[30] *Id*. at 1095.
[31] *Id*. at 1104.
[32] *Id*. at 1100.
[33] Jackson, *supra* note 24, at 1.
[34] *Id*. at 4.

Written Testimony of Harlan Yu
Executive Director, Upturn

Council of the District of Columbia
Committee on the Judiciary & Public Safety

Public Hearing on
B23-0723, The Rioting Modernization Amendment Act of 2020
B23-0881, The Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020
B23-0882, The Comprehensive Policing and Justice Reform Amendment Act of 2020

October 23, 2020

Dear Chairman Allen and Members of the Committee on the Judiciary & Public Safety,

Thank you for the opportunity to offer written testimony on these important bills.

My name is Harlan Yu, and I'm the Executive Director of Upturn, a civil rights and technology research and advocacy nonprofit based here in DC. I'm a Ward 4 resident and I'm concerned about our city's approach to public safety, and the safety and wellbeing of my family and all of our neighbors in the District. I'm particularly concerned about the rampant use of surveillance technologies by the Metropolitan Police Department (MPD) and other District agencies.

As behalf of Upturn, I'm urging the Committee to amend Subtitle F of the Comprehensive Policing and Justice Reform Amendment Act of 2020 to *at least* ban police consent searches of mobile phones, if not all consent searches outright. Police consent searches in any context are troubling, but given how much information is stored on people's phones today and the invasive extraction and search capabilities of mobile device forensic tools (MDFTs), we believe the Council should, at minimum, move to ban consent searches of cellphones in DC.

Earlier this week, Upturn released a major report (*attached*) on law enforcement's use of mobile device forensic tools[1] — the tools that MPD uses to search people's cellphones, typically upon arrest. These tools give law enforcement access to all of someone's

[1] Upturn, *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones* (October 2020), https://www.upturn.org/reports/2020/mass-extraction.

contacts, texts, photos, and location history, which matters not only to the owner of the phone, but to all of their friends and family, who are at risk of increased police contact. Our research shows that both MPD and the Department of Forensic Sciences use these tools.

We also know that, across the country, these tools have often been used to investigate minor cases that have no clear connection to a person's cellphone, including cases involving graffiti, shoplifting, prostitution, vandalism, petty theft, and the full gamut of minor drug-related offenses. Together with racist policing practices, it's more than likely that these technologies disparately affect and are used against our communities of color. Given the amount of sensitive information stored on smartphones today, we believe that these tools represent a dangerous expansion of police power with little public oversight.

Critically, our research has found that many police departments often rely on people's consent as the legal basis to search cellphones — instead of a warrant. In these cases, that means no judicial oversight or legal limitations on the scope of the search, or how the data is later used. Police consent searches in any context are troubling, but the power and information asymmetries of cellphone consent searches are egregious and unfixable. There are at least three reasons why.

The first reason is that the doctrine underlying "consent searches" is essentially a legal fiction.[2] Courts pretend that "consent searches" are voluntary, when they are effectively coerced. While the Supreme Court has held that the legality of a consent search depends on whether a "reasonable person would understand that he or she is free to refuse,"[3] the so-called "reasonable person" standard fails to account for the important racial differences in how individuals interact with law enforcement.[4] As one scholar noted, "many African Americans, and undoubtedly other people of color, know that refusing to accede to the authority of the police, and even seemingly polite requests—can have deadly consequences."[5] While the Supreme Court has held that consent cannot be "coerced, by

[2] Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind. L. J. 773, 775 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.")

[3] United States v. Drayton, 536 U.S. 194, 197 (2002).

[4] Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val. U. L. Rev.. 243, 248 (1991). ("Instead of acknowledging the reality that exists on the street, the Court hides behind a legal fiction. The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion . . . ignores the real world that police officers and black men live in.")

[5] Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 242-243 (2001). ("Given this sad history, it can be presumed that at least for some persons of color, any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm.") Indeed, as another scholar argued, the "consent search doctrine is the handmaiden of racial profiling." *See* George C. Thomas III, T*errorism, Race and a New Approach to Consent Searches*, 73 Miss. L. J. 525, 542 (2003).

explicit or implicit means,"[6] the notion that someone can actually feel free to walk away from an interaction with police has an "air of unreality" about it.[7] Given the extreme power asymmetries, it's a "simple truism that many people, if not most, will always feel coerced by police 'requests' to search."[8]

A recent study designed "specifically to examine the psychology of consent searches" highlights the problems in relying on a so-called "reasonable person" to adjudicate consent searches.[9] Participants were brought into a lab and presented with "a highly invasive request: to allow an experimenter unsupervised access to their unlocked smartphone."[10] More than 97% of participants handed over their phone to be searched when requested to, even though only 14.1% of a separate group of observers said that a reasonable person would hand over their phone. The study reveals that there is a "systematic bias whereby *neutral third parties view consent as more voluntary, and refusal easier, than actors experience it to be.*"[11] While there are plausible arguments that the lab-setting studies overestimate compliance rates in police searches, there are stronger arguments that they actually underestimate them.[12]

Second, someone consenting to a search of their phone likely doesn't even have a rough idea of what's really about to happen to their phone. The Fifth Circuit Court of Appeals recently held that a reasonable owner of a cellphone would functionally understand that a "complete" cellphone search "refers not just to a physical examination of the phone, but further contemplates an inspection of the phone's 'complete' content."[13] But, given the lack of public discussion of MDFTs, many people would likely be surprised by the power of the tools that law enforcement use to extract and analyze data from a phone.

Finally, law enforcement can do almost anything with data extracted from a cellphone after someone consents. In many jurisdictions across the country, there's no limit on when

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[6] Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).
[7] United States v. Drayton, 536 U.S. 194, 208 (2002) (Souter, J., dissenting).
[8] Marcy Strauss, *Reconstructing Consent*, 92 J.Crim. L. & Criminology 211, 221.(2001.)
[9] Roseanna Sommers, Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. (2019).
[10] *Id.,* 1980.
[11] *Id.,* 2019.
[12] *Id.,* 2007. ("First, police officers convey more authority than our experimenters likely did; our experimenters were college-aged peers dressed in street clothes, whereas police officers are government agents who wear badges and carry weap-ons. Second, in the policing context, citizens might feel that they are admitting guilt or acting suspiciously if they refuse a police officer's request. It is not clear that our participants would have felt it was self-incriminating to refuse the experimenter's request. Third, to the extent our participants were aware of the pol-icies regulating university research, they would have known that their participa-tion was completely voluntary and that they were free to quit at any time. Most people stopped by the police, by contrast, do not believe they can just walk away.")
[13] United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020), at 10.

law enforcement could re-examine a cellphone extraction.[14] Absent specific prohibitions, law enforcement could copy data from someone's phone — say, their contact list — and add that information into a far-reaching police surveillance database. For instance, it's easy to imagine law enforcement seeing data extracted from mobile phones as providing valuable "leads" for "gang databases," given the low bar for individuals and their information to be added to such databases.

Banning consent searches is not a new suggestion.[15] Nor is it a perfect solution, as it's easy for law enforcement to obtain a search warrant. But banning consent searches of cellphones can help limit police discretion, limit the coercive power of police, and minimize the amount of information that can be collected from people under investigation. **Accordingly, the Council should — at minimum — ban the use of consent searches of cellphones, if not all consent searches outright.**

[14] United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020).

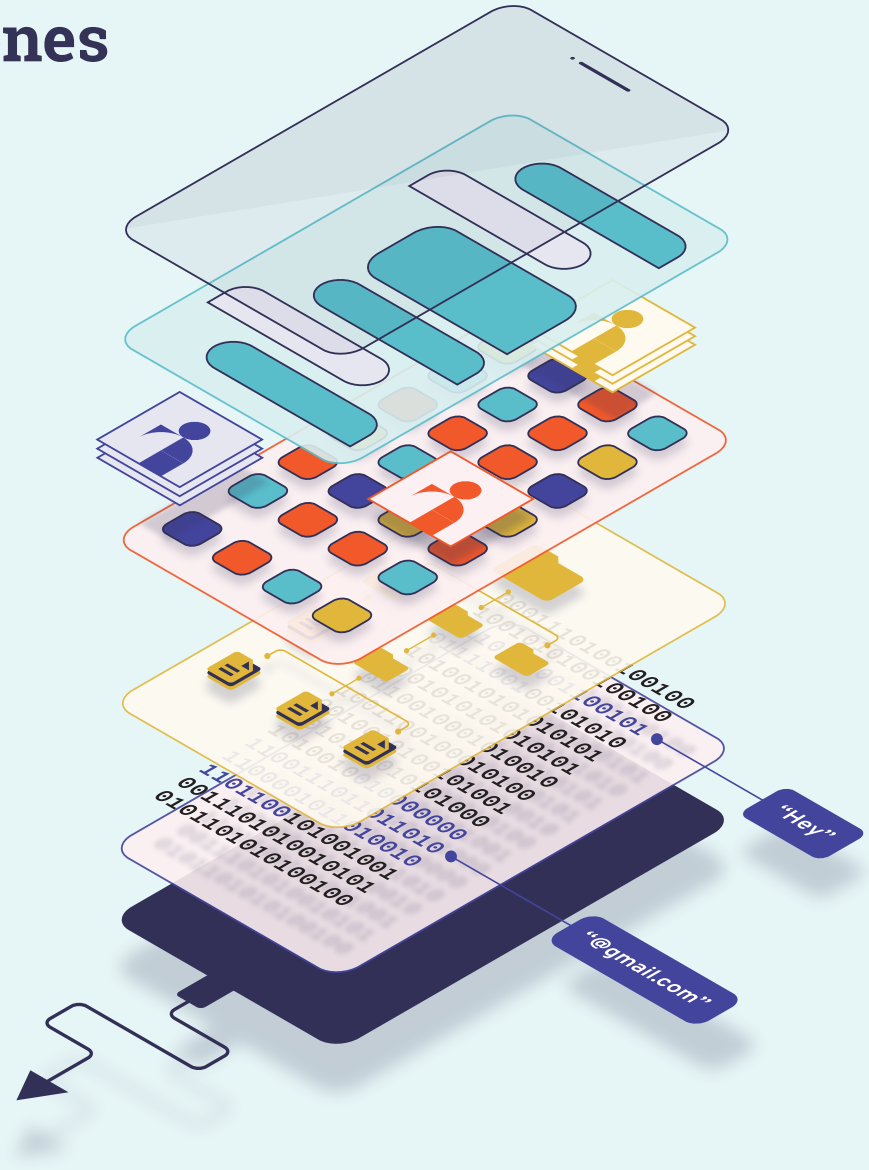
[15] For example, the New Jersey Supreme Court outlawed consent searches during traffic stops where no reasonable suspicion exists. The California Highway Patrol banned its use of consent searches as part of a broader class action lawsuit brought because of racial profiling. And in Rhode Island, by law, "[n]o operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."

Upturn
Toward Justice in Technology

October 2020

Mass Extraction:

The Widespread Power of U.S. Law Enforcement to Search Mobile Phones



Logan Koepke
Emma Weil
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Tinuola Dada
Harlan Yu

Mass Extraction:

The Widespread Power of U.S. Law Enforcement to Search Mobile Phones

October 2020

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About Upturn
Upturn is a 501(c)(3) nonprofit organization that advances equity and justice in the design, governance, and use of digital technology. For more information, see https://www.upturn.org.

Upturn
Toward Justice in Technology

Contents

Executive Summary

Every day, law enforcement agencies across the country search thousands of cellphones, typically incident to arrest. To search phones, law enforcement agencies use mobile device forensic tools (MDFTs), a powerful technology that allows police to extract a full copy of data from a cellphone — all emails, texts, photos, location, app data, and more — which can then be programmatically searched. As one expert puts it, with the amount of sensitive information stored on smartphones today, the tools provide a "window into the soul."

This report documents the widespread adoption of MDFTs by law enforcement in the United States. Based on 110 public records requests to state and local law enforcement agencies across the country, our research documents more than 2,000 agencies that have purchased these tools, in all 50 states and the District of Columbia. We found that state and local law enforcement agencies have performed hundreds of thousands of cellphone extractions since 2015, often without a warrant. To our knowledge, this is the first time that such records have been widely disclosed.

Every American is at risk of having their phone forensically searched by law enforcement.

Law enforcement use these tools to investigate not only cases involving major harm, but also for graffiti, shoplifting, marijuana possession, prostitution, vandalism, car crashes, parole violations, petty theft, public intoxication, and the full gamut of drug-related offenses. Given how routine these searches are today, together with racist policing policies and practices, it's more than likely that these technologies disparately affect and are used against communities of color.

The emergence of these tools represents a dangerous expansion in law enforcement's investigatory powers. In 2011, only 35% of Americans owned a smartphone. Today, it's at least 81% of Americans. Moreover, many Americans — especially people of color and people with lower incomes — rely solely on their cellphones to connect to the internet. For law enforcement, "[m]obile phones remain the most frequently used and most important digital source for investigation."

We believe that MDFTs are simply too powerful in the hands of law enforcement and should not be used. But recognizing that MDFTs are already in widespread use across the country, we offer a set of preliminary recommendations that we believe can, in the short-term, help reduce the use of MDFTs. These include:

- banning the use of consent searches of mobile devices,
- abolishing the plain view exception for digital searches,
- requiring easy-to-understand audit logs,
- enacting robust data deletion and sealing requirements, and
- requiring clear public logging of law enforcement use.

Of course, these recommendations are only the first steps in a broader effort to minimize the scope of policing, and to confront and reckon with the role of police in the United States. This report seeks to not only better inform the public regarding law enforcement access to mobile phone data, but also to recenter the conversation on how law enforcement's use of these tools entrenches police power and exacerbates racial inequities in policing.

1. Introduction

"We just want to check your phone to see if you were there."

You know you weren't at the 7-Eleven — you hadn't been there in two weeks. You don't want the cops to search your phone, but you feel immense pressure. "If you don't give us your consent, we'll just go to a judge to get a search warrant — do you really want to make us handle this the hard way?" You relent, knowing that they aren't going to find anything. You quickly sign a form, and the police officers take your phone.

What happens next, in a backroom of the police department, is secretive. Within a few hours, the police have traced almost everywhere you've been, looked at all of your text messages, videos, and photos, searched through your Google search history, and have built a highly detailed profile of who you are. This report seeks to illuminate what happens in those police backrooms.[1]

Every day, law enforcement agencies across the country search thousands of cellphones, typically incident to arrest. Often, these searches are done against people's wills or without meaningful consent. To search phones, law enforcement agencies use **mobile device forensic tools (MDFTs)**, a powerful technology that allows police to extract a full copy of data from a cellphone — all emails, texts, photos, locations, app data, and more — which can then be programmatically searched.[2] By physically connecting a cellphone to a forensic tool, law enforcement can extract,

1 As of the publication of this report, we are suing the NYPD for records concerning the department's use of mobile device forensic technology. Upturn is represented on a pro bono basis by Shearman & Sterling, LLP and the Surveillance Technology Oversight Project (S.T.O.P.). The NYPD argues that they "should not be required to actively harm its investigative capabilities in responding to [Upturn's] FOIL Request," that "seeking information that, if disclosed, would harm those vendors' continued business activity," and that "confirming that the potential scope of Upturn's demand would overwhelm NYPD's FOIL response capacity." *See* NYPD Memorandum of Law in Support of its Verified Answer and Objections in Points of Law, September 4, 2020, Index No. 162380/2019 Doc. 21.

2 We borrow the umbrella term "mobile device forensic tools," from the National Institute of Standards and Technology. Others have used different terms, such as "mobile phone extraction tools," "mobile device acquisition tools," "mobile phone hacking tools," and "mobile phone cracking tools." We use "mobile device forensic tools" as we believe it's the most accurate terminology. *See* NIST, *Mobile Security and Forensics*, available at https://csrc.nist.gov/Projects/Mobile-Security-and-Forensics/Mobile-Forensics. ("When mobile devices are involved in a crime or other incident, forensic specialists require tools that allow the proper retrieval and speedy examination of information present on the device. A number of existing commercial off-the-shelf (COTS) and open-source products provide forensics specialists with such capabilities.")

analyze, and present data that's stored on the phone.[3] As one expert puts it, with the amount of sensitive information stored on smartphones today, MDFTs provide a "window into the soul."[4]

Law enforcement agencies of all sizes across the United States have already purchased tens of millions of dollars worth of mobile device forensic tools. The mobile device forensic tools that law enforcement use have three key features. First, the tools empower law enforcement to access and extract vast amounts of information from cellphones. Second, the tools organize extracted data in an easily navigable and digestible format for law enforcement to more efficiently analyze and explore the data. Third, the tools help law enforcement circumvent most security features in order to copy data.

The proliferation and development of mobile device forensic tools in large part mirrors the adoption of smartphones across the United States. In 2011, only 35% of Americans owned a smartphone.[5] Today, it's at least 81% of Americans.[6] Moreover, many Americans — especially people of color and people with lower incomes — rely solely on their cellphones to connect to the internet.[7] For law enforcement, "[m]obile phones remain the most frequently used and most important digital source for investigation."[8] In many ways, mobile device forensic tools have helped to vastly expand police power in ways that are rarely apparent to communities.

In 2014, the Supreme Court decided *Riley v. California*, holding that the warrantless search of a cellphone incident to an arrest was unconstitutional.[9] As a result, today law enforcement need a warrant to search a cellphone.[10] Since this landmark decision, the public debate surrounding

3 There are a surprisingly large range of tools that can serve these purposes: some work to get easily accessible data on all popular phones, and some are tailored to specific systems or phones; some can be purchased and used as much as police want, and others cost per-use or can only be used so many times.

4 C.M. "Mike" Adams, "Digital Forensics: Window Into the Soul," Forensic, June 10, 2019, available at https://www.forensicmag.com/518341-Digital-Forensics-Window-Into-the-Soul/.

5 Pew Research Center, "Mobile Fact Sheet," June 12, 2019, available at https://www.pewresearch.org/internet/fact-sheet/mobile/.

6 *Id.* (Noting 96% own a cellphone of some kind.)

7 Camille Ryan, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, "Computer and Internet Use in the United States: 2016," American Community Survey Reports, August 2018; Jamie M. Lewis, *Handheld Device Ownership: Reducing the Digital Divide?*, March 2017, https://www.census.gov/library/working-papers/2017/demo/SEHSD-WP2017-04.html.

8 Cellebrite Annual Industry Trend Survey 2019: Law Enforcement, at 3.

9 Riley v. California, 573 U.S. 373 (2014). In this case, police searched two individuals' cellphones after they had been arrested: David Riley in August 2009 for driving with expired registration tags, and Brima Wurie in September 2007 for allegedly making a drug sale. In both cases, police officers at first manually examined the phones at the police station — scrolling through contact lists, and looking through videos and pictures. Police did not obtain a warrant to search either phone. *See* People v. Riley, D059840 (Cal. Ct. App. Feb. 8, 2013) https://casetext.com/case/people-v-riley-263; United States v. Wurie, 728 F.3d 1 (1st Cir. 2013) https://casetext.com/case/united-states-v-wurie-4.

10 Riley v. California, 573 US 373 (2014).

evidence on mobile phones has largely focused on the rare cases when law enforcement can't access the contents of a phone, due to encryption. For example, after the high-profile San Bernardino shooting in 2015[11] and, more recently, after a deadly shooting at Naval Air Station Pensacola.[12]

However, substantial public attention to these rare, high-profile cases in which law enforcement *cannot* access the contents of a phone overshadows a more significant change: the rise in law enforcement's ability to search the thousands of phones that they can access in a wide range of cases, and the power this gives to the police when it has routine and easy access to people's most sensitive data.

Throughout 2019 and 2020, Upturn filed more than 110 public records requests with state and local law enforcement agencies to determine which agencies have access to mobile device forensic tools, and how they use them. Some have suggested that technologies "to extract data from mobile phones . . . are things that few state and local police departments can afford,"[13] or that this technology is "cost prohibitive, however, for all but a handful of local law enforcement agencies."[14]

But our research tells a different story. Our records show that at least 2,000 agencies have purchased a range of products and services offered by mobile device forensic tool vendors. Law enforcement agencies in all 50 states and the District of Columbia have these tools. Each of the largest 50 police departments have purchased or have easy access to mobile device forensic tools. Dozens of district attorneys' and sheriff's offices have also purchased them. Many have done so through a variety of federal grant programs. Even if a department hasn't purchased the technology itself, most, if not all, have easy access thanks to partnerships, kiosk programs, and sharing agreements with larger law enforcement agencies, including the FBI.

11 The Department of Justice sought to compel (and a federal court ordered) Apple to provide technical assistance in unlocking an iPhone used by the gunman. *In The Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300*, Order Compelling Apple, Inc. to Assist Agents in Search, February 16, 2016, *available at* https://assets.documentcloud.org/documents/2714001/SB-Shooter-Order-Compelling-Apple-Asst-iPhone.pdf.

12 Attorney General William Barr publicly called on Apple to help unlock two phones used by the gunman. See Katie Benner, "Barr Asks Apple to Unlock Pensacola Killer's Phones, Setting Up Clash," The New York Times, Jan. 13, 2020, *available at* https://www.nytimes.com/2020/01/13/us/politics/pensacola-shooting-iphones.html. The Department of Justice also recently held a symposium regarding access to evidence on digital devices, entitled "Lawless Spaces: Warrant-Proof Encryption and Its Impact on Child Exploitation Cases." *See* https://www.justice.gov/olp/lawless-spaces-warrant-proof-encryption-and-its-impact-child-exploitation-cases.

13 William, Carter, Jennifer Daskal, *Low Hanging Fruit: Evidence-Based Solutions to the Digital Evidence Challenge*, Center for Strategic & International Studies, July 2018, 12.

14 New York County District Attorney Cyrus R. Vance, Jr., Written Testimony for the United States Senate Committee on the Judiciary on Smartphone Encryption and Public Safety, "Smartphone Encryption and Public Safety," Washington, D.C. December 10, 2019, https://www.judiciary.senate.gov/imo/media/doc/Vance%20Testimony.pdf.

Despite the widespread proliferation of these tools, there is almost no public accounting of how often or in what kinds of cases law enforcement use these tools. The under-the-radar adoption of these tools also means that there has been little public debate about the risks of these tools and how they shift power to the police.

The records we obtained through our public records requests demonstrate that law enforcement use mobile device forensic tools as an all-purpose investigative tool for a wide array of cases. Law enforcement use these tools to investigate not only cases involving major harm, but also for graffiti, shoplifting, marijuana possession, prostitution, vandalism, car crashes, parole violations, petty theft, public intoxication, and the full gamut of drug-related offenses. Few departments have detailed policies governing how and when officers can use this technology. Most either have boilerplate policies that accomplish little, or have no policies in place at all.

This report proceeds as follows. In Section 2, we describe the precise technical capabilities of mobile device forensic tools. With that technical background, in Section 3, we then trace the widespread proliferation of mobile device forensic tools throughout local law enforcement agencies nationwide. Next, in Section 4, we show how agencies routinely use these tools, even for the most mundane cases. In Section 5, we explain the unconstrained nature of these uses, especially as most agencies have no specific policies in place. Finally, we offer policy recommendations for state and local policymakers in Section 6.

This report seeks to not only better inform the public regarding law enforcement access to mobile phone data, but also to recenter the conversation on how law enforcement's use of these tools entrenches police power and exacerbates racial inequities in policing.

2. Technical Capabilities of Mobile Device Forensic Tools

We begin with a basic primer on how mobile device forensic tools (MDFTs) work and explain their capabilities with respect to **data extraction**, **data analysis**, and **security circumvention**.[15] Our technical analysis surfaces three key points:

- **MDFTs are designed to copy all of the data commonly found on a cellphone.** Mobile device forensic tools are designed to extract the maximum amount of information possible. This includes data like your contacts, photos, videos, saved passwords, GPS records, phone usage records, and even "deleted" data.
- **MDFTs make it easy for law enforcement to analyze and search data copied from phones.** A range of features help law enforcement quickly sift through gigabytes of data — a task that would otherwise require significantly more labor. This includes mapping where someone has been through GPS data, searching specific keywords, and searching images using image classification tools.
- **While security features like device encryption have received significant public attention, MDFTs can circumvent most security features in order to copy data.** Challenges to access can often be surmounted, because of the wide range of phones with security vulnerabilities or design flaws. Even in instances where full forensic access is difficult due to security features, mobile device forensic tools can often still extract meaningful data from phones.

MDFTs provide sweeping access to personal information on a phone, enabling "an extent of surveillance that in earlier times would have been prohibitively expensive."[16] In many circumstances, this access can be disproportionately invasive compared to the scope of evidence being sought and poses an alarming challenge to existing Fourth Amendment protections. **Our findings suggest that today's mobile device forensic tools can extract data from most phones and represent a dangerous expansion in law enforcement's investigatory powers.**

15 Little public research has explored the precise technical capabilities of mobile device forensic tools that allow law enforcement to search thousands of phones in a wide range of everyday cases. To the extent there has been a public debate on mobile device forensic tools, it has centered on the rare cases when law enforcement cannot access the contents of a phone, due to encryption.

16 United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007).

A Primer

Mobile device forensics is typically a two-step process: data extraction, then analysis. MDFTs help law enforcement accomplish both.[17] An MDFT is a computer program and its supplemental equipment (*e.g.*, cables, external storage) that can copy and analyze data from a cellphone or other mobile device.[18] The software can run on a regular desktop computer, or on a dedicated device like a tablet or a "kiosk" computer. These tools are sold by a range of companies, including Cellebrite, Grayshift, MSAB, Magnet Forensics, and AccessData.

The investigator initiates the extraction process by plugging the phone into the computer or tablet. With Cellebrite software (which is similar to other tools), once the tool recognizes the phone,[19] it will prompt the investigator to choose the kind of extraction to be performed, and, sometimes, the categories and time range of data to be extracted, as shown in Figures 2.1 and 2.2.[20] Often, in order to extract data, tools may bypass a phone's security features by taking advantage of security flaws or built-in diagnostic or development tools.

In essence, to extract data from a device, some methods work with the phone's built-in features, while others work around them. Circumventing the phone's built-in features usually entails more data access, but any extraction method can be invasive because of how much data people store on their phones.[21]

17 In order to assess the technical capabilities of current mobile device forensic tools, we reviewed technical manuals, examined software release notes, marketing materials, webinars, and digital forensics blog posts and forums. We also visited the office of one of the few public defenders in the US with these forensic tools (and forensic staff) in-house.

18 We borrow the umbrella term "mobile device forensic tools," from the National Institute of Standards and Technology. *See* NIST, *Mobile Security and Forensics*, *available at* https://csrc.nist.gov/Projects/Mobile-Security-and-Forensics/Mobile-Forensics. ("When mobile devices are involved in a crime or other incident, forensic specialists require tools that allow the proper retrieval and speedy examination of information present on the device. A number of existing commercial off-the-shelf (COTS) and open-source products provide forensics specialists with such capabilities.")

19 Typically, the tools either detect what kind of phone has been connected, or allow law enforcement to look up the kind of phone by its brand or model number. Some rarer phones running Android, Windows, and other operating systems may not be supported, but the vast majority of phones used in the US are.

20 Display of the categories and time range of data is highly fact-specific, dependent on phone make, model, operating system version, settings of the device, and extraction type. This feature is sometimes available, but not always.

21 We make these distinctions to give a sense of how the tools work and to explain how searches can technically be limited in scope based on the physical state of data when it is copied.

Figure 2.1

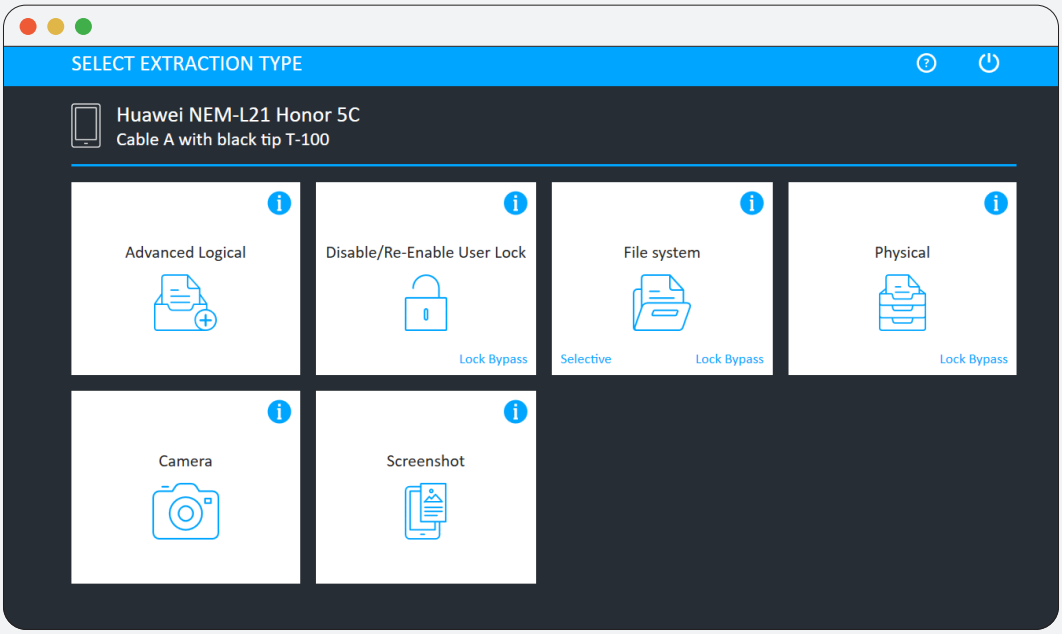


Figure 2.1 *shows one of the initial user interface screens of Cellebrite Universal Forensic Extraction Device (UFED). The "Select Extraction Type" screen offers various options for type of extraction and device unlocking.*[22]

After extraction, law enforcement use MDFTs to efficiently analyze the data — after all, the ability to copy gigabytes of phone data is not worth much if it can't be effectively searched. For example, law enforcement can sort data by the time and date of its creation, by location, by file or media type, or by source application. They can also search for key terms across the entire phone, just like you might use Google to search the web. This means police can take data extracted from different apps on the phone and view them together as a chronological series of events. It also means they can pull all pictures from the phone to view in one place, regardless of how they are organized on the phone.[23]

22 Paul Lorentz and Heather Mahalik, Cellebrite Blog, "Android Data Acquisition Simplified," July 20, 2020, *available at* https://www.cellebrite.com/en/blog/android-acquisition-simplified/.

23 When you take a photo with your phone's camera app, it's stored in a different folder than photos taken using other apps, like Instagram or Whatsapp. With just direct access to the phone's file system, someone may have to manually navigate in and out of levels of folders to find all of the images on a phone. But because images have predictable file extensions, MDFTs like Cellebrite's UFED can automate the process of looking for image files on the phone and aggregate them in one place.

Figure 2.2

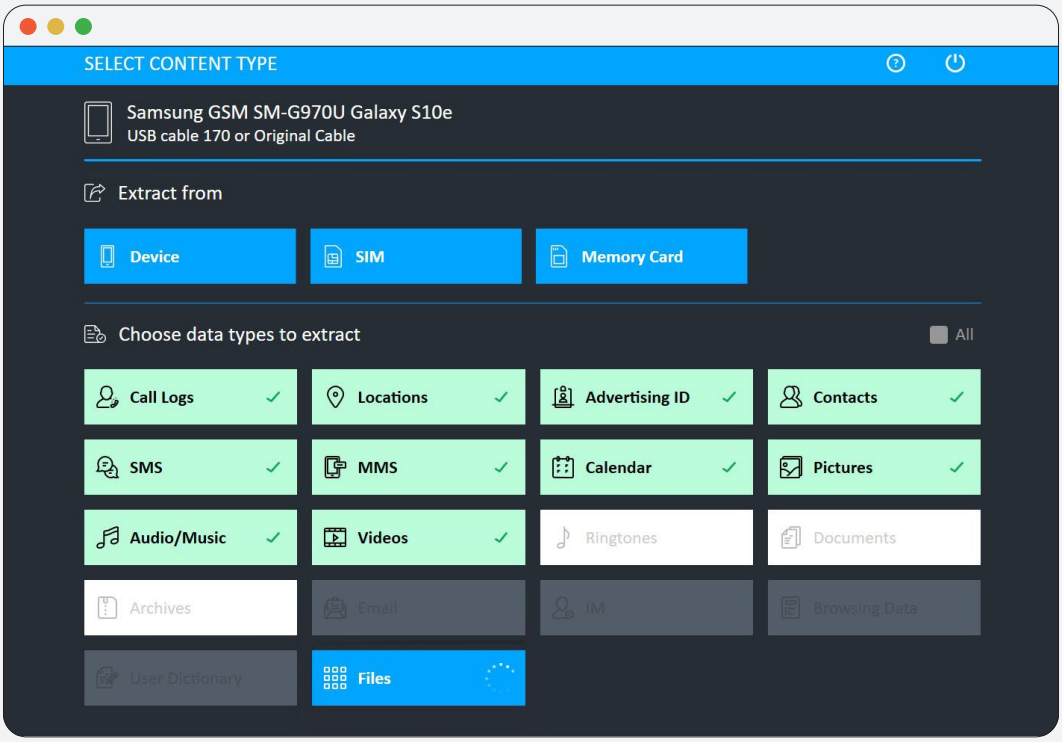


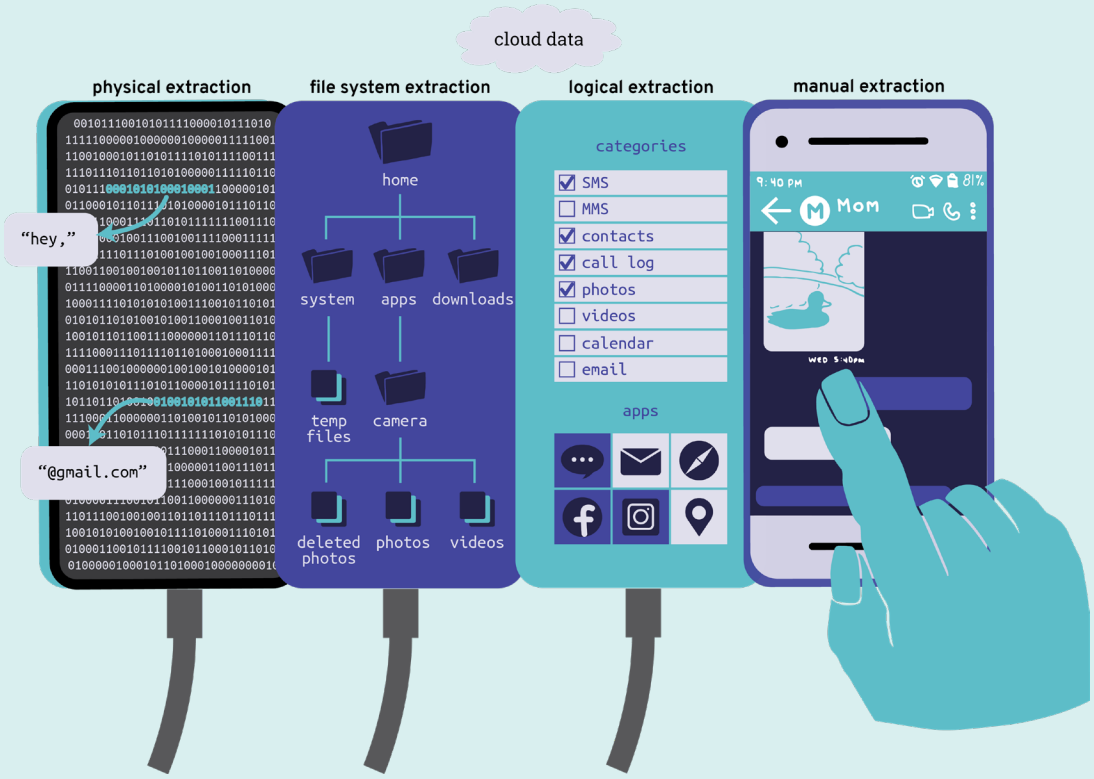
Figure 2.2 *shows the "Select Content Type" screen of the Cellebrite UFED user interface, where the user can select the categories of data they want to extract from the phone's internal storage, SIM card, and/or memory card. There is a convenient option to select "All" categories.*[24]

Device Extraction

Modern cellphones are a convenient combination of many tools: they're phones, cameras, notebooks, diaries, navigation devices, web browsers, and more. Smartphones centralize patterns of life on a single device with seemingly endless storage. MDFTs allow law enforcement to access all of this data and more, whether or not people knowingly store that information on their phones.

24 Paul Lorentz and Heather Mahalik, Cellebrite Blog, "Android Data Acquisition Simplified," July 20, 2020, *available at* https://www.cellebrite.com/en/blog/android-acquisition-simplified/.

EXTRACTION METHODS



There are a few distinct methods for copying data from phones.[25]

Manual Extraction

Manual extraction refers to when an investigator views a phone's contents like a normal user of the phone. Typically, investigators will take photographs or screenshots of the screen, email data to themselves from the phone, or videotape their exploration of a phone's contents, to prove that data was actually found on the phone. This process can compromise data integrity, as it may leave new artifacts of use on the phone.[26]

25 The mobile device forensics industry has its own labels for these methods, but often uses them imprecisely, or for marketing purposes.

26 This can create issues with forensic integrity, as a later forensic extraction would show records of these interactions. Forensic integrity refers to the assurance that police or other parties didn't interfere with or modify the data on the phone. For instance, a photo's metadata contains the last time it was accessed by the user, such that records of a police officer manually scrolling through and opening photos on a phone could show up when software is assembling a timeline of records from an extraction.

Logical Extraction

Logical extraction automates what can be done through manual extraction. In other words, it automatically extracts data that's presented on the phone to the user, using the device's application programming interface (API).[27] A logical extraction is like ordering food from a restaurant: what you can get is limited to menu items, and the waitstaff (the API) is in charge of their delivery and organization.[28]

File System Extraction

File system extraction is similar to logical extraction, but it copies even more data — such as files or other data (like internal databases) that a phone doesn't typically display to users. Continuing the restaurant analogy, this is akin to asking the chef for specific secret dishes outside of the menu, which is possible at some restaurants, but not others.

Physical Extraction

Physical extraction copies data as it's physically stored on the phone's hardware — in other words, copying data bit-by-bit, instead of as distinct files. This data has to be restructured into files for anyone to make sense of it. A physical extraction is like going to a restaurant and sneaking into the kitchen to take the food directly, as it exists in the kitchen — menu items that are waiting to be brought out, the ingredients used to prepare them, and even what's in the trash — without mediation from the waitstaff.

27 18F, "What are APIs? - Anecdotes and Metaphors," *available at* https://18f.github.io/API-All-the-X/pages/what_are_APIs-anecdotes_and_metaphors/. ("APIs are like the world's best retriever. You say, 'Fido - go fetch me X' and he brings you back X.")

28 A logical extraction tends to be the quickest method of extracting mobile phone data, because it does not copy every single piece of data on the phone, and can easily be limited in scope to certain apps or types of files (for example, only texts, calls, and contacts). Although logical extractions are usually faster, file system or physical extractions are often more desirable, because those methods can retrieve richer data, like app usage logs, and can often discover deleted data.

Smartphone photography is a prime illustration of how invasive MDFTs can be. No longer limited by physical prints, people casually accumulate thousands of photos on their phones. In 2017, an estimated 85% of all pictures taken were captured on smartphones, and the number of pictures taken each year worldwide has doubled from 660 billion in 2013 to 1.2 trillion in 2017.[29] MDFTs also extract the embedded metadata from each image file, such as the GPS coordinates of where a photo was taken, and the time and date it was taken.[30] Not only do people carry with them orders of magnitude more photos than they would without a smartphone, but they may also unwittingly carry with them a geographic record of their movements.

MDFTs extract gigabytes of data that are both casually accumulated and unexpectedly revealing. Their core utility is to extract call logs, contacts, text conversations, and photos. However, there is much more stored on phones than these obvious categories. Data from online accounts, third-party apps, "deleted" data, and even people's precise interactions with the device itself all leave behind artifacts, which MDFTs can find. Through this "gold mine of information,"[31] "the sum of an individual's private life can be reconstructed."[32]

Application Data

Virtually every app on a smartphone stores user information, from mobile web browsing history to health tracker data, mobile wallet payments, dating app conversations, and more. MDFTs can copy data for the most popular apps, and are constantly updated to support a wide range of apps. For example, Cellebrite's tools can extract and interpret data from at least 181 apps on Android's operating system, and at least 148 apps on Apple iPhones. These apps span from Google apps like Google Maps, Gmail, and Google Photos, to dating apps like Tinder, Grindr, and OkCupid, to Nike+ Run Club, to social media apps like Facebook, Instagram, Twitter, and Snapchat,

29 Felix Richter, "Smartphones Cause Photography Boom," August 31, 2017, Statista, https://www.statista.com/chart/10913/number-of-photos-taken-worldwide/.

30 Exchangeable Image File Format (EXIF) data is embedded into files, documenting, among other things, the date and time the picture was taken, camera settings like shutter speed, type of camera used, and the GPS coordinates of where a picture was taken. See "Pic2Map Photo Location Viewer" *available at* https://www.pic2map.com/. *See also* "Exif Tool" available at https://exiftool.org/.

31 Thomas Germain, "How a Photo's Hidden 'Exif' Data Exposes Your Personal Information," Dec. 6, 2019, Consumer Reports, *available at* https://www.consumerreports.org/privacy/what-can-you-tell-from-photo-exif-data/.

32 Riley v. California, 573 U.S. 373, 394 (2014).

web browsers like Chrome and Firefox, and even encrypted messenger apps like Signal and Telegram.[33] Because user-installed apps from third parties usually store data in predictable ways, it can be very easy for MDFTs to copy and parse data from them.[34]

Account-Based Cloud Data

Not all of the app data on phones are stored on the phone itself. Many apps are account-based, meaning the data in the account is synced to the cloud so that it can be accessed remotely. This means that data created elsewhere on the account may end up existing on the phone, data from the phone may be backed up remotely, and remote data may be viewable from the phone. MDFTs account for each of these possibilities, and many vendors even offer specific features or products to extract cloud backups and other remote account information. For example, Cellebrite offers a UFED Cloud product specifically for these purposes.[35]

One way that MDFTs access account-based information is by copying the account credentials that the phone stores in order to remain logged in, essentially pretending to be the user's phone. This gives investigators access to any cloud data that the user has access to from their phone, like social media data, emails, or backups of photos and other data. For the most part, this data is not encrypted. For example, an MDFT may be able to pull a remote backup of the phone from Apple's iCloud service by copying information it finds in the phone's password management system.[36] And because many services allow users to download all of their data (*e.g.*, Google's Takeout), MDFTs can access even more sources of data, some of which are shown in Figure 2.3. Figures 2.4 to 2.6 show the process of retrieving account-based cloud data in Magnet's AXIOM software.

33 Cellebrite, "Cellebrite Physical Analyzer, Cellebrite Logical Analyzer, UFED Cloud and Cellebrite Reader v7.35," Release Notes, June 2020, *available at* https://cf-media.cellebrite.com/wp-content/uploads/2020/06/ReleaseNotes_UFEDPA_735_web.pdf. Data from apps that aren't supported by an MDFT vendor may nevertheless still be extracted, but likely will not be parsed out. As a result, it would still be possible to examine this data, but it would take more time and skill.

34 Through all of these applications, mobile device forensic tools can access fairly precise location information, in-app communications, and in-app photos. Searches on the web from a browser app are also easily accessible — revealing personal interests, hobbies, fears and worries, and even medical conditions. See, e.g., Proper searching in Physical Analyzer can help you identify location data of interest," Cellebrite, *available at* https://www.youtube.com/watch?v=0byyzAO4akE; Jason Bays, Umit Karabiyik, "Forensic Analysis of Third Party Location Applications in Android and iOS," *available at* https://arxiv.org/pdf/1907.00074.pdf; Barak Goldberg, "How Health App Data Improves Location Accuracy and Activity Identification for Investigations," October 24, 2019, *available at* https://www.cellebrite.com/en/blog/how-health-app-data-improves-location-accuracy-and-activity-identification-for-investigations/; Heather Mahalik, "How to View Chat Conversations in Cellebrite Physical Analyzer," June 1, 2020, *available at* https://www.cellebrite.com/en/ask-the-expert/how-to-view-chat-conversations-in-cellebrite-physical-analyzer/; Ryan Philips, "Infant death case heading back to grand jury," May 8, 2019, Starkville Daily News, *available at* https://www.starkvilledailynews.com/infant-death-case-heading-back-to-grand-jury/article_cf99bcb0-71cc-11e9-963a-eb5dc5052c92.html. (Internet search histories, from law enforcement's point of view, give investigators a supposed map to your intent, mental state, or motives. In this case, Latice Fisher's internet search results gave law enforcement a "motive" — if she wanted to be pregnant, why was she looking up medication abortion?).

35 Cellebrite UFED Cloud, https://www.cellebrite.com/en/ufed-cloud.

36 This can also be accomplished via a warrant to the holding company itself, *e.g.*, Apple. This method is legally dubious and would require a second warrant in most instances, but MDFTs are also built for internal corporate investigations where employers have more control over their employee's accounts.

Figure 2.3

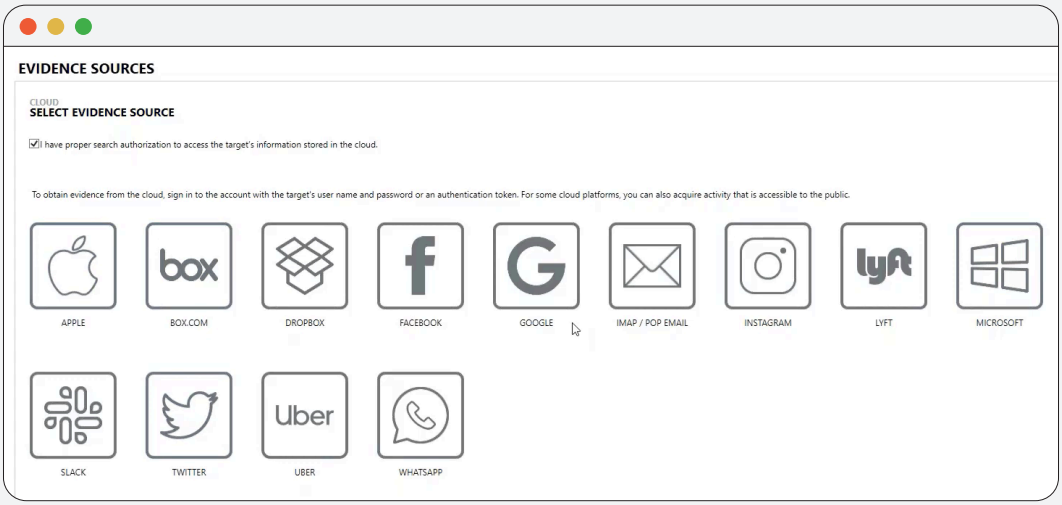


Figure 2.3 *shows the user interface of Magnet AXIOM, displaying options to extract remote data from various internet-based accounts.*[37]

Figure 2.4

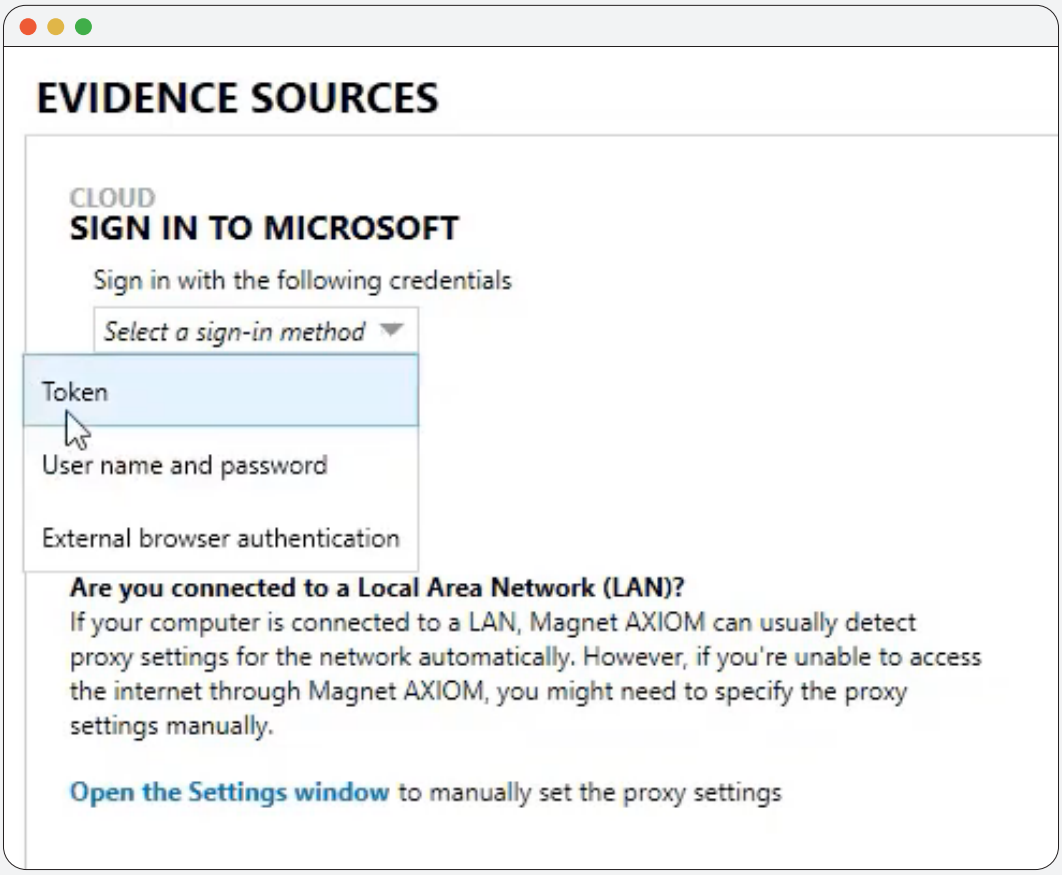


Figure 2.4 *shows how Magnet AXIOM allows investigators to use extracted authentication tokens to sign into the device owner's Microsoft account*[38]

37 Magnet Forensics, "Cloud Forensics For Law Enforcement: A Search Warrant is Great But Not Always Needed For Cloud Data," May 19, 2020, *available at* https://www.youtube.com/watch?v=q8pqZ8N4zd8.

38 Magnet Forensics, "Cloud Forensics For Law Enforcement: A Search Warrant is Great But Not Always Needed For Cloud Data," May 19, 2020, *available at* https://www.youtube.com/watch?v=q8pqZ8N4zd8.

Figure 2.5

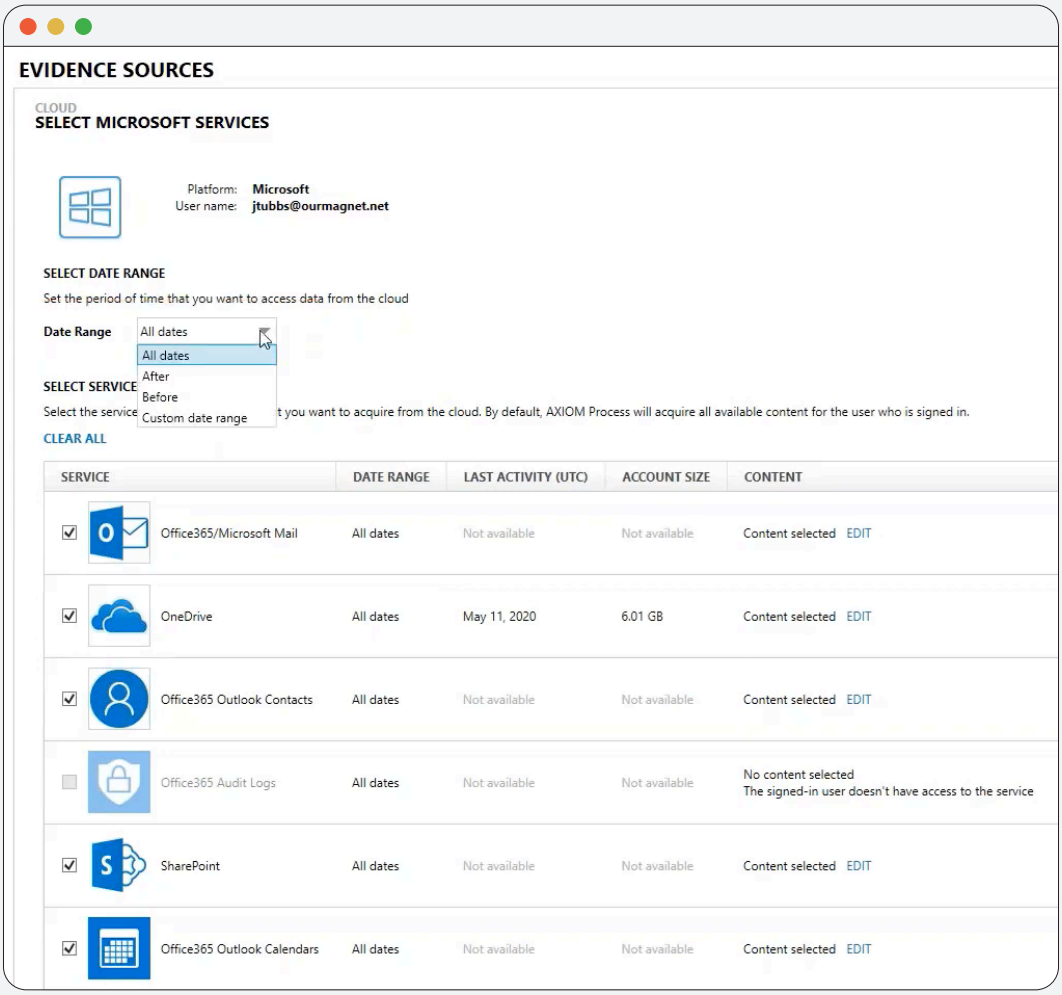


Figure 2.5 *shows the Microsoft services that Magnet AXIOM can extract remotely, like Microsoft OneDrive or Office365.*[39]

39 Magnet Forensics, "Cloud Forensics For Law Enforcement: A Search Warrant is Great But Not Always Needed For Cloud Data," May 19, 2020, *available at* https://www.youtube.com/watch?v=q8pqZ8N4zd8.

Figure 2.6

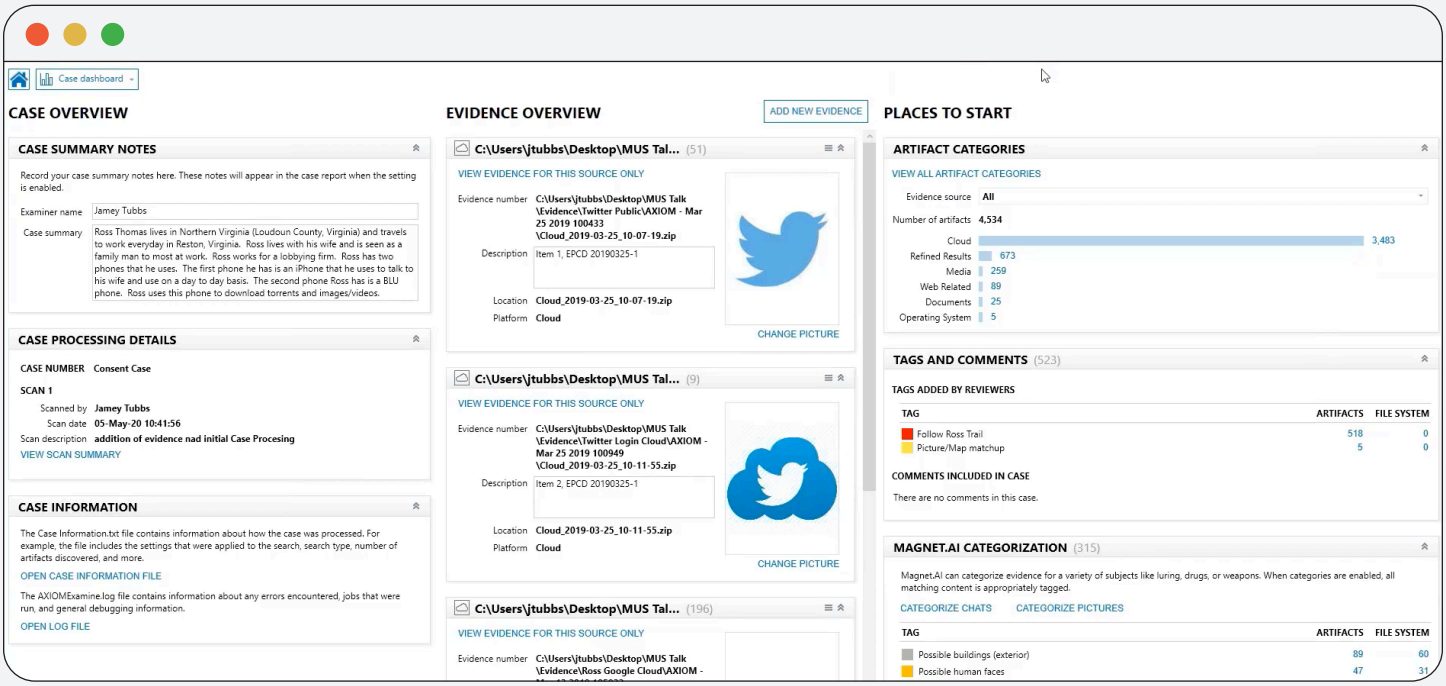


Figure 2.6 *shows the dashboard interface of Magnet AXIOM, showing access to Google and Twitter account data, along with other available data called "artifacts." There are also options to search by image content ("Magnet.AI Categorization") as well as "Keyword Matches" and "Passwords and Tokens."*[40]

One major source of information is Google's Location History. Any user with their location history turned on in their Google account will have records of their location stored online in their Google account. These location records are precise and can span years, and many users do not realize this data is being stored. In fact, Google stores this information even when the user is not doing anything that uses the phone's location. If law enforcement has physical access to a phone, they can use an MDFT to log into the user's Google account and extract this location history, which can be displayed as a timeline or map, shown in Figure 2.7.

40 Magnet Forensics, "Cloud Forensics For Law Enforcement: A Search Warrant is Great But Not Always Needed For Cloud Data," May 19, 2020, *available at* https://www.youtube.com/watch?v=q8pqZ8N4zd8.

41 Marc Knoll, trendblog.net, "Can't remember last night? Google's Location History can tell where you were," November 28, 2016, *available at* https://trendblog.net/cant-remember-last-night-google-location-history-can-help-you/.

Figure 2.7

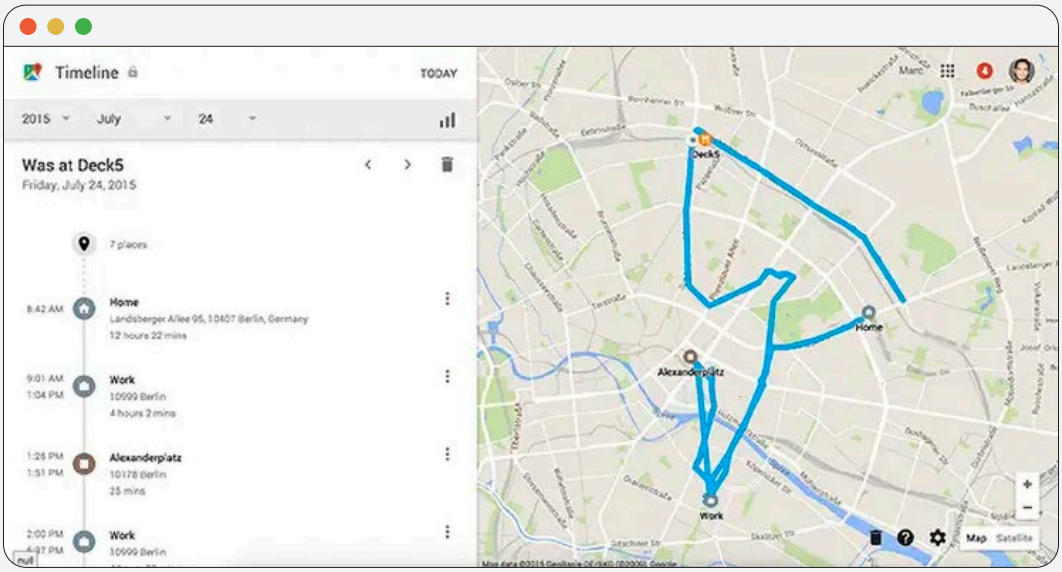


Figure 2.7 *shows a user's Google location history as a timeline and also on a map. The timeline can show how long a user stayed at a particular location.*[41]

"Deleted" Data

Mobile device forensic tools can sometimes access "deleted" data from phones.[42] Often, deleting a file on a phone isn't permanent, and the file can be recovered — similar to how most computers have a "recycling bin" for getting rid of files. Deleting a file from the phone itself often doesn't delete it from a user's cloud backup, or the variety of other places it may have been redundantly stored at some point. Even "permanently deleted" files can sometimes be recovered with the

42 There is a difference between deleting a file from the phone's operating system and physically clearing the bits from the device's hardware. Traditionally, when an electronic device permanently deletes a file, this means that the operating system declares the space where the file was stored as "free" to be overwritten, and removes the file from the file system. However, newer storage hardware must clear an entire block of space before writing to any part of that block, and many devices routinely clear space immediately after a file is deleted from the device interface in order to quicken this process. Another factor is that encryption can prevent permanently deleted files from being recovered. That means, for some newer models of phones, "deleted data" is more likely to actually be cleared.

For example, since iPhones encrypt each file on the phone individually with its own key, files deleted from the device are essentially impossible to recover because they are encrypted and the key is deleted. So even if the data itself remains, it's completely unintelligible. On the other hand, non-permanent deletion is very common in digital devices because users often accidentally delete files and want to retrieve them. An example is when you drag a file over to your computer's recycling bin — the space where it is physically stored is not actually marked as "free" to be overwritten, and the file sticks around until it's either permanently deleted or restored. Also, cloud-based storage may keep track of deleted files, such that they are permanently deleted from the device but remain tracked elsewhere. iCloud keeps track of deleted files for 30 days and can recover them at the request of the user, unless they are also permanently deleted from iCloud. This means that if a user syncs files on their phone to their iCloud account, and then deletes the files from their phone, the files can likely be recovered by looking for them in iCloud as opposed to on the device's storage.

right tools, because data isn't always physically wiped from storage when it's deleted — it's just marked as "free space" until it's overwritten by other data. However, access to deleted data depends on a range of factors, including phone hardware,[43] encryption design,[44] and extraction method.[45]

Other Data on a Phone

Phones also record vast amounts of data about how people interact with their devices — data that's considered a "digital forensics goldmine."[46] For example, MDFTs can recover logs showing when applications were installed, used, and deleted, as well as how often someone used an application. Other data includes when a device was locked or unlocked, when a message was viewed, when a Bluetooth device was connected, words added to a user's dictionary, notification contents, as well as past "spotlight searches" on iPhones, a search function that combines on-device and web results. Phones can even store screenshots of apps as they're brought out of focus so users can see all of the apps they have open.[47] These "behind the scenes" data are stored to improve the phone's performance, but they leave incredibly detailed artifacts that MDFTs can later analyze.[48]

43 For example, some storage devices must physically clear entire blocks of data before they can write to any part of it, meaning data is more likely to be wiped within a short period of time. *See* "What is trim and active garbage collection?," Crucial Blog, *available at* https://www.crucial.com/articles/about-ssd/what-is-trim. ("Flash memory, which is what SSDs are made of, cannot overwrite existing data the way a hard disk drive can. Instead, solid state drives need to erase the now invalid data. The problem is that a larger unit of the memory, a block, must be erased before a smaller unit, a page, can be written.")

44 Similarly, in cases where the phone encrypts each file individually (like on iOS), deleting a file that's not backed up in the cloud also gets rid of the corresponding key. So although deleted data might stick around on the hardware, it is likely encrypted and without any key to decrypt it — therefore useless. *See* Oleg Alfonin, "The iPhone Data Recovery Myth: What You Can and Cannot Recover," July 10, 2020, Elcomsoft Blog, *available at* https://blog.elcomsoft.com/2020/07/the-iphone-data-recovery-myth-what-you-can-and-cannot-recover/. ("In the iPhone, almost every user file is stored encrypted. The file system employs file-based encryption with separate, unique encryption keys for every file. Once a file is deleted, the encryption key is [also] destroyed, making it impossible to "undelete" or recover that file.")

45 To attempt to recover permanently deleted data directly from the device, law enforcement must perform a physical extraction, which copies the data bit-by-bit as it's stored on the phone.

46 Mati Goldberg, "How a Suspect's Pattern-of-life Analysis is Enhanced with KnowledgeC Data," Cellebrite, June 13, 2019, *available at* https://www.cellebrite.com/en/blog/how-a-suspects-pattern-of-life-analysis-is-enhanced-with-knowledgec-data/.

47 Cellebrite, "UFED, UFED Physical Analyzer, UFED Logical Analyzer, & Cellebrite Reader v7.28," Release Notes, January 2020, *available at* https://cf-media.cellebrite.com/wp-content/uploads/2020/01/ReleaseNotes_PA-7.28_A4.pdf. ("[W]hen a user swipes up on the screen while using an application in an iOS device, or presses the home button, or if they receive a call while using an application, the active application is sent to the background. A 'snapshot' of the current screen is taken in order to provide a smooth visual transition while changing screens. UFED Physical Analyzer can now recover all these snapshots under images data files. You can also filter by this file format."), at 4.

48 *Id*.

Figure 2.8

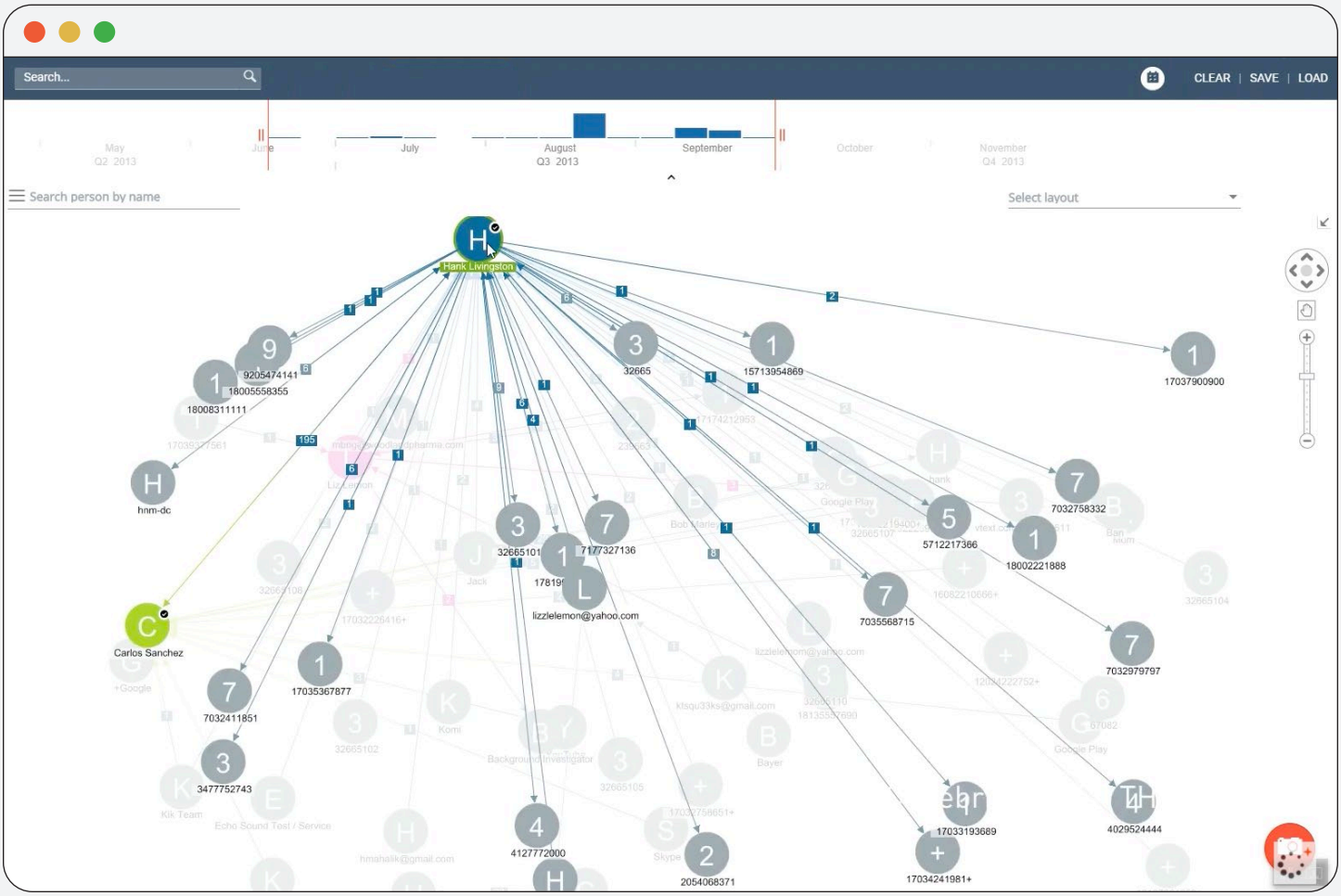


Figure 2.8 *shows a screenshot of Cellebrite Analytics, now called Cellebrite Pathfinder, which infers a social graph based on communication events. This graph shows the participants of communications extracted from the phone, as well as a histogram of communication volume over time.*[49]

Ultimately, MDFTs offer law enforcement a powerful window into almost all data stored on — or accessible from — a cellphone, as well as substantial amounts of data that users cannot see. These tools are invasive, especially for people who depend on their phone for internet access because they do not have a computer or broadband.

49 Heather Mahalik, Cellebrite Blog, "When Data Overwhelms You, Cellebrite Pathfinder Empowers You With Actionable Insights," March 19, 2020, *available at* https://www.cellebrite.com/en/ask-the-expert/when-data-overwhelms-you-analytics-empowers-you-with-actionable-insights/.

Device Analysis

Once data is extracted, MDFTs accelerate data analysis with powerful visualization tools. For example, law enforcement can view full text conversations as a chat instead of individual messages in a database; trace a user's actions on a map or chronological timeline using "patterns of life" metadata; sort data by file type regardless of its location on the phone (*e.g.*, all of the images on the phone, whether they came from the camera app or an email attachment); or create network graphs, like in Figure 2.8, to infer social relationships using contact data.

Search features also help law enforcement quickly navigate extracted data. These features include basic keyword searches, as well as more advanced techniques. Some mobile device forensic tools now use machine learning-based text and image classification to categorize file contents, including individual frames in a video.[50] For instance, as shown in Figure 2.9, Cellebrite offers a "search by face" function, whereby law enforcement can compare an image of a face to all other images of faces found on the phone. Cellebrite also allows law enforcement to define new image categories by feeding its software a small set of example images to search for (for example, searching for hotel rooms by giving the software a set of five images of hotel rooms that were taken from Google images). As another example, Magnet Forensics' AXIOM can employ text classification models in attempts to detect "sexual conversations,"[51] or to filter conversations by topics ranging from family, drugs, money, and police.[52] Tools also allow law enforcement to search for a specific address on a map and view all "location related" events surrounding a point of interest.

50 Christa Miller, "Industry Roundup: Image Recognition And Categorization," Forensic Focus, July 8, 2019, *available at* https://www.forensicfocus.com/articles/industry-roundup-image-recognition-and-categorization/. ("Thanks to developments in machine learning and artificial intelligence, a number of vendor products have been able to incorporate rapid recognition or categorization tools into their software.")

51 Magnet Forensics, "Taking Magnet.AI Up a Notch in AXIOM 2.0," April 25, 2018, *available at* https://www.magnetforensics.com/blog/taking-magnet-ai-up-a-notch-in-axiom-2-0/. ("With the launch of AXIOM 2.0, the Magnet.AI module now identifies images that may contain depictions of child sexual abuse, nudity, weapons, and drugs. We've also expanded our text classification model to detect potential sexual conversations in addition to child luring (both in the English language).")

52 Cellebrite, "Cellebrite Pathfinder 8.2: Cutting edge textual analysis takes the edge off searching through conversations," February 20, 2020, *available at* https://www.cellebrite.com/en/productupdates/analytics-desktop-8-2-cutting-edge-textual-analysis-takes-the-edge-off-searching-through-conversations/. ("Cellebrite Pathfinder v8.2 introduces cutting edge textual analysis. Building on Text Analytics and NLP (Natural Language Processing), Topic Identification allows investigators to focus on the interesting communications with utmost ease and speed.")

Figure 2.9

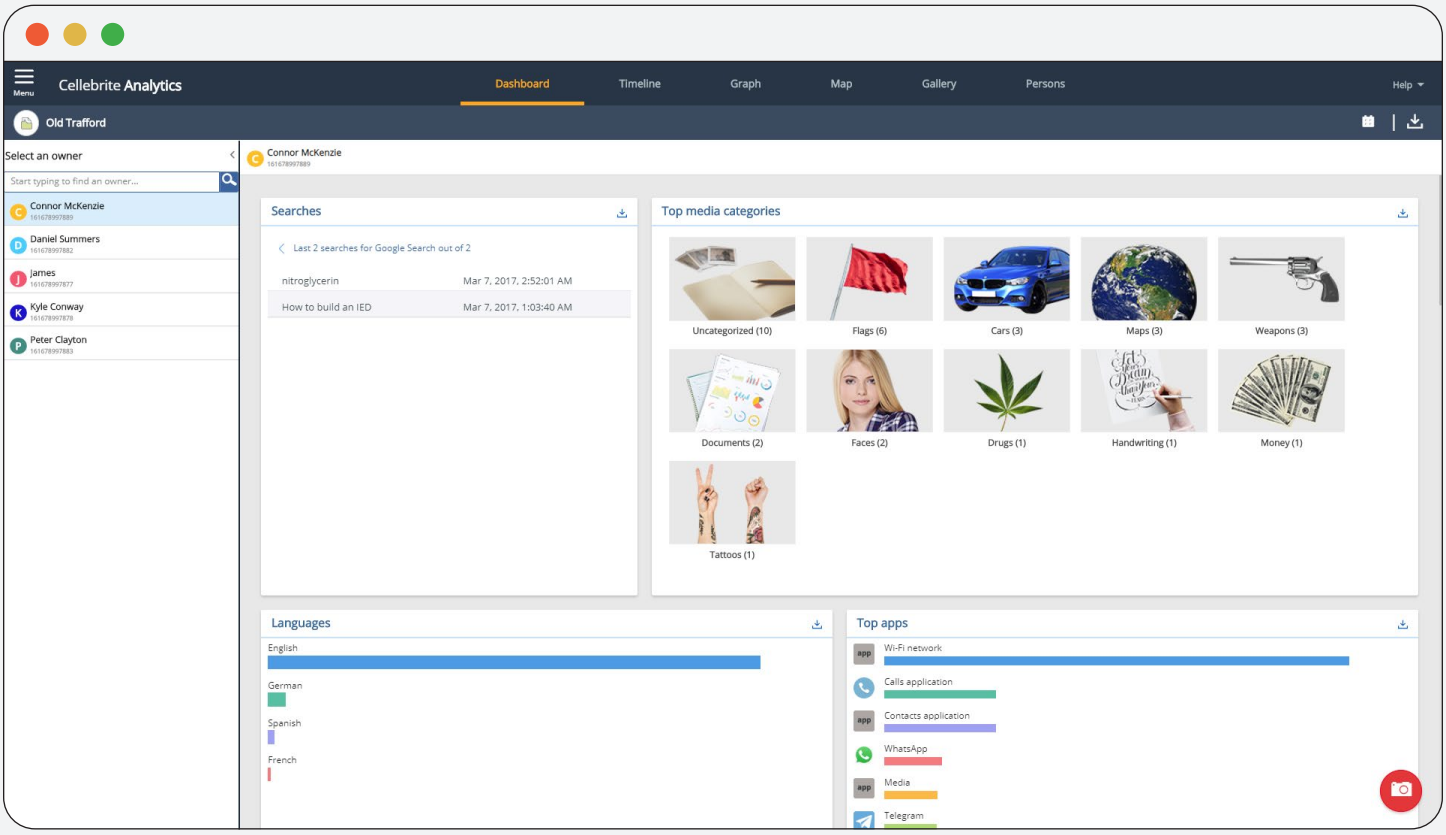


Figure 2.9 *sshows Cellebrite Pathfinder, which allows investigators to perform an image-based search using pre-generated filters, like "Flags," "Faces," "Drugs," "Weapons," or "Tattoos." The software also has features, shown at the top, such as "Timeline" (for viewing events on the phone chronologically), "Graph" (to make a social network graph of contacts and communications), "Map" (to display all phone events and media with location data on a map), "Gallery" (to view all media like photos and videos in one place regardless of source), and "Persons" (to view profiles of discrete users on the phone).*[53]

MDFTs can also apply these visualization features to data from multiple phones or other data sources together, to find links across the devices, like common contacts, call or text records, or account information. They can even look for common geolocation or purchase data between phones, to show that the phones were at some point near each other, say, to buy things at the same place and time. What might otherwise take weeks to do manually can be done automatically.

53 Cellebrite, "Cellebrite Pathfinder," *available at* https://www.cellebrite.com/en/pathfinder/.

Security Circumvention

Phone manufacturers like Apple, Samsung, Google, and others have built sophisticated security features designed to protect user information in case, for example, a phone is lost or stolen. Manufacturers design these features to balance[54] user convenience with security and privacy.[55] This balancing act can lead to design flaws, software bugs, or other vulnerabilities that law enforcement can then exploit.

MDFTs can often circumvent the security features built into phones in order to extract user data. In response, phone manufacturers continuously patch known security vulnerabilities and develop even more advanced security features, seeking to thwart unwelcome access, including by MDFTs. This "cat-and-mouse game" has evolved over years and continues to this day. MDFTs use numerous tactics to gain access to users' data on phones, such as guessing a password, exploiting a vulnerability or developer tool, or even installing spyware. With rare exception, MDFTs can nearly always access and extract some, if not all, data from phones.

MDFTs Can Extract Data From Nearly All Popular Phones

Many of the phones that law enforcement seize can be extracted with off-the-shelf tools. Departments often purchase tools from multiple vendors to increase the likelihood that any given phone can be extracted. Large MDFT vendors, like Cellebrite and Magnet Forensics, support extraction for thousands of phones. For example, in March 2016, Cellebrite supported logical extractions for 8,393 devices, and physical extractions for 4,254 devices. Since then, out of the five major phone manufacturers, Cellebrite added the most physical extraction support for Samsung (346 devices). Crucially, Cellebrite has also added lock-bypass support (*e.g.*, by exploiting a vulnerability to force the phone to skip the passcode-checking step when it turns on) for about 1,500 devices since March 2016. However, as of 2017, 28% of smartphone users did not even have screen lock enabled on their phones.[56]

54 IBM's study found that many people would still be willing to trade security for convenience if it would save them even a few seconds. Young adults are particularly likely to demand a more convenient experience, with nearly half of those under the age of 35 saying they would use a less secure method if it would save them between 1 and 10 seconds. See "Beyond Passwords," *The Atlantic*, *available at* https://www.theatlantic.com/sponsored/ibm-2018/beyond-passwords/1859/.

55 Manufacturers deploy these security features for a variety of reasons. For example, Apple has argued that "information needs to be protected from hackers and criminals who want to access it, steal it, and use it without our knowledge or permission," and also because it believes privacy is a fundamental human right. See Apple, "Introduction to Apple platform security" *available at* https://support.apple.com/guide/security/introduction-seccd5016d31/web.

56 Aaron Smith, "Americans, Passwords, and Mobile Security," January 26, 2017, Pew Research, https://www.pewresearch.org/internet/2017/01/26/2-password-management-and-mobile-security/.

MDFT vendors add support for new devices and software at a rapid pace, especially for popular devices. For example, about 45% of U.S. smartphone users have iPhones.[57] iOS 13 was released on September 19, 2019,[58] and Cellebrite announced support for Apple devices running iOS 13 less than three weeks later.[59]

Although iPhones encrypt data by default, there are many phones that still do not support encryption, or have easily surpassed encryption schemes, like lower-end Android phones.[60] Other common targets are phone chipsets or developer tools, which tend to be consistent across brands, meaning a single exploit or method can be successfully reused for a large number of devices. For example, independent researchers recently released the "checkm8" exploit, which takes advantage of a permanent[61] vulnerability in all but the newest iPhone chipsets, providing an opportunity for MDFTs to extract data without knowing the passcode.[62]

MDFTs Can Often Bypass Security Measures

Sometimes, MDFTs cannot immediately extract data from a phone due to encryption and other security features. In those cases, MDFTs often turn to another strategy: repeatedly trying random passwords until guessing the correct one, which then allows the MDFT to decrypt the phone's contents. MDFTs can also look for unencrypted data on a phone when its password is difficult to guess.

For many phones, the decryption key is generated from the password, so the strength of the protection that encryption provides is directly related to the length and complexity of the user's password. Shorter or common passcodes are easier to guess. In April 2018, Professor Matthew Green estimated that brute-forcing a passcode on an iPhone would take no more than 13 minutes

57 S. O'Dea, "Share of smartphone users that use an Apple iPhone in the United States from 2014 to 2021," February 27, 2020, Statista, https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/.

58 "iOS 13," 9TO5Mac, https://9to5mac.com/guides/ios-13/.

59 Cellebrite, "UFED Ultimate and UFED InField v7.24 Release Notes," October 2019, https://cf-media.cellebrite.com/wp-content/uploads/2019/10/ReleaseNotes_UFED_v7.24.pdf.

60 For example, some do not have hardware-enforced security features, making it easy for mobile device forensic tools to get past locks to copy data. Some Android phones have decryption keys that are simply generated from the phrase "default_password" instead of the user's password. Others have lock screens that are only visual, and don't prevent data transfer with MDFTs. Some even have leaked signed firmware that allows tools to use the manufacturer's proprietary decrypting data reading tools, with no password needed. See Oleg Alfonin, "Demystifying Android Physical Acquisition," May 29, 2018, Elcomsoft Blog, *available at* https://blog.elcomsoft.com/2018/05/demystifying-android-physical-acquisition/.

61 The bug is in read-only (as opposed to writeable) memory, such that there are physically enforced protections against patching it.

62 Dan Goodin, "Developer of Checkm8 explains why iDevice jailbreak exploit is a game changer," Ars Technica, September 28, 2019, *available at* https://arstechnica.com/information-technology/2019/09/developer-of-checkm8-explains-why-idevice-jailbreak-exploit-is-a-game-changer/.

for a 4-digit passcode, 22 hours for 6 digits, and 92 days for 8 digits. The default length prompted by iOS is 6 digits.[63] For an advanced off-the-shelf tool like GrayKey or Cellebrite Premium, this can mean guessing passcodes in under a day.

However, since the release of the iPhone XS, XR, and XS Max in 2018, which are no longer vulnerable to the major hardware flaw in previous iPhones, the rate of password guessing is much more limited, making them more difficult to access. Nonetheless, the September 2020 Cellebrite Advanced Services information sheet says that they can "determine locks and perform a full file system extraction of all iPhone devices from iPhone 4S to the latest iPhone 11 / 11 Pro / Max running the latest iOS versions up to the latest 13.4.1."[64]

Separately, without even needing to guess the password, MDFTs can take advantage of the fact that, in order to balance convenience and security, phones don't actually encrypt all data on a device.[65] Most people still want to receive calls and texts and hear alarms after their phone restarts but before they've unlocked it. Accordingly, certain data is unencrypted upon startup, including some account information that is needed to receive notifications. For example, Cellebrite's UFED Premium claims it can extract data even on locked iPhones.[66] The data that appears "before first unlock" (BFU) even includes parts of Apple's password manager.[67] Once the iPhone is unlocked after being powered on — "after first unlock" (AFU) — even more unencrypted data becomes available. Vendors like Oxygen Forensics and Grayshift advertise their ability to find and extract these unencrypted data. Figure 2.10 shows all the artifacts exacted from

63 Matthew Green (matthew_d_green), "Guide to iOS estimated passcode cracking times (assumes random decimal passcode + an exploit that breaks SEP throttling): 4 digits: ~13min worst (~6.5avg) 6 digits: ~22.2hrs worst (~11.1avg) 8 digits: ~92.5days worst (~46avg) 10 digits: ~9259days worst (~4629avg)," 10:17am, Apr 16, 2018, https://twitter.com/matthew_d_green/status/985885001542782978.

64 Cellebrite, "Cellebrite Advanced Services," September 2020, https://cf-media.cellebrite.com/wp-content/uploads/2020/09/SolutionOverview_CAS_2020.pdf.

65 The exception to this is Android's Secure Startup, which, when enabled by the user, prevents the phone from fully booting until the user password is entered and keeps all data encrypted. This means users can't receive notifications or alarms without entering their password, which most people would not casually opt into doing for its inconvenience. However, vendors like Cellebrite have advertised their ability to circumvent this for some phones with Secure Startup enabled. See Joanna Shemesh, "Cellebrite Advanced Services Solves the Toughest Encryption Problems for Apple and Android Devices," September 24, 2019, *available at* https://www.cellebrite.com/en/blog/cellebrite-advanced-services-solves-the-toughest-encryption-problems-for-apple-and-android-devices/. ("Take, for example, Secure Startup, which is an encryption mode. Two years ago, we were the first in the world to offer support for that feature. To this day, no other vendor has managed to support it.")

66 Cellebrite, "Premium access to all end-high iOS and Android Devices," May 2020, *available at* https://cf-media.cellebrite.com/wp-content/uploads/2020/05/ProductOverview_CellebritePremium_A4_web.pdf.

67 This data includes account information like usernames, which can provide leads to law enforcement for other sources of evidence.

a BFU extraction by Oxygen Forensic Detective.[68] There are thousands of files available, and as one software reviewer highlights: "Yes, all this data is from BFU extraction. Pay attention to the 'Image Categorization' – this [is] the new built-in feature . . . that allows [you] to detect, analyze, and categorize images from twelve different categories, such as weapon, drugs, child abuse, extremism and more."[69]

Figure 2.10

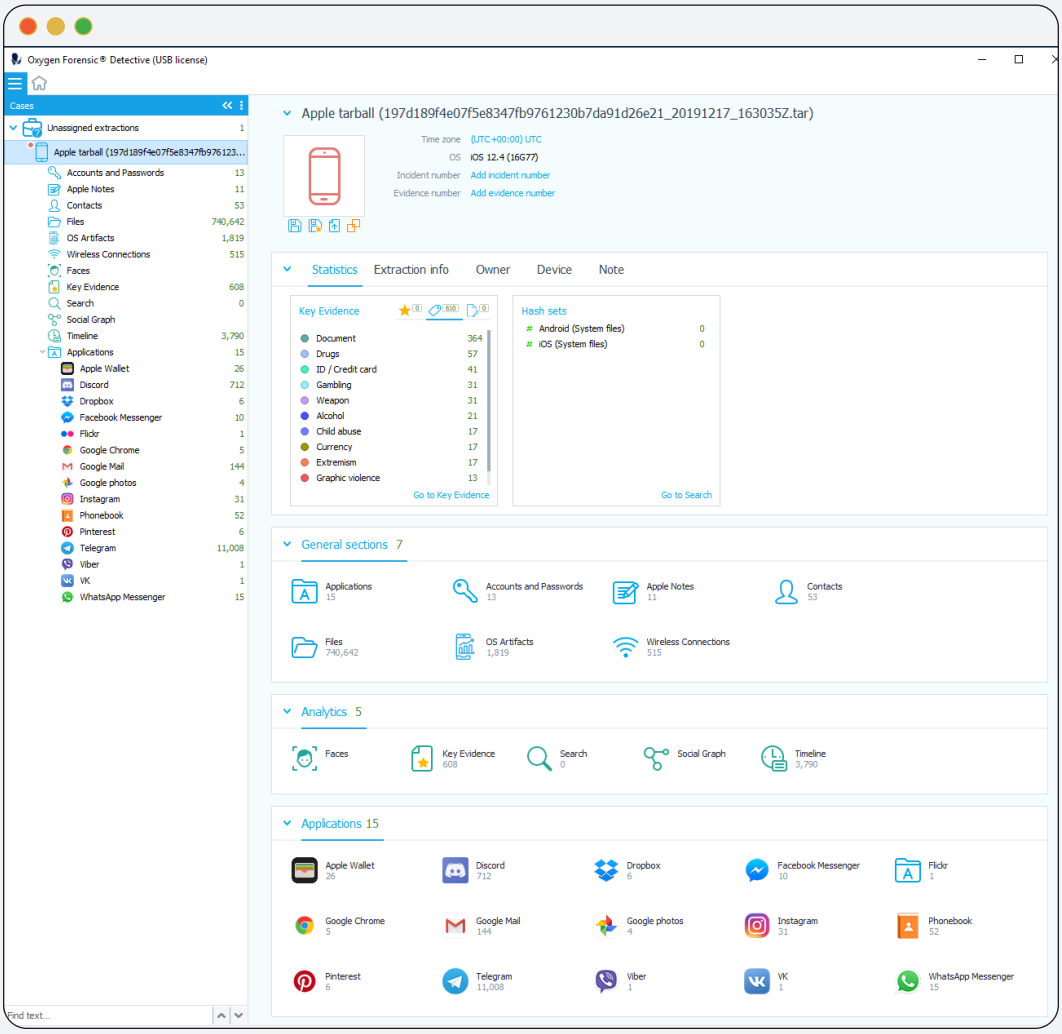


Figure 2.10 *shows the result of a "Before First Unlock" extraction by Oxygen Forensics Detective on an Apple iPhone running iOS 12.4. The software detects thousands of files, including 11,000 Telegram files, 712 Discord files, 11 Apple Notes files, 53 Contacts files, 144 files from Google Mail, 26 files from Apple Wallet, and 13 files marked as "Accounts and Passwords."*[70]

68 Vladimir Katalov, "BFU Extraction: Forensic Analysis of Locked and Disabled iPhones," December 20th, 2019, Elcomsoft Blog, https://blog.elcomsoft.com/2019/12/bfu-extraction-forensic-analysis-of-locked-and-disabled-iphones/.

69 *Id.*

70 Vladimir Katalov, Elcomsoft Blog, "BFU Extraction: Forensic Analysis of Locked and Disabled iPhones," December 20, 2019, *available at* https://blog.elcomsoft.com/2019/12/bfu-extraction-forensic-analysis-of-locked-and-disabled-iphones/.

When password guessing fails, and BFU or AFU extractions are not workable, MDFTs provide yet other tactics to gain access. For example, Grayshift offers a tool called HideUI, which is essentially spyware that law enforcement installs on a phone in order to record future password entries to eventually access the phone.[71]

Of course, there are even more basic approaches. Law enforcement often seek "consent" to search a person's phone, but that consent is often not as voluntary as one may assume. People being arrested likely do not understand how much information they are giving away when they consent to a search, even when they presume that information will be exculpatory — yet consent searches happen frequently. We highlight the problems with consent searches in Sections 4 and 6 below.

When All Else Fails, Vendors Offer "Advanced Services"

Although we've previously described how the majority of phones can be partially or completely searched, there are some phones that might take specialized effort. For example, one investigator describes being able to get extractions from 25 of 33 (76%) of phones in his cases using just Cellebrite UFED and GrayKey in his lab.[72] To cover the remaining portion of phones, Cellebrite offers "Advanced Services," which, according to their website, can unlock iOS devices including iPhone 11, 11 Pro/Max, and Android devices including newer Samsung phones.[73]

According to our public records research, the base cost of unlocking and extracting data from a phone using Advanced Services is $1,950, though they can be cheaper in bulk. In 2018, the Seattle PD purchased 20 "actions" for $33,000,[74] and email records show them using Cellebrite to unlock various iPhones within days or weeks.[75] For example, Seattle PD sent Cellebrite an

71 Olivia Solon, "iPhone spyware lets police log suspects' passcodes when cracking doesn't work," NBC News, May 18, 2020, *available at* https://www.nbcnews.com/tech/security/iphone-spyware-lets-cops-log-suspects-passcodes-when-cracking-doesn-n1209296.

72 "Possible Alternatives to Cellebrite," November 29, 2018, Reddit "/r/computerforensics," *available at* http://web.archive.org/web/20200625164840/https://www.reddit.com/r/computerforensics/comments/a1j43j/possible_alternatives_to_cellebrite/.

73 Cellebrite, "Cellebrite Advanced Services: Comprehensive Services to Access Inaccessible Data," May 2020, *available at* http://web.archive.org/web/20200626143910/https://cf-media.cellebrite.com/wp-content/uploads/2020/05/Cellebrite_Services_CAS_A4_2020_web.pdf

74 See Seattle Police Department Purchase & Supply Request, https://beta.documentcloud.org/documents/20394507-installment_101.

75 *See* Seattle Police Department, Cellebrite Advanced Services emails, https://beta.documentcloud.org/documents/20394508-installment_51.

iPhone X with an unknown 6-digit passcode in August 2018: Cellebrite received it on August 24, began processing on August 28, finished processing on September 12, and shipped it back the same day. Today, Cellebrite Premium allows law enforcement to bring these advanced unlocking capabilities in-house for $75,000 to $150,000, based on the frequency of use.[76]

3. Widespread Law Enforcement Adoption Across the United States

To date, most public reporting on law enforcement use of mobile device forensic tools has focused on law enforcement authorities with the most resources, like the Federal Bureau of Investigation, U.S. Immigration and Customs Enforcement,[77] the Drug Enforcement Administration,[78] and Customs and Border Protection,[79] or on state law enforcement agencies.[80] Much less is publicly known about the availability of these tools to the thousands of local law enforcement agencies across the United States.[81] To find out, we filed more than 110 public records requests to law enforcement agencies across the country, and searched a variety of databases on government spending and grantmaking.[82]

76 Cellebrite, "Premium access to all iOS and high-end Android devices," *available at* https://cf-media.cellebrite.com/wp-content/uploads/2020/07/ProductOverview_CellebritePremium.pdf.

77 Thomas Brewster, "Immigration Cops Just Spent A Record $1 Million On The World's Most Advanced iPhone Hacking Tech," Forbes, May 8, 2019, *available at* https://www.forbes.com/sites/thomasbrewster/2019/05/08/immigration-just-spent-a-record-1-million-on-the-worlds-most-advanced-iphone-hacking-tech/#7d8860a85a0a.

78 Joseph Cox, "The DEA Says It Wants That New iPhone Unlocking Tool 'GrayKey,'" Vice, March 28, 2018, *available at* https://www.vice.com/en_us/article/mbxba4/graykey-grayshift-dea-iphone-hack.

79 See, e.g., U.S. Customs and Border Protection Purchase Orders, Federal Procurement Data System, https://www.fpds.gov/ezsearch/fpdsportal?indexName=awardfull&templateName=1.5.1&s=FPDS.GOV&q=grayshift+customs+and+border&x=0&y=0.

80 Joseph Cox, "US State Police Have Spent Millions on Israeli Phone Cracking Tech," Vice, December 21, 2016, *available at* https://www.vice.com/en_us/article/aekqkj/us-state-police-have-spent-millions-on-israeli-phone-cracking-tech-cellebritea.

81 Some information is known about the largest local law enforcement agencies. *See* George Joseph, "Cellphone Spy Tools Have Flooded Local Police Departments," February 8, 2017, CityLab, *available at* https://www.bloomberg.com/news/articles/2017-02-08/cellphone-surveillance-gear-floods-u-s-cities.

82 For more details on our methodology and our data, see Appendix A and Appendix B. Appendix C is a table that provides total amounts each agency has spent on MDFTs since 2015 based on agency responses to our public records requests. These figures represent lower bounds on the amounts actually spent, since records responses may be incomplete.

Mobile device forensic tools can cost thousands of dollars for law enforcement agencies. Some have argued that these tools are "cost prohibitive . . . for all but a handful of local law enforcement agencies,"[83] or "are things that few state and local police departments can afford."[84] The Manhattan District Attorney's Office has claimed:

> *Faced with growing backlogs of encrypted devices, some law enforcement agencies have begun working with private-sector partners to attempt to develop workarounds to obtain contents from otherwise "warrant-proof" Apple and Android phones. This office, with our relatively considerable resources, is one of the few local agencies that can afford to pursue this kind of solution. Other offices lack such resources, which creates an unequal system in which access to justice depends on a particular jurisdiction's financial capacity.*[85]

Our research indicates that this is not the case. **Rather, we found widespread adoption of mobile device forensic tools by law enforcement in all fifty states and the District of Columbia. In all, we documented more than 2,000 agencies across the United States that have purchased a range of products and services offered by mobile device forensic tool vendors.[86] Every American is at risk of having their phone forensically searched by law enforcement.**

Almost every kind of law enforcement actor is represented in the data we collected: Local police departments, sheriffs, district attorneys, forensic labs, prisons, housing authorities, public schools, statewide agencies, and more.

Many agencies purchase MDFTs from multiple vendors, including Cellebrite, Magnet Forensics, Grayshift, MSAB, AccessData, and Oxygen Forensics.[87] A single GrayKey unit — which is

83 Written Testimony of New York County District Attorney Cyrus R. Vance, Jr. Before the United States Senate Committee on the Judiciary, "Smartphone Encryption and Public Safety," Washington, D.C., December 10, 2019 https://www.judiciary.senate.gov/imo/media/doc/Vance%20Testimony.pdf.

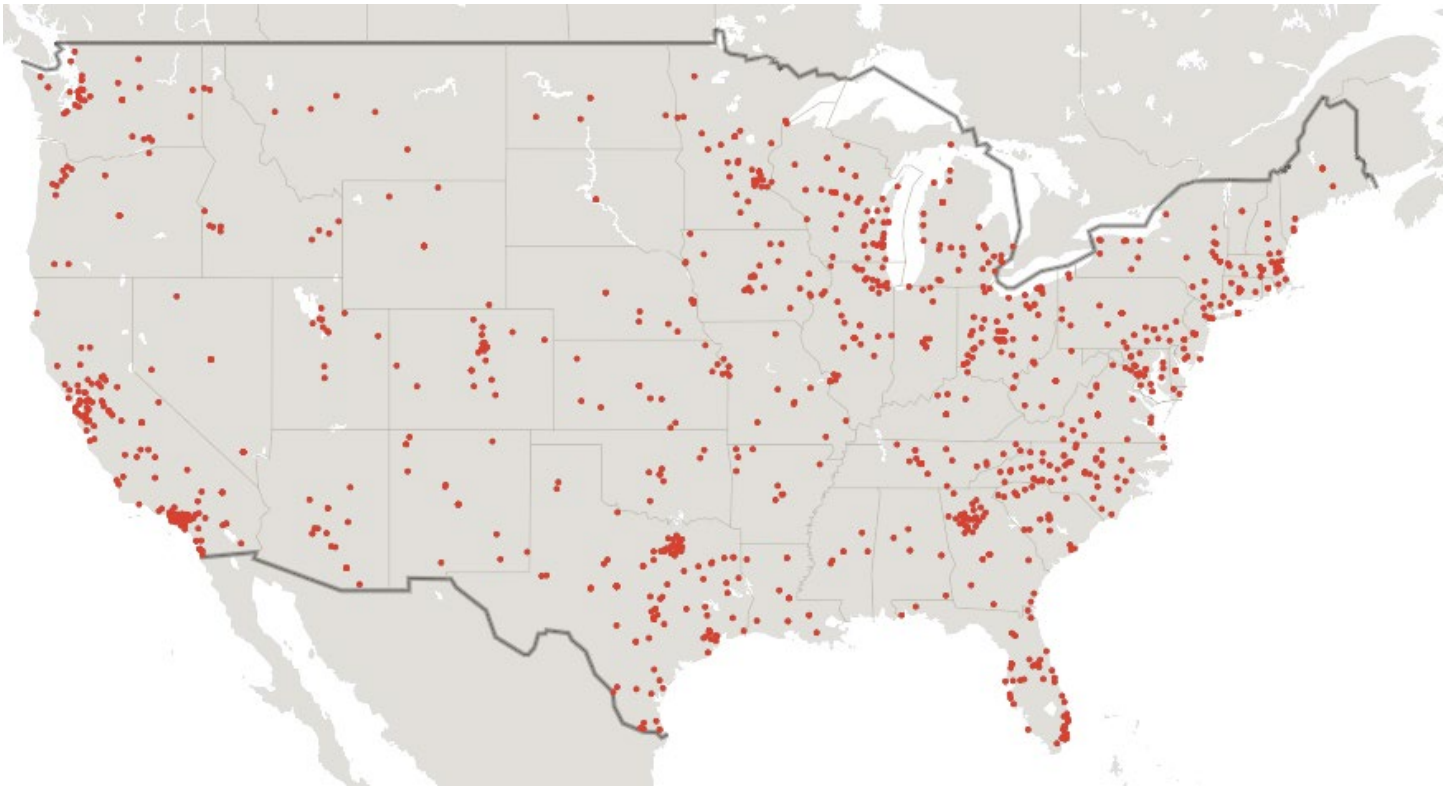
84 William, Carter, Jennifer Daskal, *Low Hanging Fruit: Evidence-Based Solutions to the Digital Evidence Challenge*, Center for Strategic & International Studies, July 2018, 12.

85 Third Report of the Manhattan District Attorney's Office on Smartphone encryption and Public Safety, November 2017, at 8, https://www.manhattanda.org/wp-content/themes/dany/files/2017%20Report%20of%20the%20Manhattan%20District%20Attorney%27s%20Office%20on%20Smartphone%20Encryption.pdf.

86 This number represents a floor — many agencies do not upload their information to GovSpend, and we have documented multiple instances of such agencies purchasing MDFTs.

87 This aligns with a recommendation from a National Institute of Standards and Technologies report, which notes that "it is advisable to have multiple tools available . . . to switch to another if difficulties occur with the initial tool." *See*, Rick Ayers, Sam Brothers, Wayne Jansen, *Guidelines on Mobile Device Forensics*, NIST Special Publication 800-101, Revision 1, National Institute of Standards and Technology, May 2014, 41, *available at* https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-101r1.pdf.

Map 1

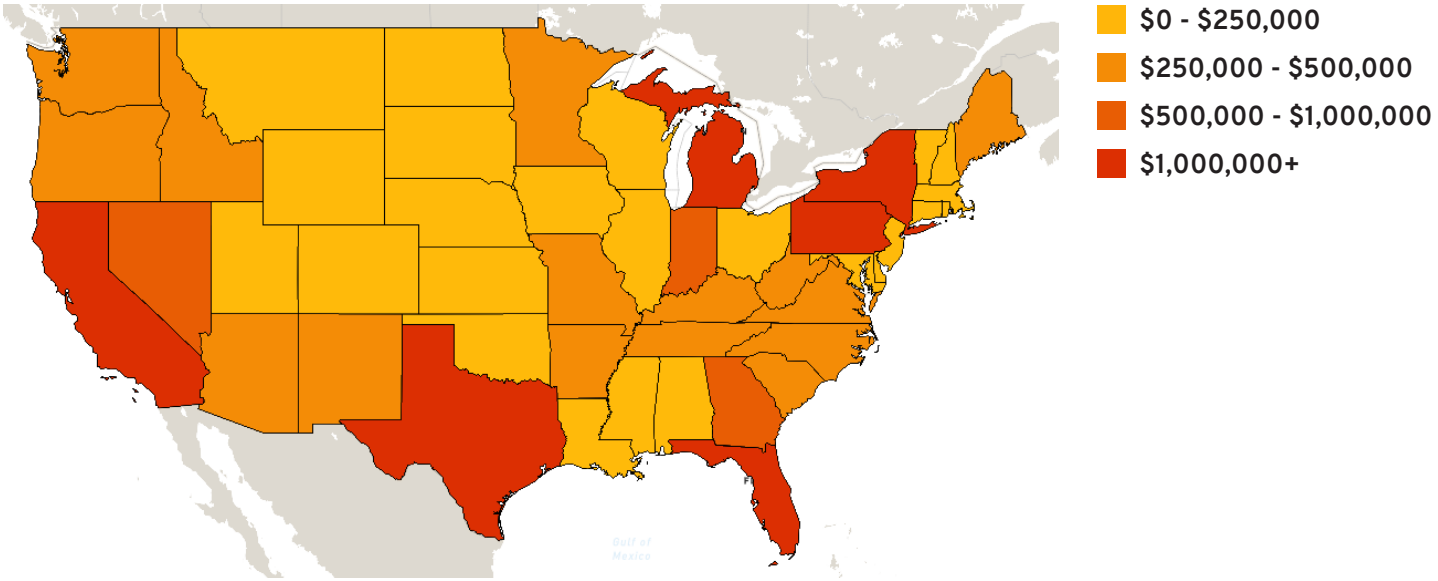


***Map 1** shows the proliferation of MDFTs across agencies in the United States. Each dot represents an agency that has purchased at least one MDFT based on our records. We believe many more agencies in the U.S. have purchased MDFTs than the ones we were able to identify.*

considered the most advanced iPhone extraction device — costs between $15,000 and $30,000.[88] Cellebrite products vary in cost, but a UFED product costs about $10,000, with a $3,000 to $4,000 annual license fee. The level of spending documented below would allow a law enforcement agency to buy dozens of licenses for different kinds of MDFTs each year, such that they could extract data from numerous phones every day.

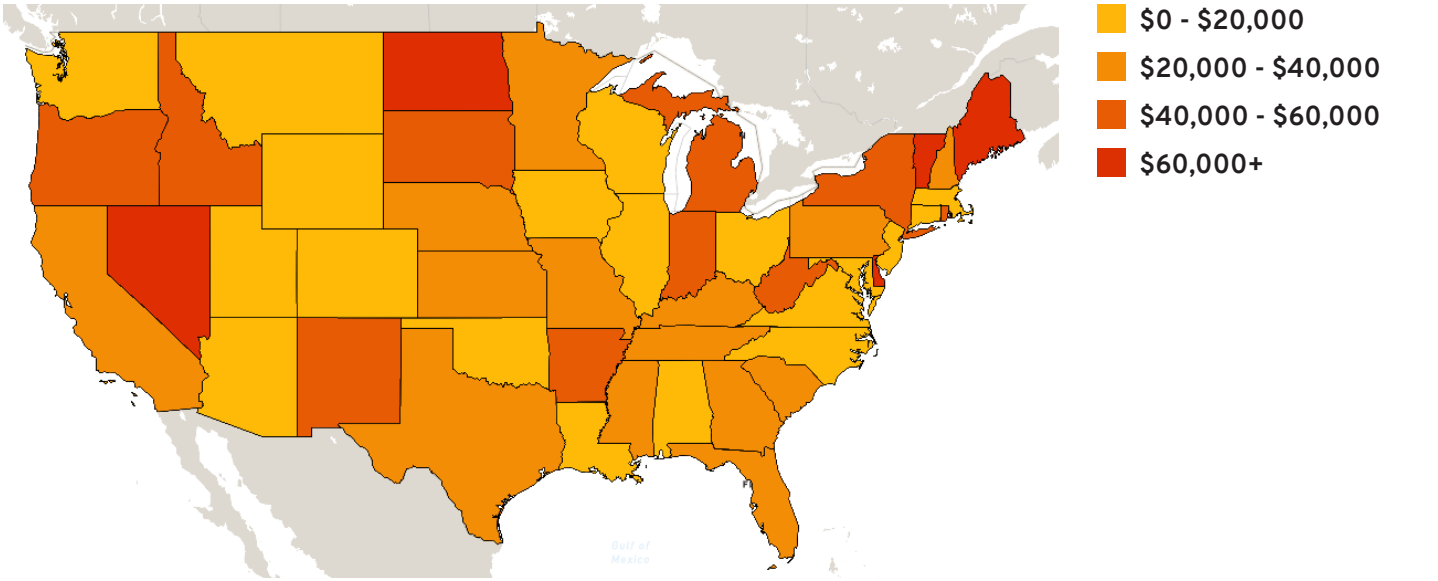
88 The $15,000 unit is an "online" version, which permits 300 uses. The $30,000 "offline" version permits unlimited use.

Map 2.1



Map 2.1 *shows the total amount of money spent on MDFTs in each state since 2015. Total amounts come from our records requests and from financial transparency websites that states offer. Given this, the total amounts we calculated are likely underestimates.*

Map 2.2



Map 2.2 *shows the total amount of money spent on MDFTs in each state per 1,000 sworn officers.*

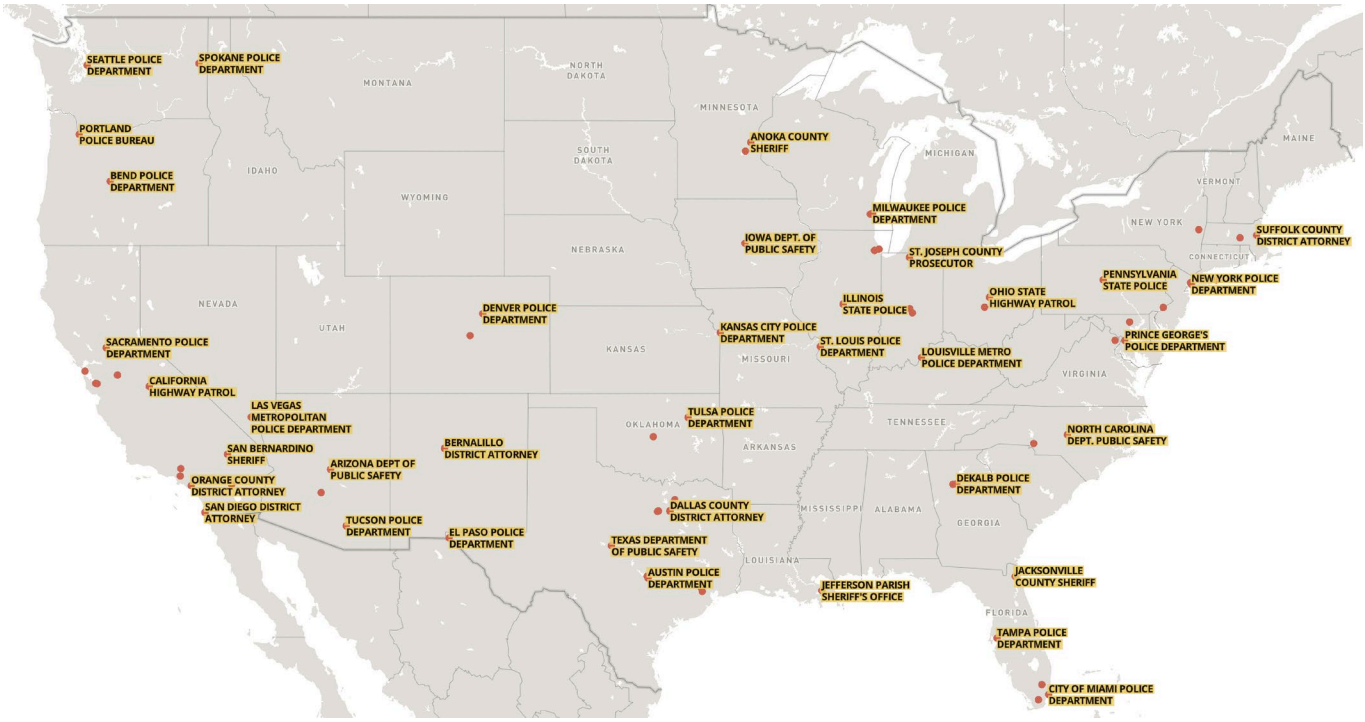
Almost Every Major Law Enforcement Agency Has These Tools

From documents we've obtained, it is clear that the vast majority of large U.S. law enforcement agencies have purchased or used a range of MDFTs. They include:

- Every one of the 50 largest local police departments,
- State law enforcement agencies in all 50 states,
- At least 25 of the 50 largest sheriff's offices and,
- At least 16 out of the 25 largest district or prosecuting attorneys' offices.

These departments have spent hundreds of thousands of dollars on these tools. For example, the Las Vegas Metropolitan Police Department has spent at least $640,000 on MDFTs, the Miami-Dade Police Department has spent

Map 3



Map 3 *displays the total amount of money that law enforcement agencies that responded to our public records requests have spent on MDFTs since 2015. Some agency amounts are "unknown" if their response indicated they purchased MDFTs, but did not share with us specific purchase orders or invoices. Appendix C contains the full data underlying this map.*

at least $230,000, the Charlotte-Mecklenburg Police Department has spent at least $160,000, the Tucson Police Department has spent at least $125,000, and the Columbus Police Department has spent at least $114,000. Between 2018 and 2019, the Georgia Bureau of Investigation spent over $610,000 on MDFTs. Since 2018, state agencies in Michigan have spent more than $1.1 million, and the Indiana State Police have spent at least $510,000 on MDFTs since 2015.

Similarly, sheriff's offices and district attorneys' offices have also spent hundreds of thousands on MDFTs: the Broward County (FL) Sheriff's Office spent at least $560,000, the San Bernardino (CA) Sheriff's Office has spent at least $270,000, the Santa Clara (CA) District Attorney's Office has spent at least $250,000, and the Harris County (TX) Sheriff's Office has spent at least $175,000.

Many Smaller Agencies Can Afford Them

It may be unsurprising that many of the largest law enforcement agencies in the United States have the resources to acquire these tools. **But our research clearly shows that MDFTs are prevalent even among smaller law enforcement agencies.** Many are willing to spend a surprisingly large amount of money to acquire these capabilities.

A range of police departments that serve cities of fewer than 100,000 residents have spent tens of thousands of dollars. For example, the Buckeye (AZ) Police Department has spent at least $80,000, the Alpharetta (GA) Police Department has spent at least $66,000, the Bend (OR) Police Department has spent at least $62,000, and the Asheville (NC) Police Department has spent at least $49,000.[89]

Similarly, GovSpend and city data indicate that a range of cities have purchased MDFTs.[90] For example, the City of Shaker Heights (OH) spent at least $136,134, the City of Mansfield (OH) has spent at least $75,000, the City of Superior (WI) has spent at least $61,259, and the City of Walla Walla (WA) has spent at least $59,000. Each of these cities have populations of 25,000 to 50,000.[91] A range of smaller cities, counties, and towns, like the city of Papillion (NE),[92] the

89 Population estimates derived from Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2019 Population: April 1, 2010 to July 1, 2019, based off of 2018 data. Bend, Oregon: 97,620; Buckeye, Arizona: 74,339; Asheville, North Carolina: 92,630; Alpharetta, Georgia: 66,257.

90 For these particular cities, it is not listed that a law enforcement agency purchased mobile device forensic technology. We believe this is an appropriate and fair inference, nevertheless, given all of our data.

91 Population estimates derived from Annual Estimates of the Resident Population for Incorporated Places: April 1, 2010 to July 1, 2019, based on 2018 data. Mansfield has an estimated population of 46,538, Superior has an estimated population of 26,064, Shaker has an estimated population of 27,215, and Walla Walla has an estimated population of 32,893.

92 City of Papillion, Nebraska, City Council Minute Records, October 15, 2019, *available at* https://www.papillion.org/AgendaCenter/ViewFile/Minutes/_10152019-205.

town of Whitestown (IN),[93] Jackson Township (NJ),[94] the city of Richland (WA),[95] Glynn County (GA),[96] and the city of Lompoc (CA),[97] have all purchased Grayshift's GrayKey. Budget documents indicate places like the city of Allen (TX)[98] and the city of Pearland (TX) are planning to purchase GrayKey soon.[99]

These examples underscore how accessible and affordable these tools can be, even for agencies with smaller budgets.

Federal Grants Drive Acquisition

A wide variety of federal grants help law enforcement agencies of all sizes acquire MDFTs. In fact, law enforcement agencies "regar[d] assistance from both federal and state governments as critical to success in digital evidence processing," especially for smaller agencies, "given [their] more limited potential budgets compared with large agencies."[100] But even larger departments and agencies have estimated that "95 percent of our [mobile device forensic] equipment" comes from outside funding.[101]

Grants from the Edward Byrne Memorial Justice Assistance Grant (JAG) Program have helped a variety of agencies in particular acquire Cellebrite products — such as police in Salt Lake City

93 Town of Whitestown, Indiana, Check Register History, Town Council Claims for February 2020, *available at* https://whitestown.in.gov/vertical/sites/%7BB8BE8AC3-9DE8-4247-BCB0-1173F48CC7C3%7D/uploads/February_2020_Disbursements.pdf.

94 Jackson Township, New Jersey, Board of Trustees Meeting, Record of Proceedings, February 11, 2020, *available at* http://www.jacksontwp.com/Downloads/Feb%2011%2020%20Mtg.pdf.

95 City of Richland, Washington, City Council Regular Meeting, December 18, 2018, *available at* https://richlandwa.civicclerk.com/Web/UserControls/DocPreview.aspx?p=1&aoid=2310.

96 Glynn County, Georgia, County Board of Commissioners, Agenda for Regular Meeting, October 1, 2020, *available at* https://www.glynncounty.org/DocumentCenter/View/68006/100120.

97 City of Lompoc, California, Regular Meeting of the Lompoc City Council, December 4, 2018, https://www.cityoflompoc.com/Home/ShowDocument?id=7151.

98 City of Allen, Texas, Proposed Annual Budget, Fiscal Year 2020-2021, 181, *available at* https://www.cityofallen.org/DocumentCenter/View/5398/Proposed-Budget-Document.

99 City of Pearland, Texas, FY21 Proposed Budget "Resilience in Uncertainty," Special Revenue Funds, Page 12, *available at* https://www.pearlandtx.gov/home/showdocument?id=28457.

100 Sean E. Goodison, Robert C. Davis, and Brian A. Jackson, Digital Evidence and the U.S. Criminal Justice System: Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence, 2015, 16 *available at* https://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR890/RAND_RR890.pdf.

101 *Id*.

(UT), Burlington (NC), Sumter (SC), and the Marathon County (WI) Sheriff's Department. As of this year, the Miami-Dade Police Department is looking to use $283,000 of JAG grant money to buy Cellebrite tools.[102]

The Internet Crimes Against Children (ICAC) task force, a program run by the Department of Justice's (DOJ) Office of Juvenile Justice and Delinquency Prevention, is a particularly large source of funding for local acquisition of MDFTs. For example, the Arizona Department of Public Safety purchased two GrayKey units with the funds, the Phoenix Police Department used the funds to "complete a project to supply, across the State of Arizona, Cellebrite mobile forensic products,"[103] and police departments from Las Vegas, to Dallas, to DeKalb County (GA) used ICAC money to purchase a variety of MDFTs.

Similarly, the DOJ's Paul Coverdell Forensic Science Improvement Grants Program has provided significant local funding. For example, the Bronx County (NY) District Attorney used the grant money to purchase Cellebrite products.[104] The Charleston (SC) Police Department was funded to purchase two new Cellebrite UFEDs because their digital evidence unit "witnessed a dramatic increase in mobile device submissions."[105] The Alameda County (CA) Sheriff used funds to purchase two GrayKey units,[106] as did forensic science laboratories in Kansas.[107]

102 *See*, Miami-Dade Board of County Commissioners, Office of the Commission Auditor, Public Safety and Rehabilitation Committee Meeting, June 9, 2020, *available at* https://www.miamidade.gov/auditor/library/2020-06-09-psr-meeting.pdf; Memorandum from the Mayor to the Board of County Commissioners, "Request for Additional Expenditure Authority to Contract SS9737-1/23-1, Cellebrite Forensic System, Service and Maintenance," July 8, 2020, *available at* http://www.miamidade.gov/govaction/legistarfiles/MinMatters/Y2020/201021min.pdf.

103 Department of Justice, Office of Juvenile Justice and Delinquency Prevention, "FY 2012 Internet Crimes Against Children Task Force Continuation Program," Award Number: 2012-MC-FX-K008, Awardee: Phoenix police Department, *available at* https://ojjdp.ojp.gov/funding/awards/2012-mc-fx-k008.

104 Department of Justice, National Institute of Justice, "Bronx Coverdell Digital Forensic Science Laboratory," Award Number: 2019-CD-BX-0075, Awardee: Office of the Bronx County District Attorney, *available at* https://nij.ojp.gov/funding/awards/2019-cd-bx-0075.

105 Department of Justice, National Institute of Justice, "City of Charleston Police Department's Forensic Services Division-Maintaining Quality Digital Examinations," Award Number: 2017-CD-BX-0060, Awardee: City of Charleston, *available at* https://nij.ojp.gov/funding/awards/2017-cd-bx-0060.

106 Memorandum, Alameda County Sheriff's Office, "Accept the 2018 Paul Coverdell Forensic Science Improvement Grant, July 9, 2019, *available at* http://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_07_09_19/PUBLIC%20PROTECTION/Regular%20Calendar/Sheriff_281959.pdf.

107 Department of Justice, National Institute of Justice, "Kansas Federal NIJ FY 19 Paul Coverdell Forensic Science Improvement Grants Program," Award Number: 2019-CD-BX-0028, Awardee: Executive Office of the State of Kansas. https://nij.ojp.gov/funding/awards/2019-cd-bx-0028.

Agencies Share Their Tools With One Another

Even if a law enforcement agency has not purchased MDFTs themselves, many — if not all — have fairly easy access. One option is to form partnerships with other, larger departments. For example, many larger local law enforcement agencies conduct extractions at the request of smaller nearby agencies.[108] Another option is to turn to state-wide agencies — ranging from the offices of Attorneys General, to state departments of forensics or crime labs — that accept requests to perform examinations of digital devices from local agencies.[109]

Yet another common option is to visit labs run by the Federal Bureau of Investigation (FBI). The FBI maintains 17 Regional Computer Forensic Laboratories with broad capabilities to assist local law enforcement.[110] There are at least 84 locations where "cellphone investigative kiosks" (CPIKs) are available, which allow law enforcement "to extract data from a cellphone, put it into a report, and burn the report to a CD or DVD in as little as 30 minutes."[111]

From publicly available data, law enforcement used the cellphone investigative kiosks and virtual cellphone investigative kiosks at least 31,000 times between fiscal years 2013 and 2016.[112]

108 *See, e.g.*, Ft. Worth Police Department, Request Log Redacted, https://beta.documentcloud.org/documents/20390983-2018-request-log-redacted1; also see Boone County Sheriff's Department, "Law Enforcement Portal," available at http://bcsdcybercrimes.com/leportal.html.

109 *See, e.g.*, Virginia Department of Forensic Sciences, "Frequently Asked Questions," https://www.dfs.virginia.gov/faq/; Ohio Attorney General, "Unlocking digital evidence: BCI's Cyber Crimes Unit helps law enforcement access, preserve valuable data," On the Job: Criminal Justice update, September 28, 2017, https://www.ohioattorneygeneral.gov/Media/Newsletters/Criminal-Justice-Update/Fall-2017/Unlocking-digital-evidence-BCI%E2%80%99s-Cyber-Crimes-Uni.

110 The Service Areas are: Chicago, Greater Houston, Heart of America, Intermountain West, Kentucky, New England, New Jersey, New Mexico, North Texas, Northwest, Orange County, Philadelphia, Rocky Mountain, San Diego, Silicon Valley, Tennessee Valley, and Western New York.

111 Regional Computer Forensics Laboratory, Service Offerings, https://www.rcfl.gov/services.

112 See U.S. Department of Justice, Regional Computer Forensics Laboratory Annual Report For Fiscal Year 2015, at 13; also see, U.S. Department of Justice, Regional Computer Forensics Laboratory Annual Report For Fiscal Year 2016, at 13. The FY 2017 and FY 2018 reports unfortunately do not report CPIK or VCPK usage numbers.

4. A Pervasive Tool for Even the Most Common Offenses

Our public records requests asked law enforcement agencies for logs of use that identified, among other things, how often and in what kinds of cases law enforcement used MDFTs.[113] The records we've obtained can at best tell an incomplete story, as we did not receive records of use from every department we sent records requests to. Only 44 agencies disclosed usage records, and their form varied greatly.[114]

But here is the story they do tell: **Law enforcement use mobile device forensic tools tens of thousands of times, as an all-purpose investigative tool, for an astonishingly broad array of offenses, often without a warrant. And their use is growing.**

These records challenge two prominent, connected narratives surrounding the use of this technology. The first narrative focuses on the rare instances in which law enforcement cannot access the contents of a phone in a high-profile case. The records we obtained document frequent, seemingly routine, everyday instances in which law enforcement do gain access. The second, connected narrative is that these tools are only (or in large part only) used in cases involving serious harm. They are certainly used in those cases — and in some jurisdictions the majority of MDFT use is for cases of serious harm. But such a framing not only misses the dominant uses of these tools, but also completely ignores racially biased policing policies and practices.

113 In particular, our request sought "records reflecting the department's *aggregate* use of MDFTs. For example, monthly reports that reflect the total number of MDFT cases for each month, broken down by type of crime, and number and type of phones, and number and type of other devices." *See* Appendix B.

114 Some departments, like the Arizona Department of Public Safety, provided us with presentations documenting yearly numbers of cellphone extractions. Others, like the Seattle Police Department, provided us hundreds of cellphone extraction request forms. Some, like the San Francisco, Atlanta, and Fort Worth Police Departments provided spreadsheets that logged a range of information — like the kind of offense, the make and model of the phone, the relevant legal authority with specific search warrant numbers, and whether or not the extraction was successful. Some were handwritten. Some were Excel spreadsheets. Much of the documentation we received is haphazard, or otherwise incomplete. For example, in the Gwinnett County District Attorney's Office response to our records request, they noted that "[o]nly one employee maintains a log of his use of MDFTs."

Tens of Thousands of Device Extractions Each Year

The records of use we've assembled from 44 law enforcement agencies represent at least 50,000 extractions of cellphones between 2015 and 2019.[115] To our knowledge, this is the first time that such records have been widely disclosed.[116]

Importantly, *this number represents a severe undercount* of the actual number of cellphone extractions performed by state and local law enforcement since 2015 for many reasons. First, this number only captures usage by 44 agencies, while we know that at least 2,000 agencies have these tools, out of more than 18,000 agencies nationwide. Second, some departments that did disclose usage logs did not start tracking their use of MDFTs until recently. Third, many departments that responded indicated that while they possess MDFTs, they do not track or collect how often they use them. Finally, many of the largest local police departments — such as New York City, Chicago, Washington DC, Baltimore, and Boston — have either denied or did not respond to our requests.

Combining all the information we've gathered,[117] it's safe to say that state and local law enforcement agencies collectively have performed hundreds of thousands of cellphone extractions since 2015.

115 As we sent many of our public records requests in early 2019, many agencies responded with records up to that chronological point. For example, if we sent a public records request in February 2019, we would receive records documenting use of MDFTs up to February 2019, even if a department responded in March 2020.

116 We found one prior public records project that asked for "utilization logs," but only two departments responded to those requests. Neither of the responses provided details about the underlying offenses. https://www.muckrock.com/search/?page=1&per_page=25&q=Mobile+Phone+Forensics+Tools.

117 *See*, *e.g.*, U.S. Department of Justice, Regional Computer Forensics Laboratory Annual Report For Fiscal Year 2015, at 13; also see, U.S. Department of Justice, Regional Computer Forensics Laboratory Annual Report For Fiscal Year 2016, at 13; Essex County Prosecutor's Office, Forensic Analysis and Cyber Tech Services Unit, http://www.njecpo.org/?page_id=2550 ("In 2018, the FACTS Unit conducted over 1,000 cellphone extractions and analysis."); George Woolston, "Inside the special law enforcement unit that brings down child predators," Echo-Pilot, August 7, 2020, *available at* https://www.echo-pilot.com/news/20200807/inside-special-law-enforcement-unit-that-brings-down-child-predators (noting that Burlington County Prosecutor's Office High-Tech Crimes Unit "do somewhere in the neighborhood of 500 phones a year."); Curtis Waltman, "Police are getting a lot of use out of cellphone extraction tech," Muckrock, June 5, 2017, *available at* https://www.muckrock.com/news/archives/2017/jun/05/tulsa-tucson-cellebrite/. For comparison's sake, Customs and Border Protection officers conducted several thousand "advanced" searches of electronic devices from FY2012-FY2018. Of course, this data doesn't disaggregate between "electronic devices." *See* Statement of Undisputed Material Facts, *Alasaad v. McAleenan*, No. 17-cv-11730-DJC, at 10. Dkt. 90-2.

Graffiti, Shoplifting, Drugs, and Other Minor Cases

The records we've obtained demonstrate that some law enforcement agencies use MDFTs as an all-purpose investigative tool for a broad array of offenses.

Some law enforcement agencies frequently point to the need to investigate serious offenses like homicide, child exploitation, and sexual violence to justify their use of these tools. And it is certainly true that in some instances, the most common offenses logged in records of use are things like murder or child sexual abuse material — instances where substantial harm has allegedly occurred.

But the records we've obtained also tell a different story: that law enforcement also use these tools to investigate cases involving graffiti, shoplifting, marijuana possession, prostitution, vandalism, car crashes, parole violations, petty theft, public intoxication, and the full gamut of drug-related offenses.

Many logged offenses appear to have little to no relationship to a mobile device, nor are the offenses digital in nature. In fact, for many of these alleged offenses, it's difficult to understand why such an invasive investigative technique would be necessary, other than mere speculation that evidence could be found on the phone.

To better understand law enforcement's use of these tools, we began seeking out search warrants that law enforcement obtained to search phones. As part of a search warrant, law enforcement submit affidavits — written statements of alleged facts from an agent's point of view — to a judicial authority. The affidavit must establish probable cause for a search, in this case, of a mobile phone.[118] By examining warrant affidavits, we can begin to understand the routine use of these tools.

These records are imperfect, as search warrant affidavits only provide a law enforcement officer's perspective on an alleged incident. Nevertheless, these documents can help paint a picture of what allegedly went on prior to law enforcement's seizure of a phone, and why there is supposedly probable cause to search the phone. A sample of some these incidents include:

118 The probable cause standard means there's a reasonable basis to believe a crime may have been committed and that the target of suspicion committed the crime, or that evidence of the crime is present and in the place to be searched. It's a low standard to begin with. See Illinois v. Gates, 462 U. S. 213, 232, 243-244, n. 13 (1983) (probable cause "is not readily, or even usefully, reduced to a neat set of legal rules" and "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.") *See also* Kaley v. United States, 571 U. S. 320, 338. (2014) ("Probable cause, we have often told litigants, is not a high bar.")

- After an undercover purchase of $220 worth of marijuana, officers sought to search two phones for evidence of narcotics sales and "other criminal offenses."[119]
- An off-duty officer witnessed what they thought was shoplifting at a Dick's Sporting Goods Store and said the individuals had left in a Honda Accord. Another officer initiated a vehicle pursuit. Five individuals were arrested and four phones seized. After speaking to the five individuals, officers learned they "had been communicating, via cellphone, throughout the night and were allegedly going to sell the stolen clothing to 'their regulars.'" Officers sought to search the phones for "plans and correspondence regarding these thefts and the organized crime," and "[t]he identity of 'their regulars.'"[120]
- Officers witnessed "suspicious behavior" in a Whole Foods grocery store parking lot that they believed to be a "controlled substance exchange" between occupants in a Lexus and a Buick. After the Lexus drove by the unmarked police car, one of the officers "reported the smell the odor [sic] of Marijuana coming through his open window seemingly from the Lexus." The officers stopped the Lexus because they "did not have a front license plate which is an equipment violation." Upon searching the car, officers found a small amount of what appeared to be cocaine and marijuana and a black scale. Officers sought to search a subject's phone for "further evidence of the nature of the suspected controlled substance exchange," and for evidence "on the knowledge of possession and/or sales of the controlled substances found . . . in [the] vehicle."[121]
- Officers were dispatched to a dispute at a McDonald's. After arriving, they learned that the dispute appeared to be over $70 that was owed. Apparently, the person who was owed money was "forcing" the person who owed money "to remove his clothing and forcefully removed it as some sort of collateral." One individual was arrested for charges of simple robbery. Four phones were ultimately seized and officers sought to search them "to further this investigation."[122]
- A plain clothes DEA Task Force Officer was "making consensual contacts" with individuals at the Dallas/Fort Worth International Airport. After asking a traveler "if he had any large sums of US Currency with him," the officer received consent to search his backpack, and found a large sum of U.S. currency. At this point the subject said he "had used this backpack to store marijuana inside of it before." Officers then saw a WhatsApp message displayed on the subject's phone that said "This flower is so good by far one of my fav strands ever." Officers sought to search the phone for evidence of narcotics sales and money laundering.[123]

119 *See* Tarrant County Search Warrant SW38982, https://beta.documentcloud.org/documents/20394694-sw_38982.

120 *See* Tarrant County Search Warrant SW40465, https://beta.documentcloud.org/documents/20394702-sw_40465.

121 *See* Anoka County Search Warrant 18-108859, https://beta.documentcloud.org/documents/20394762-18-108859.

122 *See* Anoka County Search Warrant 17015643, https://beta.documentcloud.org/documents/20394763-17015643.

123 *See* Tarrant County Search Warrant SW39468, https://beta.documentcloud.org/documents/20394695-sw_39468.

- A patrol car stopped a vehicle for a "left lane violation." "Due to nervousness observed and inconsistent stories, a free air sniff was conducted by a . . . K9 with a positive alert to narcotics." A search of the car revealed several shrink-wrapped bags of suspected marijuana and marijuana wax. Officers seized eight phones from the car's occupants, and sought to find "evidence of drug transactions, which would provide further evidence with intent to distribute."[124]
- An officer stopped a "white minivan . . . for speeding and traveling in the left lane when prohibited." The driver was "nervous upon contact." After denying a consent search of the car, a K9 sniff of the car led to the discovery of marijuana. A search of the car revealed several bags of suspected marijuana. After seizing two phones from the car, officers sought to search the phones for "evidence of drug transactions that will provide further evidence with intent to distribute."[125]
- In a particularly egregious case, officers shot and killed a man after he "ran from the driver's side of the vehicle" during a traffic stop. Police ultimately discovered a small orange prescription pill container next to the victim. Tests of the pills revealed they were a mix of acetaminophen and fentanyl. After a subsequent search of the victim's vehicle, officers discovered a phone. Officers sought to search the phone for evidence related to "counterfeit Oxycodone," "evidence relating to . . . motives for fleeing from the police," and evidence "relating to the stolen Smith & Wesson SD9 Handgun."[126]
- During an eviction with an "uncooperative" individual, officers shot the individual 15 times after he apparently reached under a blanket for what officers saw as a rifle. Officers seized several cellphones and sought to search them for "any information which would reveal [the individual's] mindset and motivation at the time of the shooting."[127]
- Officers were looking for a juvenile who allegedly violated the terms of his electronic home monitoring. Officers eventually located the individual and, after a "short foot pursuit . . . he threw several items to the ground," including a phone. Officers located the phone and sought to search it for evidence of escape in the second degree.[128]

124 *See* Colorado State Patrol Search Warrant ST170049-4A170155, https://beta.documentcloud.org/documents/20394714-st1700494a170155-search-warrant.

125 *See* Colorado State Patrol Search Warrant ST170210-17-SW-380, https://beta.documentcloud.org/documents/20394713-st170210-redacted.

126 *See* King County Search Warrant 19-272, https://beta.documentcloud.org/documents/20394722-affidavit-19-272.

127 *See* Spokane Search Warrant 2018-10032539, https://beta.documentcloud.org/documents/20394723-warrant-5_-closed_2018-10032539.

128 *See* King County Search Warrant 19-527, https://beta.documentcloud.org/documents/20394724-affidavit-19-5271.

Some departments use MDFTs by and large to investigate drug-related offenses. For example, the vast majority of logged cellphone extractions by the Colorado State Patrol and Baltimore County Police Department are for drug-related offenses. Logs from the Dallas Police Department indicated that drug-related offenses were the second most common offense in which MDFTs were used, behind murder.

For other law enforcement agencies, drug-related offenses are often in the top three or five most common offenses listed in logs we obtained. For example, 20% of phones the Suffolk County (NY) Police Department forensically examined in 2018 were narcotics cases. A log of outside agency cellphone extraction requests to the Santa Clara County (CA) District Attorney's Office appears to show that drug-related offenses are in the top three most common offenses listed. The same is true of the San Bernardino (CA) Sheriff's Office. And while drug-related offenses didn't constitute many cellphone extractions by the Fort Worth Police Department before 2017, they ballooned in 2018 and 2019 to be the third most common offense.

The prominence of drug-related offenses in cellphone extraction logs is especially worrisome given the extreme racial disparities in drug arrests,[129] the disproportionate severity of drug sentences, and the role drug arrests play in deportations.[130] Although none of the extraction logs we received maintained data on race or ethnicity, given this disparity, it's highly likely that these cellphone extractions disproportionately affect Black and Latinx people.

129 Human Rights Watch, ACLU, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, October 2016; also see, Joseph E Kennedy, Isaac Unah, Kasi Wahlers, *Sharks and Minnows in the War on Drugs: A Study of Quantity*, Race and Drug Type in Drug Arrests, 52 U.C. Davis L. Rev. 729, 746 (2018) ("Overall, marijuana dominates all other types of drugs in terms of arrests. Blacks and Hispanics are arrested disproportionately in terms of their share of the overall population. The racial disparities involved are not as great as those present among arrests for hard drugs. Whites dominate heroin and meth/amphetamine arrests, but those drugs account for relatively few hard drug arrests overall. Blacks, in contrast, dominate crack cocaine arrests and are disproportionately represented in powder cocaine arrests. One racial disparity in drug arrests overall may, then, be at least partially driven by what drugs we arrest people for, with Black overrepresentation driven by crack cocaine arrests and White underrepresentation driven by the relatively low levels of heroin and meth/amphetamine arrests."); also see Ojmarrh Mitchell, Michael S. Caudy, *Examining Racial Disparities in Drug Arrests*, 32 Justice Quarterly 288, (2013) ("For example, holding all other variables constant, at ages 17, 22, and 27 African-Americans' odds of drug arrest are approximately 13, 83, and 235% greater than whites, respectively.")

130 Drug Policy Alliance, *The Drug War and Mass Deportation*, February 2016.

131 *See, e.g.*, Tarrant County Search Warrant SW41310 https://beta.documentcloud.org/documents/20394768-sw_41301; Colorado State Patrol Search Warrant ST170210-17-SW-379, https://beta.documentcloud.org/documents/20394713-st170210-redacted. ("individuals engaged in narcotic sales send/receive text messages regarding narcotic sales, make/receive phone calls regarding narcotic sales and take photographs/video of themselves possessing narcotics," and that data the phone that will likely either "contain evidence of drug transactions that will provide further evidence with intent to distribute.")

Almost universally, the search warrants we obtained for drug-related offenses rely on the logic that boils down to a claim that drug dealers use cellphones.[131] An affidavit from a Fort Worth (TX) officer provides a prototypical example:

> *it is a common practice for individuals involved in the drug trade, to store, keep or conceal contact names, phone numbers, addresses, address books, and contact list of associates, inside cellular telephones, along with logs of incoming and outgoing calls, text messages, e-mails, direct connect data, SIM cards, voice mail messages, logs of accessing and downloading information from the internet, photographs, moving video, audio files, dates, appointments, and other information on personal calendars, Global position system (GPS) data, and telephone memory cards.*[132]

For many of the cases in which law enforcement turn to MDFTs, it's often difficult to assess why such an invasive technique would be necessary at all. Of course, there are some allegations where the connection between the data on a phone and the alleged conduct make it easier for law enforcement to establish probable cause. But there are plenty of cases where the nexus between a phone's contents and data and the alleged offense is tenuous at best.[133] The use of an MDFT in these cases seems like a drastic investigative overreach.

Officers Often Rely on Consent, Not Warrants

In 2015, the Supreme Court held in Riley that in order to search a cellphone, police must get a warrant. However, "consent searches" have long been understood to be an exception to the Fourth Amendment's warrant requirement. Our records show that, for some agencies, law enforcement regularly rely on a person's consent as the legal basis to search cellphones.

Of the 1,583 cellphone extractions that the Harris County (TX) Sheriff's Office performed from August 2015 to July 2019, only 47% of phones were extracted subject to a search warrant — the other 53% were consent searches, or searches of phones that were "abandoned/deceased." Of the 437 cellphones that the Denver Police Department extracted from March 2018 to early April 2019,

132 See Tarrant County Search Warrant SW40869, https://beta.documentcloud.org/documents/20394764-sw_40869.

133 For example, a recent DC Court of Appeals decision centered on a first-degree murder investigation. There, law enforcement's original search warrant for the suspect's cellphone allowed the police to search for "[a]ll records and "any evidence" related to the alleged offense, and law enforcement used a Cellebrite machine to extract all data off the phone. But, as the Court of Appeals held, while law enforcement had probable cause to search a phone for text messages between two individuals on one specific day, and the relevant GPS data from the phone on two specific days, "beyond those discrete items, the affidavits stated no facts that even arguably provided a reason to believe that any other information or data on the phones had any nexus to the investigation of [the victim's] death." See Eugene Burns v. United States, District of Columbia Court of Appeals 17-CF-1347, Dec. 2019.

nearly half were searched pursuant to a search warrant. Approximately one third of the phones the Seattle Police Department sought to extract data from were consent searches.

Of the 497 cellphone extractions that the Anoka County (MN) Sheriff's Office performed from early 2017 to May 2019, 38% were consent searches of some kind. For the Atlanta Police Department, of the at least 985 cellphone extractions performed from 2017 to early April 2019, about 10% were pursuant to a consent to search form. And for the Broward County (FL) Sheriff's Office, at least 18% of extractions were based on consent.

Given the broad prevalence of consent searches in other criminal legal contexts,[134] it is perhaps unsurprising that consent searches play a decent role in the searches of mobile phones. We address the problems with consent searches for mobile phones in particular in Section 6.

A Routine and Growing Practice

The records we've obtained clearly indicate that law enforcement agencies are using MDFTs for an ever-expanding array of offenses. **Given that racial disparities in arrest rates are one of the defining aspects of the American criminal legal system, it's likely that cellphone extractions already mirror these disparities.**[135]

In documents we obtained, law enforcement readily admit that these tools are regularly used and internally understood as a standard investigatory tool: "[R]equests for cellphone analysis has become the standard for phones involved in all types of criminal investigation;"[136] "it is used on a daily basis;"[137] "[our department] relies heavily on Cellebrite . . . tools."[138] In a recent D.C. court

134 Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind. L. J. 773 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.")

135 Megan Stevenson, Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. 731, 769-770 (2018) (Finding that Black people are arrested at higher rates compared to their similarly situated white counterparts for a large number of misdemeanors offenses, a decades long, consistent disparity. In particular finding "that black people are arrested at more than twice the rate of white people for nine of twelve likely-misdemeanor offenses: vagrancy, prostitution, gambling, drug possession, simple assault, theft, disorderly conduct, vandalism, and 'other offenses.'")

136 Dallas Police Department Purchase Authorization Request, December 3, 2019, https://beta.documentcloud.org/documents/20390026-d004755-021319_r.

137 Illinois State Police Procurement Justification Form in June 2016, https://beta.documentcloud.org/documents/20391543-cellebrite-an17-0107_marked_redacted.

138 San Diego Police Department, "Critical Data Extraction Tool Upgrades," April 30, 2018, Memorandum, https://beta.documentcloud.org/documents/20392573-sole-source-cellebrite-mod-3778-052118.

opinion, the court noted that "search warrant requests seeking access to cellphone data have become a common feature of law enforcement investigations."[139]

Statistics on use, where available, help demonstrate that law enforcement use of these tools is growing. For example, the Las Vegas Metropolitan Police Department examined 260% more cellphones in fiscal years 2018-2019 compared to 2015-2016 (from 222 in FY15-16 to 800 in FY18-19). Louisville's Metropolitan Police Department examined 236% more phones between 2017 and 2018 (from 88 phones to 296). Arizona's Department of Public Safety use grew 50% from 2015 to 2018 (from 796 phones in 2015 to 1,198 phones in 2018). Honolulu's Police Department used MDFTs 568% more in 2018 than 2015 (from 25 in 2016 to 167 in 2018). And Dallas' Police Department noted a 25% increase in cellphone extractions from 2018 to 2019.[140]

5. Few Constraints and Little Oversight

Despite how invasive MDFTs are, few departments have detailed internal policies that clearly restrict how or when they are used. In our public records requests, we asked each department for any policies or guidelines that would control MDFT use.[141]

Many departments have no policies at all — despite using these tools for years. Nearly half of the departments that responded to our records requests (40 out of 81) indicated they had no policies in place. Even when policies exist, they are often remarkably vague, for instance, by giving general guidance to officers to obtain a search warrant. Among the policies we did receive, we rarely saw any detailed guidance on concerns related to digital searches, such as the scope and particularity of searches, and the retention and use of extracted data. Unsurprisingly, agencies almost always acquire these tools with no public oversight. From our research, we found scant evidence of any community discussion or debate regarding the adoption of these tools.

139 Eugene Burns v. United States, District of Columbia Court of Appeals 17-CF-1347, Dec. 2019, 4.

140 To be certain, some departments' usage of MDFTs fluctuates somewhat between years — like the Fort Worth Police Department, St. Louis Metropolitan Police Department, San Francisco Police Department, or Harris County Sheriff's Office. Generally speaking, however, these departments were already regularly using the tools several hundred times per year as of 2015 or 2016.

141 Our request noted that these policies and guidelines included, but were not limited to the following "training materials regarding their operation, restrictions on when they may be used, limitations on retention and use of collected data, security measures taken to protect stored and in-transit data, guidance on when a warrant or other legal process must be obtained, and guidance on when the existence and use of MDFTs may be revealed to the public, criminal defendants, or judges." *See* Appendix B.

Many Agencies Have No Specific Policies in Place

Many agencies simply have no policies in place to govern how MDFTs are used. Among the 81 law enforcement agencies that responded to our public records requests, at least 40 of them indicated that they did not have any policies.

Of the 41 policies we received, only nine are detailed enough to provide meaningful guidance to officers. Combined, this means that nearly 90% of the departments that responded to our records requests give their officers wide discretion to use MDFTs and the phone data they collect.

Even very large agencies like the Los Angeles Police Department (LAPD) had no specific policies in place for MDFTs, even though the LAPD has spent hundreds of thousands of dollars on these tools and has used them thousands of times. Other major departments that have no policies include the Houston (TX) Police Department and the Nassau County (NY) Police Department.[142] State law enforcement agencies and county sheriff's offices are similarly lacking.[143]

Many of the country's largest and most prominent district attorneys' offices also use these tools without specific policies, including offices in Manhattan (NY), Cook County (IL), Tarrant County (TX), Philadelphia (PA), Suffolk County (MA), and Dallas County (TX). In their responses to our public records requests, some offices simply noted that they follow applicable case law governing the use of MDFTs. For example, the Manhattan District Attorney's Office responded that their office "strictly follows and adheres to all applicable federal and state constitutional laws, New York criminal procedure laws, and search and seizure case law in the utilization of this [technology] on a case by case basis."[144]

142 In addition, many mid-size and smaller police departments, like the Portland (OR) Police Bureau, Sacramento (CA) Police Department, the Bend (WA) Police Department, and the West Allis (WI) Police Department also have no specific policies in place. The Tulsa (OK) Police Department similarly had no policy in place, but indicated they "follow best practices," without indicating what those best practices are or who had designated them.

143 Of the 13 state law enforcement agencies that responded to our request, five indicated they had no relevant policies — the Arizona Department of Public Safety, the California Highway Patrol, the Indiana State Police, the Pennsylvania State Police, and the Washington State Patrol. Days before publication, the New York State Police sent responsive records to our request but did not include any policies in their response. Of the ten sheriff's offices that responded, four indicated they had no policies. The Broward County Sheriff Office noted that their office was in the process of drafting policies "as part of the department's restructuring."

144 *See* New York County District Attorney FOIL Response, https://beta.documentcloud.org/documents/20394637-upturn-foil_da-response2.

The policies we did receive varied substantially in length and detail. Some were nearly 40 pages long; others were barely a paragraph. Some were clearly in the process of being developed; others were boilerplate policies that were too broad to be meaningful. Of course, detailed policies won't by themselves ensure that people's rights will be respected. But without them, mobile device searches will expand the power of the police in an even less constrained way. We highlight a few acute problems below.

Overbroad Searches and the Lack of Particularity

The Fourth Amendment to the United States Constitution requires warrants to describe with particularity the places to be searched and the things to be seized.[145] This "particularity requirement" was designed to protect against "general warrants," such that law enforcement could not indiscriminately rummage through a person's property. In addition, the warrant application must identify the specific offense for which law enforcement has established probable cause. To be certain, almost every department policy acknowledges the need to have a sound legal basis to search a phone, whether it's a search warrant, verbal or written consent, or some other basis, like abandonment or exigent circumstances. But few departments provide much more clarity or direction beyond this general acknowledgement.

Some departments vaguely allude to the need for particularized searches. For example, the Las Vegas Metropolitan Police Department's Digital Forensics Lab policy notes that "searches that constitute a 'fishing expedition' . . . will not be conducted," but does not add any more detail.[146] Similarly, the Kansas City Police Department's policy mentions that an examiner "conducting the data extraction will adhere to the details and limitations regarding allowable data extraction and retention as specified in the warrant" — but does not further elaborate on what those limitations can or should be.[147]

In fact, some policies, like the Illinois State Police's, encourage broad search warrants, noting that "[a]ll computer hardware and software should be included [in search warrant applications], keeping in mind the entire system is necessary to replicate the suspect's use of it and to enable forensic examination of the system."[148]

145 U.S. Const. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*.")

146 *See* Las Vegas Metropolitan Police Department, Digital Investigations Bureau, https://beta.documentcloud.org/documents/20392915-logan-koepke-190403-20-lvmpd-digital-investigations-bureau-policies.

147 *See* Kansas City Missouri Police Department Examination of Electronic Data Storage Devices, https://beta.documentcloud.org/documents/20392850-4316_001.

148 *See* Illinois State Police, Collecting and Packaging Computer and Digital/Multimedia Forensic Evidence, https://beta.documentcloud.org/documents/20391527-ops-202-dir.

Other policies ask officers to seek broad search authority from the courts, and only to narrow their search when making internal requests to forensic examiners. For example, the Indianapolis Metropolitan Police Department directs officers requesting forensic analysis to describe "the evidence you expect to recover from the exam. Be specific as to what information the examiner should search for, such as 'Evidence of Dealing Narcotics' . . . [d]on't list types of data (e.g. call log, text, email, etc. . . .) as *your search warrant should cover all data*."[149] Similarly, the Jacksonville Sheriff's Office policy notes that failing to provide "details of the investigation and what detailed information the detection seeks from a forensic analysis . . . will greatly increase the processing and analysis time."[150] In other words, to the extent that law enforcement policies do speak to narrow forensic searches, they do so with reference to productivity and efficiency, not legal authority or constitutional protections.

Relatedly, few policies provide guidance on what examiners should do if they encounter potential evidence of another crime that is not detailed in the initial search warrant. Using a search warrant to look for digital evidence of one potential crime, only to then search for digital evidence of a completely separate crime, raises serious constitutional questions. This practice and limitation is crucial, because without it, law enforcement could go on a "fishing expedition" in search of evidence of any crime, far beyond the original justification for a search. We observed only two policies that provided any guidance on this point.[151]

The risk of overbroad searches is especially worrying given the fact that it's nearly impossible for those outside of law enforcement — such as a defense lawyer — to repeat the steps that a forensic examiner took and to audit the scope of a search.[152] A handful of agency policies do require examiners to document how a search was conducted, but the level of documentation required is still unlikely to allow a defense lawyer to meaningfully audit a search.

149 *See* Indianapolis Metropolitan Police Department, Request Form for Mobile Device Forensics, https://beta.documentcloud.org/documents/20391585-mobile_forensics_request_form_02-20-2019. (emphasis added)

150 *See* Jacksonville Sheriff's Office, Computer Forensic Investigations, Order 392, https://beta.documentcloud.org/documents/20392554-redacted_upm_392_computer_forensic_investigations_.

151 For example, the Santa Clara District Attorney's Office advises that if an "[e]xaminer discovers evidence of another crime(s) that is outside the scope of the submitted search warrant, the Examiner may continue the examination for items named in the warrant. The Examiner should contact the submitting agency and/or the prosecutor handling the case for guidance before conducting any searches for evidence not named in the original warrant." *See* Santa Clara District Attorney's Office, Santa Clara County Crime Laboratory Computer Forensic Standard Operating Procedures, https://beta.documentcloud.org/documents/20394644-2019-08-19-pra-resp-email-att-standard-operating-procedures-rev-26-112820181. As another example, the San Diego Police Department says that if "an examiner discovers evidence of another crime(s) that is outside the scope of the submitted legal authority, the examiner will notify the assigned prosecutor and/or submitting investigator of the discovery and nature of any evidence of other crime(s) outside the scope of the original search warrant." *See* San Diego Police Department, Forensic Technology Unit Manual, https://beta.documentcloud.org/documents/20392583-forensic-technology-unit-manual-082218-current.

152 Repeatability refers to obtaining the same results when using the same method on identical test items in the same laboratory by the same operator using the same equipment within short intervals of time. Reproducibility refers to obtaining the same results being obtained when using the same method on identical test items in different laboratories with different operators utilizing different equipment.

One policy from the Massachusetts State Police states that "[f]ull documentation of all procedures performed and software used should be recorded for every examination and added to the case file."[153] The Tucson Police Department's Forensic Electronic Media Unit's Quality Manual notes that "[n]otes should be taken contemporaneous to the examination or as close as possible."[154] And the Texas Department of Public Safety's Computer Information Technology and Electronic Crimes Unit Standard Operating Procedure requires the unit to establish a "peer review process where 20% of all forensic analysis completed will be reviewed,"[155] but they did not provide an example.

There are longstanding legal debates over how to properly govern digital searches: Legal scholars and courts have wrestled with the problems of overbroad digital searches for decades.[156] These arguments are incredibly important, and we surface only some of them in Section 6. Suffice it to say that it's especially striking, given the prominence of these legal debates, that law enforcement agencies have largely allowed officers and forensic examiners to search mobile phones without detailed policies and with few constraints.

153 *See* Massachusetts State Police Forensic Services Group Digital Evidence and Media Section, Technical Manual, https://beta.documentcloud.org/documents/20393038-4708_001.

154 *See* Tucson Police Department, Forensic Electronic Media Unit Quality Manual, https://beta.documentcloud.org/documents/20390047-femu-qa-manual-final-rev-27.

155 This peer review process is supposed to evaluate and document the following: Whether proper evidence intake procedures were followed (legal authority, chain of custody, and handling of evidence); Whether appropriate forensic acquisition methods were followed (write protection, CMOS date/time captured, sterilization procedures, and validating DDE integrity); Whether appropriate forensic examination procedures were followed; Whether appropriate information was identified in the Digital Forensics Report and CID Case Management Report; Whether dissemination procedures were completed properly; Upon review of post-examination evidence, whether archival procedures were properly followed. See Texas Department of Public Safety, Computer Information Technology & Electronic Crimes (CITEC) Unit Standard Operating Procedures, January 2019, https://beta.documentcloud.org/documents/20393187-citec-sop.

156 *See, e.g.*, Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 VA. L. Rev In Brief 1 (2011); James Saylor, *Computers As Castles: Preventing the Plain View Doctrine From Becoming a Vehicle for Overbroad Digital Searches*, 79. Ford. L. Rev. 2809 (2011); Eric Yeager, *Looking for Trouble: An Exploration of How to Regulate Digital Searches*, 66 Vand. L. Rev. 685 (2013); Andrew D. Huynh, *What Comes after Get a Warrant: Balancing Particularity and Practicality in Mobile Search Warrants Post-Riley*, 101 Cornell L. Rev. 187 (2015); Adam Gershowitz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 Vand. L. Rev. 585 (2016); Michael Mestitz, *Unpacking Digital Containers: Extending Riley's Reasoning to Digital Files and Subfolders*, 69 Stan. L. Rev. 321 (2017); Sara J. Dennis, *Regulating Search Warrant Execution Procedure for Stored Electronic Communications*, 86 Ford. L. Rev. 2993 (2018); Laura Donohue, *Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches*, 128 Yale L. J. Forum 961 (2019).

Police Databases and Unrelated Investigations

After law enforcement extracts data from a phone and prepares a forensic report, what happens to the underlying data and how might it be used later? Few policies we received mention any limits on how long extracted data may be retained, or how that data may be used beyond the scope of an immediate investigation.

Absent specific prohibitions, law enforcement could copy data from someone's phone — say, their contact list — and add that information into a far-reaching police surveillance database. For instance, it's easy to imagine law enforcement seeing data extracted from mobile phones as providing valuable "leads" for "gang databases," given the low bar for individuals and their information to be added to such databases. "Gang databases" are notorious, in part, for the loose standards and criteria upon which law enforcement rely to enter people into the databases. Factors can include things like "pictures of the individual displaying perceived gang signals on social media,"[157] "association with known gang members,"[158] "frequenting gang areas,"[159] and other indicators fabricated by law enforcement.[160] This discretion has led to extreme racial disparities in gang databases.[161] Critically, these designations can have profound effects on peoples' lives: it can "immediately make people ineligible for jobs and housing, subject to increased bail and enhanced charges, and more likely to get deported."[162] For law enforcement who operate gang databases, data extracted from a phone, like contacts, photos and videos, messages, location history, and more, would be of immediate interest.

Furthermore, forensic analysis tools make it easy for law enforcement to reexamine the contents of a previously extracted phone — it's as simple as opening a file on a computer. Absent specific policies or laws that require notifying someone that their phone has been searched,[163] it would

157 City of Chicago Office of Inspector General, *Review of the Chicago Police Department's "Gang Database,"* April 11, 2019, *available at* https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf.

158 Josmar Trujillo, Alex Vitale, *Gang Takedowns in the De Blasio Era: The Dangers of 'Precision Policing,'* The Policing and Social Justice Project at Brooklyn College, December 2019, *available at* https://static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf.

159 California State Auditor, The CalGang Criminal Intelligence System, Report 2015-130, August 2016, *available at* https://www.auditor.ca.gov/pdfs/reports/2015-130.pdf.

160 Stefano Bloch, "Are You in a Gang Database?" New York Times, February 3, 2020, *available at* https://www.nytimes.com/2020/02/03/opinion/los-angeles-gang-database.html.

161 Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 Cardozo L. Rev. 991 http://cardozolawreview.com/wp-content/uploads/2019/01/Stephan.40.2.9..pdf

162 *Id.*, 1018-1019.

163 For example, the New Mexico Electronic Communications Privacy Act requires notifications to the subject of an investigation contemporaneously with the execution of a warrant.

be impossible for those under investigation to know of — let alone challenge — situations where law enforcement continues to rifle through previously extracted data for new or unrelated investigations.

There are a small handful of state laws that do prescribe evidence retention periods specifically for digital evidence obtained from cellphones. For example, New Mexico's recently enacted Electronic Communications Privacy Act requires that "any information obtained through the execution of the warrant that is unrelated to the objective of the warrant be destroyed within thirty days after the information is seized and be not subject to further review, use or disclosure."[164] However, such laws are far from the norm, and most Americans are currently not protected by these types of data deletion or sealing requirements.

Expanding Searches From a Phone Into the Cloud

Digital forensics practitioners consider cloud data to be "a virtual goldmine of potential evidence."[165] A recent report from Cellebrite indicated that "one in every two cases requires access to cloud-based data."[166] As previously discussed in Section 2, major vendors like Cellebrite now sell tools that specifically help law enforcement parlay access to data stored on a phone into further access to data held in the cloud. These tools could, for instance, allow law enforcement to siphon and collect all data from an iCloud account, or all emails from a Gmail account. Or they could allow the police to impersonate the individual. These "cloud analyzer" tools, which are relatively new, represent an immense expansion of law enforcement investigatory powers.

Yet no agency turned over any policies that specifically control the use of cloud data extraction tools.

In theory, unless cloud-based data is specifically detailed in a search warrant for a mobile device, law enforcement should not be able to extract data from the cloud. Cloud extraction poses further challenges: collecting data after execution of a search should require a wiretap order. Search warrants allow for police to get data as of the time of the search warrant's issuance. But if data keeps coming in, this future collection should be treated like a wiretap.

164 *See* https://nmlegis.gov/Sessions/19%20Regular/final/SB0199.pdf. Similarly, California's Electronic Communications Privacy Act allows judges to, at their discretion, "require that any information obtained through the execution of the warrant or order that is unrelated to the objective of the warrant be destroyed as soon as feasible after the termination of the current investigation and any related investigations or proceedings." *See* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB178.

165 Ben Rossi, "CSI in the cloud: how cloud data is accelerating forensic investigations," Information Age, May 12, 2015, *available at* https://www.information-age.com/csi-cloud-how-cloud-data-accelerating-forensic-investigations-123459485/.

166 Cellebrite, 2020 Digital Intelligence Industry Benchmark Report: The top trends redefining Law Enforcement, *available at* https://www.cellebrite.com/en/insights/industry-report/.

The National Institute of Standards and Technology's Guidelines on Mobile Device Forensics advises law enforcement that "[r]etrieval and analysis of cloud based data should follow agency specific guidelines on cloud forensics."[167] But our research did not find any local agency policy that provided guidance on or control over cloud data extraction.

Rare Public Oversight

The adoption of mobile device forensic tools is almost always a secretive, obscured process.[168] Community engagement on the tools, like other surveillance technologies, is the very rare exception — and in some cases, dissenting voices are deliberately excluded from public discussion.[169] Where it does occur, it is substantially hindered by law enforcement secrecy. Even where existing governance structures ought to facilitate public debate regarding law enforcement use of these tools, these processes are skewed towards law enforcement.

167 Rick Ayers, Sam Brothers, Wayne Jansen, *Guidelines on Mobile Device Forensics*, NIST Special Publication 800-101, Revision 1, National Institute of Standards and Technology, May 2014, 47, *available at* https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-101r1.pdf.

168 To find evidence of community engagement and debate, we searched for news articles, opinion pieces, and editorials featured in local newspapers, and trawled through agendas of city councils and county commissions. For the most part, we were unable to locate much news coverage. To the extent we could find coverage, most local reporting we could identify simply reported the fact that a local law enforcement agency had already acquired a new mobile device forensic tool. Headlines like "Police can now access your iPhone without your help," "Local law enforcement using mysterious new tool to unlock cellphones," and "Charlottesville police buy equipment to crack locked iPhones" were common. Most news articles that address concerns with the technology only do so when reporting on objections raised by a third-party, like an ACLU lawsuit, or when journalists are prevented from accessing information. For example, in San Diego, NBC 7 recently published a story with the headline "Spy Games? Civil Rights Advocate Calls out San Diego PD's Covert Use of iPhone Spyware." See Brooks Jarosz, "Police can now access your iPhone without your help," KTVU Fox 2, July 19, 2018, *available at* https://www.ktvu.com/news/police-can-now-access-your-iphone-without-your-help; Jim Otte, "Local law enforcement using mysterious new tool to unlock cellphones," WHIO TV 7, November 22, 2018, *available at* https://www.whio.com/news/local/local-law-enforcement-using-mysterious-new-tool-unlock-cell-phones/W9zAfzQXrFsJmOJjO04TJK/; Bryan McKenzie, "City police purchase equipment to crack locked iPhones," The Daily Progress, November 2, 2018, *available at* https://www.dailyprogress.com/news/local/city-police-purchase-equipment-to-crack-locked-iphones/article_1299d766-df01-11e8-bb6e-8fafe6b93387.html; Ryan Poe, "The 901: This is why people don't trust Memphis police," Memphis Commercial Appeal, January 22, 2020, *available at* https://www.commercialappeal.com/story/news/local/the-901/2020/01/22/memphis-police-use-cellebrite-tool-but-wont-answer-questions-901/4533550002/; Dorian Hargorve, Mari Payton, Tom Jones, "Spy Games? Civil Rights Advocate Calls out San Diego PD's Covert Use of iPhone Spyware," NBC 7, August 18, 2020, *available at* https://www.nbcsandiego.com/news/investigations/spy-games-civil-rights-advocate-calls-out-san-diego-police-departments-covert-use-of-iphone-spyware/2387761/. Similarly, most of what we could identify from city councils and county commissioners or board or county supervisors resembled pro forma approval of budgets and resolutions that included mobile device forensic tools.

169 David Thomas, "City Council considers use of 'Textalyzer' technology," *Chicago Daily Law Bulletin*, January 12, 2018, https://www.chicagolawbulletin.com/archives/2018/01/12/city-council-reviews-textalyzer-tech-1-12-18.

There were a few notable exceptions, but public debate rarely translated into limits on law enforcement use of these tools. For example, the city council of Rochester, New York recently debated an ordinance to allow the Rochester Police Department to purchase a GrayKey.[170] During the city council meeting, the Chief of the Rochester Police Department claimed that the GrayKey would only be "used for solving the most violent crimes we have in Rochester, such as homicide or serious assaults." In response, one council member asked what the mechanism would be "to ensure that this [technology] is not used for things like a low-level drug offense?" The police chief indicated that "it has to be a certain level of criteria for a judge [to sign off] . . . so it can never be used for a traffic stop, for a marijuana violation." This claim is, at best, misleading.[171]

Every person who submitted comments to the city council urged the city council to vote no on the Rochester Police Department's request to purchase GrayKey. One person told the city council that "with the increasing concentration of highly personal information in electronic devices, information not historically available in any form under any type of seizure, tools like GrayKey constitute an unacceptable threat to Fourth Amendment protections."[172] Another person said that the tool should not be purchased "without explicit policies concerning its implementation, that would include the means to restrict which information is stored, shared, or which information is accessed." Yet another noted that "devices like this set a precedent for surveillance that more than often directly impacts marginalized communities, specifically black and brown communities." Ultimately, the city council voted unanimously to authorize the Rochester Police Department to purchase a GrayKey.[173]

Limited community engagement occurred in a handful of other jurisdictions. For example, Davis (CA) and Santa Clara County (CA) both enacted surveillance ordinances that are designed to "ensure residents, through local city councils are empowered to decide if and how surveillance technologies are used."[174] In both Davis and Santa Clara County, law enforcement had acquired

170 Rochester City Council Meeting, May 12, 2020, *available at* https://www.youtube.com/watch?v=xvLGo4XAI_E.

171 True, a judge must find probable cause exists to authorize a search warrant. Perhaps this is what the chief meant by "a certain level of criteria for a judge [to sign off]." But no law or policy restrictions prohibit a judge from issuing a search warrant to search a phone as a result of a traffic stop or marijuana violation.

172 Rochester City Council Meeting, Public Comment, https://www.youtube.com/watch?v=LJDHh2GARio.

173 City of Rochester, Ordinance No. 2020-146, May 13, 2020, *available at* https://www.cityofrochester.gov/WorkArea/DownloadAsset.aspx?id=21474844360; Gino Fanelli, "City Council greenlights GrayKey iPhone hacking tool for police," Rochester City Newspaper, May 12, 2020, *available at* https://www.rochestercitynewspaper.com/rochester/city-council-greenlights-graykey-iphone-hacking-tool-for-police/Content?oid=11779733.

174 These ordinances are part of a broader Community Control Over Police Surveillance (CCOPS) effort, which usually requires law enforcement to develop a surveillance technology use policy and a surveillance impact report before they can acquire new surveillance technology. *See* ACLU, "Community Control Over Police Surveillance," https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance.

MDFTs before the surveillance ordinances took effect. Nevertheless, the city council and county board of supervisors, respectively, still had to approve surveillance use policies for the tools. In Davis, community members voiced opposition to the use of MDFTs.[175] During an October 2018 public hearing, one commenter noted that "I can only see [this technology] being used to harm marginalized people and to harm people that are fighting [law enforcement] abuse."[176] Others noted the importance of making statistics on police use of technologies like MDFTs publicly available. Throughout the MDFT surveillance use policy approval process in Santa Clara, there was only one public comment. In both instances, the surveillance use policies were unanimously approved.

Our review of the processes in Davis and Santa Clara indicate that while surveillance ordinances could theoretically play an important role in governing surveillance technologies like MDFTs, their impact has limitations in practice. One reason is that, despite a dedicated process for community oversight, law enforcement agencies were still not forthright with information. For example, the Santa Clara County District Attorney withheld the make and model of its MDFTs from its surveillance use policy to "promote officer safety and maximize the benefits to be derived from the use of data extraction/examination forensic tools and software."[177] Similarly, the Davis Police Department's annual surveillance report on its use of Cellebrite UFED provides little helpful information. The report mentions that the tool was "used to serve criminal search warrants on 33 devices for 13 felony investigations,"[178] but provides no more detail. Further, in response to a standard request for "information, including crime statistics, that help the City Council assess whether the surveillance technology has been effective at achieving its identified purposes," the Davis PD merely responded that "use of the device is still the most effective way to access electronic information on a cellphone."[179]

175 City of Davis, City Council Meeting, Item 4.M, July 10, 2018 https://davis.granicus.com/player/clip/868?view_id=6.

176 *Id*.

177 County of Santa Clara, Office of the District Attorney Surveillance Use Policy, "Data Extraction/Examination Forensic Tools and Software," November 2018, at 1, FN 1, *available at* http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=180351&MeetingID=9769.

178 City of Davis, California, Memo to City Council, Surveillance Technology – 2019 Annual Surveillance Report, Cellebrite Universal Forensic Extraction Device, June 18, 2019, at 2, http://documents.cityofdavis.org/Media/Default/Documents/PDF/CityCouncil/CouncilMeetings/Agendas/20190618/08D-Surveillance-Tech-PD-Cellebrite.pdf.

179 *Id*., 8.

6. Policy Recommendations

We envision a society where systems of policing and incarceration are obsolete.[180] We therefore reject the necessity of both law enforcement and their investigatory tools. Based on our research, we believe that MDFTs are simply too powerful in the hands of law enforcement and should not be used.

Below, we offer a set of recommendations that we believe can bring us closer to this vision.[181] Recognizing that MDFTs are already in widespread use across the country, we offer a set of preliminary recommendations that we believe can, in the short-term, help reduce the use of MDFTs. At the margin, further increases in the already formidable tools and data available to law enforcement stand to amplify mass incarceration and worsen racial and other disparities. Therefore, we recommend policy steps that would reduce the tools and data available to law enforcement.

As we considered potential recommendations, we weighed whether or not each would likely reduce the scale of policing, whether it would reduce the tools and data available to law enforcement, and whether it would help challenge narratives that assume law enforcement will increase public safety.[182] We believe that the recommendations we make can limit the power of

180 Mariame Kaba, "Yes, We Mean Literally Abolish the Police," New York Times, June 12, 2020, *available at* https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html.

181 There were a number of recommendations we considered that we ultimately did not include because they did not fit within this framework: 1) *Implementing an offense-based restriction to the use of MDFTs to the most serious cases of harm*. This recommendation could significantly limit the number of cases where MDFTs are used. However, offense-based restrictions on surveillance technology have proven to be porous over time. Consider the Wiretap Act. In 1968, "twenty-four categories of offenses listed in Title III had a clear relationship to national security or organized crime." Since Title III's passage, "Congress has amended 18 U.S.C. §2516—the section of Title III that enumerates wiretap-worthy offenses—thirty-one times." Where gambling offenses made up the predominate number of wiretaps in the 1970s, drug-related offenses have taken over, " making up roughly 50 to 80 percent of intercept orders and applications from 1987 to the present." See Jennifer S. Granick et al., *Mission Creep and Wiretap Act 'Super Warrants': A Cautionary Tale*, 52 Loy. L.A. L. Rev. 431, 446-447 (2019). Moreover, offense-based restrictions implicitly concede that there are a category of certain offenses that justify the role of the police and their investigatory powers which we do not support. 2) *Reciprocal funding for public defenders to have mobile device forensic tools from existing grants*. Although this could benefit low-income defendants, and although public defenders are severely under-resourced, this kind of recommendation would further legitimize the use of these tools and overall increase their prevalence. We also believe that such a recommendation could have the perverse effect of starting an "arms race" in attempts to purchase these tools. 3) *Law enforcement agencies should adopt robust internal use policies*. We do not believe that law enforcement can or should be responsible for enforcing their own accountability or transparency.

182 We ask these questions based on the work of Critical Resistance. See Critical Resistance, "Reformist reforms vs. abolitionist steps in policing," http://criticalresistance.org/abolish-policing/.

the police, while not further entrenching the practices that remain. We also recognize that these recommendations are only the first steps in a broader strategy to minimize the scope of policing and reduce the options that police have to bring people into the criminal legal system.

Ban the Use of Consent Searches of Mobile Devices

Police consent searches in any context are troubling, but the power and information asymmetries of cellphone consent searches are egregious and unfixable. Accordingly, policymakers should ban the use of consent searches of cellphones. There are at least three reasons why.

The first reason is that the doctrine underlying "consent searches" is essentially a legal fiction.[183] Courts pretend that "consent searches" are voluntary, when they are effectively coerced. While the Supreme Court has held that the legality of a consent search depends on whether a "reasonable person would understand that he or she is free to refuse,"[184] the so-called "reasonable person" standard fails to account for the important racial differences in how individuals interact with law enforcement.[185] As one scholar noted, "many African Americans, and undoubtedly other people of color, know that refusing to accede to the authority of the police, and even seemingly polite requests—can have deadly consequences."[186] While the Supreme Court has held that consent cannot be "coerced, by explicit or implicit means,"[187] the notion that someone can actually feel free to walk away from an interaction with police has an "air of unreality" about it.[188] Given the extreme power asymmetries, it's a "simple truism that many people, if not most, will always feel coerced by police 'requests' to search."[189]

183 Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind. L. J. 773, 775 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.")

184 United States v. Drayton, 536 U.S. 194, 197 (2002).

185 Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val. U. L. Rev. 243, 248 (1991). ("Instead of acknowledging the reality that exists on the street, the Court hides behind a legal fiction. The Court constructs Fourth Amendment principles assuming that there is an average, hypothetical person who interacts with the police officers. This notion . . . ignores the real world that police officers and black men live in.")

186 Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 242-243 (2001). ("Given this sad history, it can be presumed that at least for some persons of color, any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm.") Indeed, as another scholar argued, the "consent search doctrine is the handmaiden of racial profiling." *See* George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 Miss L. J. 525, 542 (2003).

187 Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

188 United States v. Drayton, 536 U.S. 194, 208 (2002)(Souter, J., dissenting).

189 Marcy Strauss, *Reconstructing Consent*, 92 J.Crim. L. & Criminology 211, 221.(2001.)

A recent study designed "specifically to examine the psychology of consent searches" highlights the problems in relying on a so-called "reasonable person" to adjudicate consent searches.[190] Participants were brought into a lab and presented with "a highly invasive request: to allow an experimenter unsupervised access to their unlocked smartphone."[191] More than 97% of participants handed over their phone to be searched when requested to, even though only 14.1% of a separate group of observers said that a reasonable person would hand over their phone. The study reveals that there is a "systematic bias whereby *neutral third parties view consent as more voluntary, and refusal easier, than actors experience it to be*."[192] While there are plausible arguments that the lab-setting studies overestimate compliance rates in police searches, there are stronger arguments that they actually underestimate them.[193]

Second, someone consenting to a search of their phone likely doesn't even have a rough idea of what's really about to happen to their phone. The Fifth Circuit Court of Appeals recently held that a reasonable owner of a cellphone would functionally understand that a "complete" cellphone search "refers not just to a physical examination of the phone, but further contemplates an inspection of the phone's 'complete' content."[194] But, given the lack of public discussion of MDFTs, many people would likely be surprised by the power of the tools that law enforcement use to extract and analyze data from a phone. Further, most of the consent to search forms we obtained from law enforcement agencies don't clearly specify how they will search the phone, the tools they'll use, or the extent of the search.[195]

190 Roseanna Sommers, Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. (2019).

191 *Id*., 1980.

192 *Id*., 2019.

193 *Id*., 2007. ("First, police officers convey more authority than our experimenters likely did; our experimenters were college-aged peers dressed in street clothes, whereas police officers are government agents who wear badges and carry weap-ons. Second, in the policing context, citizens might feel that they are admitting guilt or acting suspiciously if they refuse a police officer's request. It is not clear that our participants would have felt it was self-incriminating to refuse the experimenter's request. Third, to the extent our participants were aware of the pol-icies regulating university research, they would have known that their participa-tion was completely voluntary and that they were free to quit at any time. Most people stopped by the police, by contrast, do not believe they can just walk away.")

194 United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020), at 10.

195 The Denver Police Department's consent form mentions that devices may be submitted "to the computer forensic laboratory for copying and examination." *See* https://beta.documentcloud.org/documents/20390003-consent-for-search-of-cell-phone-tablet. The Tampa Police Department's mentions that "this search may require the temporary utilization of software and/or hardware." *See* https://beta.documentcloud.org/documents/20393153-tpd-form-142-e-consent-to-search-electronic-media-devices-english. The Colorado State Patrol's consent form mentions that they can "submit the electronic device described below to a computer/electronic forensic examiner . . . who has specialized training necessary to conduct such an examination." *See* https://beta.documentcloud.org/documents/20391059-csp-343-consent-to-search-electronic-device. The Illinois State Police's consent to search form mentions that their search "may include the duplication/imaging and complete forensic analysis of any data contained within the internal, external, andlor removable storage media of this device." *See* https://beta.documentcloud.org/documents/20391550-img_0001.

Finally, law enforcement can do almost anything with data extracted from a cellphone after someone consents. At least one case appears to suggest that, so long as a consent form is written broadly enough, there's no limit on when law enforcement could re-examine a cellphone extraction.[196] The consent form at issue in that case and the consent forms we obtained are strikingly similar. One form from the Indianapolis Metropolitan Police Department says that "said search may take an extended period of time, however this time normally does not exceed sixty (60) days from the time of consent." The U.S. Border Patrol claims they can store data extracted from phones searched at the border for 75 years.[197]

Banning consent searches is not a new suggestion.[198] Nor is it a perfect solution, as it's easy for law enforcement to obtain a search warrant. But banning consent searches of cellphones can help limit police discretion, limit the coercive power of police, and minimize the amount of information that can be collected from people under investigation. State and local policymakers should ban consent searches of cellphones.

Abolish the Plain View Exception for Digital Searches

The plain view exception for digital searches should be eliminated. In a digital search, forensic analysis software can far too easily expose data unrelated to the immediate search, unrestricted by where the data physically resides on the phone. The idea that digital evidence can exist "in plain view" in the way that physical evidence can, when considering how software can display and sort over-seized data, is incoherent.

For physical searches, the plain view exception to the warrant standard allows law enforcement to seize evidence in plain view of any place they are lawfully permitted to be, if the incriminating character of the evidence is immediately apparent.[199] For example, if law enforcement were lawfully searching a house for stolen credit cards, but came across cocaine on the kitchen

196 United States of America v. Cristofer Jose Gallegos-Espinal, (No. 19-20427) (5th. Cir. 2020).

197 Department of Homeland Security, Privacy Impact Assessment, U.S. Border Patrol Digital Forensics Programs, DHS Reference No. DHS/CBP/PIA-053(a), July 30, 2020.

198 For example, the New Jersey Supreme Court outlawed consent searches during traffic stops where no reasonable suspicion exists. The California Highway Patrol banned its use of consent searches as part of a broader class action lawsuit brought because of racial profiling. And in Rhode Island, by law, "[n]o operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."

199 Horton v. California, 496 U.S. 128, 130 (1990).

counter, the plain view exception would allow law enforcement to seize the drugs.[200] In other words, if law enforcement are authorized to search for one thing, but come across another thing that's clearly incriminating, the plain view exception allows them to seize that thing.

This exception may have made sense in the physical world, but it collapses in the digital world. When law enforcement extract all of the data from a cellphone, and then perform a search across all of that data, everything comes into "plain view." Traditionally, the plain view exception is limited by a range of physical factors, such as the size and opacity of closed containers. Only so much can become visible, lawfully, during a search of a physical environment, like the home.

Each of these limitations is upset by the digital environment. In digital searches, "[n]early everything can come into plain view and be subject to use in unrelated cases. The result seems perilously like the regime of general warrants that the Fourth Amendment was enacted to stop."[201] Because forensic software continues to provide law enforcement with ever more powerful search capabilities, the notion of data being "in plain view" is without limit.[202] A search for one kind of digital evidence will almost inevitably reveal troves of other digital evidence.[203] Searching for certain data or keywords, organizing data chronologically, or clicking on different types of extracted data fundamentally changes what's in "plain view" for the investigator.

The Supreme Court has held that the plain view exception "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."[204] The trouble is, "[c]urrent law allows computer searches for evidence to look disturbingly like searches for all evidence."[205]

200 Emily Berman, *Digital Searches, The Fourth Amendment, and the Magistrates' Revolt*, 68 Emory L. J. 49, 59 (2018). ("According to this doctrine, if the police have a warrant to search a home for firearms used in a robbery and see drugs sitting on a table upon entering the house, for example, those drugs may be seized as well. Imagine that officers seeking evidence of tax fraud come across email messages indicating that the suspect has enlisted a hitman to kill someone. Absent explicit restrictions, the suspect may now be charged not only with tax fraud, but also with attempted murder and solicitation. And while that example may not garner much sympathy for the suspect, who was,after all, soliciting murder, it represents a government intrusion into a private realm for which there was no probable cause and no warrant.")

201 Orin Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 Tex. Tech L. Rev. 1 (2015) (symposium keynote), 11.

202 Most software allows the user to sort by file type — for example, showing all images files in one group, regardless of where they were on the phone. Thus, even though files retain information on their location within the phone, they are not bound by this location when being searched for.

203 Orin S. Kerr, S*earches and Seizures in a Digital World*, 119 Harv. L. Rev. 531 (2005).

204 Coolidge v. New Hampshire, 406 U.S. 443, 466 (1971).

205 Orin Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 Tex. Tech L. Rev. 1 (2015) (symposium keynote), 10-11

As it stands today, the basic equation for digital searches of cellphones is this: technologies like MDFTs empower law enforcement to seize everything and see everything, and the plain view exception effectively allows law enforcement to do anything during those searches. The result: protections guaranteed by the Fourth Amendment are made meaningless. The response from courts across the United States has been tepid, at best. Intervention is necessary.

It's worth considering the counterarguments. One frequent argument in support of the plain view exception for digital searches is that investigators cannot be restricted in their search because potential suspects can and will conceal evidence within a computer's storage.[206] As the argument goes, suspects may obfuscate the location of information by storing data in unanticipated places, with random file names and paths to mislead an investigator. As a result, digital evidence can exist anywhere on a device and investigators need the legal tools to find it.

While someone can fairly easily change where data is stored on a computer, it's significantly more difficult — and in many instances, technically impossible[207] — on cellphones. A cellphone's user interface is significantly more limiting than a desktop computer's, often restricting the ways that users can manipulate files. On a desktop, it's easy to move files around, change file names, or save files into folders or subfolders. Such capabilities are far more limited on a mobile device. Nevertheless, MDFTs allow police to search all of the data on the phone, as if most users have the technical expertise to hide data in arbitrary locations on their phone. With cellphones in particular, the argument that evidence could be hidden anywhere rings hollow.

Abolition of the plain view exception could take several forms. Congress could pass a law to bar the plain view exception for digital searches by amending Rule 41 of the Federal Rules of Criminal Procedure. State legislatures in states that have criminal procedure rules could take similar action. And judges could require, as a condition of issuing a search warrant, that law enforcement agents forswear reliance upon the plain view exception.

The Supreme Court has held that "a cellphone search would typically expose to the government far *more* than the most exhaustive search of a house."[208] As a result, it's time to address the existing loopholes in Fourth Amendment doctrine.

206 Department of Justice, Computer Crimes and Intellectual Property Section, Criminal Division, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations Manual*, ("[c]riminals can mislabel or hide files and directories . . . attempt to delete files to evade detection, or take other steps designed to frustrate law enforcement searches for information. These steps may require agents and law enforcement or other analysts with appropriate expertise to conduct more extensive searches . . . or peruse every file briefly to determine whether it falls within the scope of the warrant.")

207 iOS — Apple's mobile operating system for iPhones — does not allow a user to do any of this.

208 Riley v. California, 573 U.S. 373, 396 (2014).

Require Easy-to-Understand Audit Logs

State and local policymakers should require that mobile device forensic tools used by law enforcement have clear recordkeeping functions, specifically, detailed audit logs and automatic screen recording. This would incentivize MDFT vendors to build this functionality. With such logs, judges and others could better understand the precise steps that law enforcement took when extracting and examining a phone, and public defenders would be better equipped to challenge those steps. Audit logs and screen recordings[209] would document a chronological record of all interactions that law enforcement had with the software, such as how they browsed through the data, any search queries they used, and what data they could have seen.[210]

There is an extreme power and resource imbalance between public defenders and law enforcement.[211] This disparity is only exacerbated by defenders' technological and resource disadvantage: Few public defenders have access to MDFTs. Instead, defenders are often forced to examine forensic reports that are thousands of pages long and "easily navigable only if you have a forensic company's proprietary software."[212] Further, defenders and judges often have no way of knowing whether law enforcement actually stayed within the bounds of a search warrant for a phone. For courts, simply taking law enforcement's word for it should be insufficient — lying under oath is endemic to the institution of American policing.[213] Audit logs would be especially helpful for defenders trying to suppress evidence that was obtained in a prohibited manner.

209 One potential issue with screen recording is the presence of CSAM or other sensitive material.

210 In order to function, software responds to specific events that the user triggers. This means that user activity can be logged at the point of it activating a response from the program.

211 Research has demonstrated that fewer than 30 percent of county-based and 21 percent of state-based public defender offices have enough attorneys to adequately handle their caseloads. *See* Bureau of Justice Statistics, Lynn Langton and Donald Farole Jr., *County Based and Local Public Defender Offices, 2007* (2010), 8, https://www.bjs.gov/content/pub/pdf/clpdo07.pdf; Bureau of Justice Statistics, Lynn Langton and Donald Farole Jr., *State Public Defender Programs, 2007* (2010), 12, www.bjs.gov/content/pub/pdf/spdp07.pdf. *Also see* Justice Policy Institute, *System Overload: The costs of Under-Resourcing Public Defense, 2011*, available at http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf; American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004); Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, Brennan Center, September 9, 2019, *available at* https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf.

212 Kashmir Hill, "Imagine Being on Trial. With Exonerating Evidence Trapped on Your Phone." New York Times, November 22, 2019, *available at* https://www.nytimes.com/2019/11/22/business/law-enforcement-public-defender-technology-gap.html.

213 *See*, e.g., Irving Younger, "The Perjury Routine," The Nation, May 8, 1967; Myron R. Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 Chi. L. Rev. 1016 (1987); Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, City of New York, Commission Report (1994) at 38; Stanley Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. Eng. L. Rev. (1993); Joseph Goldstein, "'Testilying' by Police: A Stubborn Problem," The New York Times, March 18, 2018, *available at* https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html; Peter Keane, "Why cops lie," San Francisco Chronicle, March 15, 2011; Michael Oliver Foley, *Police Perjury: A Factorial Survey*, (2000); Samuel Gross, et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, National Registry of Exoneration, September 1, 2020, *available at* https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

This recommendation even comports with principles articulated by law enforcement associations, like the Association of Chief Police Officers, which has said that "[a]n audit trail . . . of all processes applied to digital evidence should be created and preserved. An independent third party should be able to examine those processes and achieve the same result."[214]

Critically, audit logging is unlikely to be an effective tool for broad transparency and police accountability.[215] This tool will not improve police behavior. But on a case-by-case basis, this tool could give public defenders and judges a significantly clearer window into the nature and extent of cellphone searches.

Enact Robust Data Deletion and Sealing Requirements

State and local lawmakers should require law enforcement to delete any extracted cellphone data that is not related to the objective of the warrant within thirty days from the date the information is obtained.[216] In addition, for cases that result in a conviction, data that was deemed relevant should be sealed at the conclusion of the case. For other cases, where charges are dismissed or do not result in conviction, all data should be deleted, relevant or not. Data deemed relevant in one case should never be used for general intelligence purposes or used in unrelated cases.

As we explained in Section 5, in the absence of clear law or policy, law enforcement could use personal information like contact lists, photos, and location data to fuel police surveillance systems. This is true not only of the data of the person whose phone was searched, but also that of anyone they have been in contact with using their phone. Cellphone searches are unlike traditional seizures because law enforcement extracts all of the data on the device and subsequently searches for case-relevant information. Maintaining information outside the scope of the warrant is akin to law enforcement maintaining the ability to indefinitely and limitlessly search a home.

214 Association of Chief Police Officers, *APCO Good Practice Guide for Computer based Electronic Evidence*, March 2012, available at https://www.digital-detective.net/digital-forensics-documents/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf. *Also see*: Rick Ayers, Sam Brothers, Wayne Jansen, *Guidelines on Mobile Device Forensics*, NIST Special Publication 800-101, Revision 1, National Institute of Standards and Technology, May 2014, *available at* https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-101r1.pdf. (noting that "[p]roper documentation is essential in providing individuals the ability to re-create the process from beginning to end."); Scientific Working Group on Digital Evidence, SWGDE Best Practices for Mobile Phone Forensics, Feb. 11, 2013, *available at* https://drive.google.com/open?id=18dwENQNztbEa0G9GLSUeDxZxeDEeUc-3 (noting that documentation should include "sufficient detail to enable another examiner, competent in the same area of expertise, to repeat the findings independently.").

215 Based on lessons from body-worn cameras, there is little reason to believe that simply being recorded will alter the behavior of an investigator who can justify their actions after the fact. We are more concerned with defenders having the ability to successfully suppress evidence and to not be at a disadvantage in getting exonerating evidence.

216 The only exception should be for exculpatory information.

Policies requiring this kind of data deletion or sealing already exist in New Mexico, Utah, and California.[217] Additionally, New York requires all arrest records for any person not convicted of a crime to be sealed.[218]

There is clear potential for abuse of this kind of policy if law enforcement unilaterally determines the relevancy of data to the warrant. Such abuse can partially be mitigated by requiring clear defense access to the extracted data so they can challenge law enforcement's inclusion or exclusion of information. Audit logs would also help.

Clear retention requirements could not only help hold law enforcement accountable to the scope of the warrant, but could also significantly limit the data that law enforcement could include in internal systems like intelligence databases, "gang databases," and predictive policing tools.[219]

Require Clear Public Logging of Law Enforcement Use

State and local policymakers should require public reporting and logging for how law enforcement use mobile device forensic tools. These records should be released at least monthly, as this would allow more immediate access to information by advocates, policymakers, and the public seeking to understand the capabilities of their police agency. Agencies should additionally release annual reports on overall department usage.

217 New Mexico's Electronic Communications Privacy Act, Section 3.D.2 ("except when the information obtained is exculpatory with respect to the natural person targeted,require that any information obtained through the execution of the warrant that is unrelated to the objective of the warrant be destroyed within thirty days after the information is seized and be not subject to further review, use or disclosure.") *See* https://nmlegis.gov/Sessions/19%20Regular/final/SB0199.pdf; Utah's Electronic Information or Data Privacy Act, Section 1.B, 1.D ("electronic information or data [that is not the subject of the warrant] shall be destroyed in an unrecoverable manner by the law enforcement agency as soon as reasonably possible after the electronic information or data is collected.") *See* https://le.utah.gov/~2019/bills/static/HB0057.html; California's Electronic Communications Privacy Act, 1546.1(d)(2) ("The warrant shall require that any information obtained through the execution of the warrant that is unrelated to the objective of the warrant shall be sealed and not subject to further review, use, or disclosure without a court order."); 1546.1(e)(2) ("When issuing any warrant or order for electronic information, or upon the petition from the target or recipient of the warrant or order, a court may, at its discretion, do any or all of the following: . . . Require that any information obtained through the execution of the warrant or order that is unrelated to the objective of the warrant be destroyed as soon as feasible after the termination of the current investigation and any related investigations or proceedings.). *See* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB178.

218 *See* https://codes.findlaw.com/ny/criminal-procedure-law/cpl-sect-160-50.html.

219 Rashida Richardson, Amba Kak, "It's Time for a Reckoning About This Foundational Piece of Police Technology," Slate, September 11, 2020, *available at* https://slate.com/technology/2020/09/its-time-for-a-reckoning-about-criminal-intelligence-databases.html.

These records should include aggregate information on how law enforcement is using MDFTs, including:

- How many phones were searched in a given time period.
- Whether those searches were by consent (though consent searches should be banned), or through a warrant.
- Warrant numbers associated with searches, when applicable.
- The type(s) of offenses being investigated.
- How often the tools led to successful data extractions.
- Explanations for any failed extractions.
- Which tools were used for extraction and analysis, and their version numbers.

Understanding how, when, and under what legal authority law enforcement use these powerful technologies can increase transparency and accountability.[220] Beyond mere transparency, these kinds of records are important as they can help advocates, researchers, policymakers, and the public effectively pursue policies that reduce the power and scope of law enforcement. More broadly, these kinds of records can help challenge law enforcement's narrative surrounding how, when, and why these tools are used.

While this kind of public reporting can be helpful, it will not inherently lead to a responsible or decreased use of MDFTs by law enforcement. Take wiretapping as an example. Federal law requires an annual reporting of the number of "applications for orders authorizing or approving the interception of wire, oral, or electronic communications."[221] But there is evidence of widespread underreporting of wiretaps.[222] Transparency reports published by wireless service providers like AT&T, Sprint, T-Mobile, and Verizon "state that they implemented three times as many wiretaps as the total number reported by the Administrative Office of the Courts."[223] This casts doubt on whether public reporting of MDFT usage will accurately represent their usage

220 In fact, in a similar context, wiretapping, the Administrative Office of the United States Courts annually reports the number of federal and state "applications for orders authorizing or approving the interception of wire, oral, or electronic communications," including "the offense specified in the order." *See* 18 U.S.C. 2519(2)-(3).

221 18 U.S.C. 2519(1)-(3).

222 Jennifer S. Granick, Patrick Toomey, Naomi Gilens, Daniel Yadron Jr., *Mission Creep and Wiretap Act 'Super Warrants': A Cautionary Tale*, 52 Loy. L.A. L. Rev. 431, 446. ("Despite the statute's reporting requirements, some scholars have raised concerns that the official number of wiretaps is inaccurately low.")

223 *Id*.

by law enforcement. Worse, law enforcement could manipulate these records in order to justify increased funding. However, given that MDFT reporting should include warrant numbers and more detailed information than Title III reporting requires, there is less opportunity for the inaccuracies rampant in aggregate reporting.

Ultimately, this information will still be useful even if incomplete. Policymakers and advocates should remain cautious in using the information agencies report, and cross-reference with other sources of information, like warrants, public records, and reports from individuals and public defenders.

7. Conclusion

Our research shows that every American is at risk of having their phone forensically searched by law enforcement. Significantly more local law enforcement agencies have access to this technology than previously understood. These agencies use the tools far more than previously documented, and use them in a broad array of cases. They do so with few policies or legal constraints in place. Given how routine these searches are today, and given racist policing practices, it's more than likely that these technologies disparately affect and are used against communities of color. Put together, this report documents a dangerous expansion in law enforcement's investigatory power.

For too long, public debate and discussion regarding these tools has been abstracted to the rarest and most sensational cases in which law enforcement cannot gain access to cellphone data. We hope that this report will help recenter the conversation regarding law enforcement's use of mobile device forensic tools to the on-the-ground reality of cellphone searches today in the United States.

Acknowledgements

This work would not be possible without the tireless work of our colleagues and partners. We are grateful to them, and we take responsibility for any errors that remain here. Special thanks to Jerome Greco and The Legal Aid Society for allowing us to visit their Digital Forensics Unit, and for providing us with assistance since the beginning of this project. Also special thanks to Cameron Cantrell and Sarika Ram for their research as Summer Fellows at Upturn, and to Ming Hsu for his work on the maps in this report.

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For *pro bono* representation of Upturn in our litigation under New York's Freedom of Information Law to compel the NYPD to produce documents related to its use of mobile device forensic tools, we'd also like to thank Albert Fox Cahn, the Executive Director of the Surveillance Technology Oversight Project and Shearman & Sterling, LLP.

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Appendix A: Methodology

In order to determine how many law enforcement agencies have purchased mobile device forensic tools, we sent more than 110 public records requests to a wide range of law enforcement agencies.

We began our public records survey in February 2019. We sent public records requests to a variety of law enforcement agencies: police departments, sheriff offices, district attorneys' and prosecuting offices, state law enforcement, and forensics labs across the country. We also sent records requests to Departments of Finances and Departments of Procurement, many of which keep records of purchases. We sent records requests to the country's 50 largest local police departments, as well as many of the largest state law enforcement agencies.[224] We also sent requests to smaller law enforcement agencies where previous public reporting indicated the purchase of MDFTs.

Many departments provided us some records in response to our requests — some provided full responses, some provided limited responses. As we expected, some departments denied our requests. For example, both the Baltimore and Cincinnati Police Departments denied our requests based on investigatory methods and technique exemption to public disclosure. Others quoted exorbitant fees to fulfill our records request, which we've declined to pay. For example, the Fairfax County (VA) Police Department quoted us $10,349, the Missouri State Highway Patrol quoted us $1,324, and the Jacksonville Sheriff's Office quoted us more than $700,000 to fulfill our requests. Other agencies simply have not responded in a determinative way.
Beyond public records requests to individual agencies, we supplemented our research in four other ways.

First, we explored existing, publicly available reporting or information, through services like MuckRock or other media reporting.

Second, we explored various open databases from city, county, and state governments, which document spending and vendor payments. Such databases often provide a transparent view into government purchasing as a whole, and contain specific purchasing information on MDFTs. In many instances, these databases helped us determine if a police department had purchased MDFTs, even if the department denied our records request. For example, although the Cincinnati

224 U.S. Department of Justice, Bureau of Justice Statistics, "Census of State and Local Enforcement AGencies, 2008," July 2011, Appendix Tables 5, 8 *available at* https://www.bjs.gov/content/pub/pdf/csllea08.pdf.

Police Department denied our records request, a publicly available dataset indicates the police department paid more than $100,000 to vendors like Cellebrite, Grayshift, and MSAB. Similarly, although the Detroit Police Department quoted us over $1,000 to fulfill our request, the City of Detroit's Open Data Portal reveals that the Detroit Police Department paid at least $30,000 to Cellebrite.

Third, we searched databases that document federal grantmaking to local law enforcement agencies. Some data on federal grants helped us determine that a law enforcement agency purchasedMDFTs even if the agency denied our records request. For example, although the Bronx District Attorney's Office denied our request, the office is, among other things, funded through the Coverdell Forensics Science Improvement Grant to "to acquire the Cellebrite Advanced Universal Forensic Extraction Device software solution."

Finally, we used GovSpend, which is a database of government contracts and purchase orders. GovSpend aggregates purchase order data from local, state, and federal government agencies, to provide inter-agency transparency on costs. The database is also open to certain non-governmental parties, like news media organizations. We used GovSpend to better understand the scale of MDFT purchases across the country.

In all, we received more than 12,000 pages of documents in response to our records requests.

Appendix B: Public Records Request Template

[Date]
[Agency Address]

Re: [State Records Request Law] Request

To Whom it May Concern:

This is a request under the [State Records Request Law and citation], on behalf of Upturn, a 501(c)(3) nonprofit organization based in Washington D.C. Our mission is to promote equity and justice in the design, governance, and use of digital technology. This request seeks records relating to the [Agency's] use of mobile device forensic technologies, as well as the Department's policies and procedures governing such use.

Background

Due to the ubiquity of mobile devices, law enforcement sees the data stored on mobile devices, like cellphones, as key sources of evidence for investigations. However, mobile devices can contain large amounts of people's sensitive and private information, much of which may be irrelevant to a given investigation. As the Supreme Court recognized five years ago in *Riley v. California*, "[o]ne of the most notable distinguishing features of modern cellphones is their immense storage capacity." As such, forensic searches of mobile devices are often highly invasive, and we believe that such searches by law enforcement are increasingly common.

Mobile device forensic tools (MDFTs) are used by law enforcement to extract data from mobile devices. In some cases, if the data on the mobile device is encrypted, some MDFTs can help law enforcement circumvent a device's security features in order to access otherwise inaccessible data. These capabilities have been the subject of broad public debate, for example, in the aftermath of the high-profile San Bernardino shooting in 2015. Whether or not devices are encrypted, law enforcement's use of MDFTs is an issue of significant public interest.

Currently, there is a considerable lack of public information available regarding how local law enforcement agencies use MDFTs, and the policies and procedures that govern such use. The public is entitled to understand the Department's activities and capabilities with respect to MDFTs, and this request seeks to further the public's understanding.

Public Records Request

Upturn seeks records regarding the Department's use of **mobile device forensic tools (MDFTs)**. This includes any software, hardware, process, or service that is capable of any of the following:

- extracting any data from a mobile device,
- recovering deleted files from a mobile device, or
- bypassing mobile device passwords, locks, or other security features.

Examples of MDFTs include, but are not limited to, products or services offered by vendors such as Cellebrite, Grayshift, Oxygen Forensics, BlackBag Technologies, Magnet Forensics, MSAB, AccessData, Paraben, Katana Forensics, BK Forensics, and Guidance Software/OpenText.

Upturn specifically requests the following records under the [applicable state law]:

1. Purchase Records and Agreements: Any and all records reflecting an agreement for purchase, acquisition, or license of MDFTs, or permission to use, test, or evaluate MDFTs since 2015.
2. Records of Use: Any and all records describing the Department's use of MDFTs since 2015.
    a. In particular, we seek records reflecting the department's aggregate use of MDFTs. For example, monthly reports that reflect the total number of MDFT cases for each month, broken down by type of crime, and number and type of phones, and number and type of other devices.
        i. Please specify any instances where the department used Cellebrite Advanced Services, or otherwise transferred possession of a device or its contents to a vendor for off-site processing, including Regional Computer Forensics Laboratories.
        ii. Please include any instances of forensic examination of a device (e.g. using JTAG or chip-off processes) that may not involve a vendor's product.
3. Policies Governing Use: Any and all records regarding policies and guidelines governing the use of MDFTs, including but not limited to: training materials regarding their operation, restrictions on when they may be used, limitations on retention and use of collected data, security measures taken to protect stored and in-transit data, guidance on when a warrant or other legal process must be obtained, and guidance on when the existence and use of MDFTs may be revealed to the public, criminal defendants, or judges.

Information About the Request

Upturn appreciates [Agency's] attention to this request. According to [applicable state law], your agency must comply with a request [within X business days / timeframe]. Further, under [applicable state law] we request a fee waiver. As Upturn is a non-profit organization, and disclosure of requested records will promote public awareness and knowledge of governmental action, we are requesting that fees associated with this request be waived. If you determine that a fee waiver is not appropriate in this instance, and if the estimated cost associated with fulfilling this request exceeds $25, please contact me before proceeding to fulfill our request.

Please furnish all applicable records in electronic format to records@upturn.org. For records available only in a physical format, please send such records to:

Upturn
1015 15th St. N.W. Suite 600
Washington, D.C., 20005

Should you have any questions concerning this request, please contact Logan Koepke by telephone at (214) 801-4499 or via e-mail at logan@upturn.org.

Sincerely,

Logan Koepke
Emma Weil

Appendix C: Total Amounts Spent on MDFTs

Law Enforcement Agency	Amount Spent (at least)	Vendors
Anoka County Sheriff	$34,205	AccessData, BlackBag Technologies, Cellebrite, CRU, Guidance Software, Katana Forensics, Magnet Forensics, Micron Consumer Products Group, MSAB, Paraben Corporation
Arizona Department of Public Safety	$110,605	Grayshift, Cellebrite, BlackBag Technologies, Magnet Forensics, Tritech Forensics
Atlanta Police Department	Unknown	Unknown
Austin Police Department	$92,719	AccessData, BlackBag Technologies, Cellebrite, Grayshift, Guidance Software, Magnet Forensics
Baltimore County Police Department	Unknown	Unknown
Bend Police Department	$62,761	Cellebrite
Bernalillo District Attorney	$35,354	Cellebrite
Broward County Sheriff	$563,091	Cellebrite, Grayshift, Oxygen Forensics, Magnet Forensics, MSAB, BlackBag Technologies, AccessData, Katana Forensics, Guidance Software
California DOJ	$225,449	Cellebrite
California Highway Patrol	$25,289	BlackBag Technologies, Cellebrite, MSAB

Law Enforcement Agency	Amount Spent (at least)	Vendors
Charlotte-Mecklenburg Police Department	$181,557	BlackBag Technologies, Cellebrite, Grayshift, MSAB
Chicago Police Department	$31,830	Cellebrite
City of Miami Police Department	$66,558	Cellebrite
Collin County Sheriff	$90,724	Cellebrite, Magnet Forensics
Colorado State Patrol	$56,345	Cellebrite, Federal Law Enforcement Training CT
Columbus Police Department	$114,656	AccessData, Grayshift, Magnet Forensics, Oxygen Forensics, Cellebrite
Cook County District Attorney	$17,495	Cellebrite
Cook County Sheriff's Office	$37,342	Cellebrite
Dallas County District Attorney	$4,902	AccessData, BlackBag Technologies, Cellebrite, Katana Forensics
Dallas Police Department	$482,542	Cellebrite, GTS Technology Solutions, Cellebrite
DC Department of Forensic Sciences	$57,414	Cellebrite, MSAB
DC Metropolitan Police Department	$21,693	Cellebrite
DeKalb Police Department	$4,865	AccessData
Denver Police Department	$51,170	Cellebrite, Cellebrite
El Paso Police Department	Unknown	Unknown

Law Enforcement Agency	Amount Spent (at least)	Vendors
Fairfax County Police Department	Unknown	Unknown
Fort Worth Police Department	$120,921	AccessData, BlackBag Technologies, Cellebrite, Grayshift, MSAB, Oxygen Forensics, Magnet Forensics
Gwinnett County District Attorney	$66,388	H-11 Digital Forensics, Cellebrite, Oxygen Forensics, Magnet Forensics, Susteen, Cleverbridge, Passware
Harris County Sheriff	$176,854	BlackBag Technologies, Cellebrite, Katana Forensics, Magnet Forensics, MSAB
Hennepin County Sheriff	$59,661	Cellebrite, Grayshift
Honolulu Police Department	$60,212	Cellebrite
Houston Police Department	$210,255	AccessData, Cellebrite, Magnet Forensics, MSAB
Illinois State Police	$157,147	Cellebrite, Grayshift, Guidance Software, Magnet Forensics
Indiana State Police	$513,517	BlackBag Technologies, Cellebrite, Magnet Forensics, Grayshift, Katana Forensics, MSAB, OpenText, Oxygen Forensics
Indianapolis Metropolitan Police Department	$153,341	BlackBag Technologies, Cellebrite, Grayshift, Guidance Software, Katana Forensics, Magnet Forensics, MSAB
Iowa Department of Public Safety	$133,324	Cellebrite
Jacksonville County Sheriff	$22,728	Grayshift, Cellebrite

Law Enforcement Agency	Amount Spent (at least)	Vendors
Jefferson Parish Sheriff's Office	Unknown	Unknown
Kansas City Police Department	$81,688	Cellebrite
Las Vegas Metropolitan Police Department	$646,229	AccessData, BlackBag Technologies, Cellebrite, Guidance Software, Katana Forensics, Magnet Forensics, MSAB, EnCase Forensics
Los Angeles District Attorney	$55,795	Cellebrite, Grayshift
Los Angeles Police Department	$358,426	BlackBag Technologies, MSAB, Cellebrite, Guidance Software
Louisville Metro Police Department	$65,692	Cellebrite
Manhattan District Attorney	$638,676	Cellebrite
Massachusetts State Police	Unknown	Unknown
Miami Dade Police Department	$337,072	Cellebrite
Milwaukee Police Department	$7,400	Cellebrite
Modesto Police Department	$147,117	BlackBag Technologies, Grayshift, Cellebrite, AccessData
Nassau Police Department	$64,274	Cellebrite, MSAB, Oxygen Forensics

Law Enforcement Agency	Amount Spent (at least)	Vendors
New York County District Attorney	$495,315	Cellebrite, BlackBag Technologies, Final Data, Forensic Computers Inc, Grayshift, Magnet Forensics, MSAB, EnCase Forensics, AccessData, Teel
New York Police Department	$30,000	Grayshift
North Carolina Department of Public Safety	$122,621	AccessData, Cellebrite, Guidance Software, Katana Forensics, Magnet Forensics, MSAB, OpenText
Ohio State Highway Patrol	$75,088	BlackBag Technologies, Cellebrite, Grayshift, Magnet Forensics
Oklahoma City Police Department	$33,890	Cellebrite, Grayshift, Magnet Forensics, AccessData
Orange County District Attorney	$24,187	Cellebrite, Susteen
Pennsylvania State Police	$540,625	Cellebrite, Magnet Forensics, MSAB, Grayshift, Oxygen Forensics
Pennsylvania State Police	$623,929	Cellebrite, Magnet Forensics, MSAB, Grayshift, Oxygen Forensics
Philadelphia District Attorney	$64,506	AccessData, Cellebrite, Katana Forensics, Magnet Forensics
Phoenix Police Department	$117,460	Cellebrite
Portland Police Bureau	$261,119	AccessData, Cellebrite, Grayshift, Magnet Forensics, MSAB, Oxygen Forensics
Prince George's Police Department	$67,300	Cellebrite
Riverside County Sheriff	$180,535	Cellebrite

Law Enforcement Agency	Amount Spent (at least)	Vendors
Sacramento Police Department	$94,051	Cellebrite, Grayshift, EnCase Forensics
San Bernardino Sheriff	$270,380	BlackBag Technologies, Cellebrite, Guidance Software, Magnet Forensics, MSAB
San Diego District Attorney	$164,499	Cellebrite, Grayshift, Magnet Forensics, MSAB
San Diego Police Department	$232,999	Cellebrite, Grayshift, Magnet Forensics, MSAB, OMC2 LLC/Bantam Tools, Teel
San Francisco Police Department	$40,935	Cellebrite
San Jose Police Department	$296,363	BlackBag Technologies, Cellebrite, Grayshift, Guidance Software, Katana Forensics, Magnet Forensics, MSAB
Santa Clara District Attorney	$233,203	Grayshift, Cellebrite, MSAB, AccessData, Guidance Software
Seattle Police Department	$240,837	Cellebrite, MSAB, Magnet Forensics, Grayshift
Spokane Police Department	$255,369	Cellebrite
St. Joseph County Prosecutor	$14,626	AccessData, Cellebrite, Magnet Forensics
St. Louis Police Department	$26,652	AccessData, BlackBag Technologies, Cellebrite, MSAB, Oxygen Forensics
Suffolk County District Attorney	$31,195	Cellebrite

Law Enforcement Agency	Amount Spent (at least)	Vendors
Suffolk County Police Department	$34,671	BlackBag Technologies, Cellebrite, Grayshift, Guidance Software, Magnet Forensics, OpenText
Tampa Police Department	Unknown	Unknown
Tarrant County District Attorney	$9,986	AccessData, Magnet Forensics
Texas Department of Public Safety	$188,782	BlackBag Technologies, Grayshift, Cellebrite, Magnet Forensics, MSAB, EnCase Forensics, Oxygen Forensics
Travis County District Attorney	$171,980	Cellebrite, Grayshift, MSAB, Guidance Software, OpenText, EnCase Forensics, Teel, Magnet Forensics, BlackBag Technologies
Travis County Sheriff's Office	Unknown	Unknown
Tucson Police Department	$126,958	AccessData, Cellebrite, Grayshift, Magnet Forensics, MSAB, Sanderson Forensics
Tulsa Police Department	Unknown	Cellebrite, Susteen
Washington State Patrol	$52,343	Cellebrite, Magnet Forensics
West Allis Police Department	$10,397	Cellebrite

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Submission of Rebecca Shaeffer
Legal Director, Fair Trials Americas
On behalf of Fair Trials Americas

Committee on the Judiciary and Public Safety Public Hearing on on Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"; Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"; and Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

October 23 2020

This submission follows oral testimony provided to the Council on October 15.

About Fair Trials: Fair Trials[1] is an international criminal justice reform organization with offices in London, Brussels, and Washington DC. Fair Trials works to improve rights protection in criminal legal systems around the world with reference to international standards and comparative best practice. For the past 20 years, Fair Trials has worked in Europe and globally to develop and implement improved procedural rights standards, including the right to counsel in police custody, improved notification of rights for people in custody (orally and in writing), improved access to disclosure of evidence prior to interrogation, and increased safeguards for children in conflict with the law. Through its cross-regional learning program, "the Translatlantic Bridge," Fair Trials is seeking to support US jurisdictions looking to improve protections for people in custody by providing them with information and expertise from international jurisdictions where access to counsel in custody is well established.

Introduction: As the District looks for meaningful ways to increase accountability and oversight over police, access to counsel in police custody can play an important role in identifying, documenting and preventing police misconduct during a period of time where police are currently able to act with no oversight – in the perilous first hours post-arrest.

In order to maximize the time and resources of the Committee, I would like to validate the contents of the submission of DC Justice Lab in its brief, "A More Mature Miranda,"[2] and the submission of the Georgetown Juvenile Justice Initiative in relation to the particular needs of youth in the District, and to the particular tendency of young people to falsely confess and to waive rights under police pressure. I will not repeat that information here. Instead this submission focuses on additional benefits of providing counsel to arrested people (in this case, children), particularly those which pertain to police oversight and accountability. I also providing, in annex, a general brief on this topic produced by Fair Trials in Annex, entitled, "Station House Counsel: Shifting the Balance of Power Between Citizen and State."[3]

Proposed scope of legislation: In coalition work with the DC Justice Lab, Georgetown Juvenile Justice Initiative, Black Swan Academy, Rights 4 Girls, the ACLU DC, the Center for Court Excellence, and the Public Defender Service, Fair Trials has identified momentum behind the provision of counsel for

[1] www.fairtrials.org
[2] Available at: https://static1.squarespace.com/static/5edff6436067991288014c4c/t/5f7cb311f1089b28400d4ad5/1602007825403/More+Mature+Miranda.pdf
[3] Annex I, also available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf

youth in police custody, and we focus on that issue in this brief. However, in other jurisdictions we are working toward access to counsel in police custody for all arrested people, regardless of age, and we see this youth-specific provision as an opportunity to demonstrate the value of early access to counsel as a stepping stone toward full representation for children and adults alike. With that caveat in mind, Fair Trials recommends an amendment to the Comprehensive Policing and Justice Reform Bill (*hereinafter*, **the Policing Bill**) that would:

> Make any statement made to law enforcement officers by any person under eighteen years of age *inadmissible* in any court of the District of Columbia for *any purpose*, including impeachment, unless:
> • The child is advised of their rights by law enforcement in a manner consistent with their cognitive ability;
> • The child actually confers with an attorney in relation to their right to silence and to a laywer; and
> • The child knowingly, intelligently, and voluntarily waives their rights *in the presence of counsel*.

Background: Nationally, about 90% of youths waive their right to counsel.[4] In D.C. the procedure and language for informing children of their rights is the same as for adults, but juveniles' cognitive skills and reading comprehension are still developing and they may not truly understand the information they are given.[5] More importantly, they tend to undervalue the role of counsel. Children are more likely to waive the right to a lawyer despite being the group that is least able to resist police interrogation and to make wrongful confessions.[67] Youths face not only the power differentials inherent to all interrogation but also the effect of being raised to respect and obey adults. They are more likely to be influenced by deceptive methods and short-term incentives (i.e., being told they can go home if they say "what happened").[8]

Even if a child does invoke their rights during interrogation, D.C. does not have a formal system for providing a lawyer until the initial hearing stage. However, the legal process begins before the initial hearing. When counsel is not yet appointed, youth are interviewed by Court Social Services officers. D.C. attorneys have reported these interviews including questions about drug use, gang affiliation, and the charged offense itself. Although using these answers as evidence of a criminal offence in court is against the court rules, attorneys have reported them being prejudicial nonetheless, particularly in the context of guilty plea negotiations, diversion and pre-trial decisions.

[4] "Police routinely read juveniles their rights but do kids understand?" American Bar Association (2016). Available at: https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/august-2016/police-routinely-read-juveniles-their-miranda-rights--but-do-kid/

[5] Id, n 3.

[6] "Arresting Development: Convictions of Innocent Youth," Tepfer, Joshua, et.al. Northwestern University College of Law Scholarly Commons (2010). Available at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1204&context=facultyworkingpapers

[7] *Haley v. Ohio*, 332 U.S. 596

[8] "Access Denied: A National Snapshot of States' Failures to Protect Juveniles' Access to Counsel https://njdc.info/wp-content/uploads/2017/10/Access-Denied.pdf

The negative effect of the lack of mandatory juvenile representation has a discriminatory impact on Black children in the District, where Black children make up 95% of youth who are subject to arrest.[9] Furthermore, people from lower socioeconomic backgrounds are also less likely to assert their right to counsel.[10]

While the juvenile system is intended to be primarily rehabilitative, it can and frequently does result in criminal conviction and loss of liberty, with long term impacts on life outcomes for youth. Furthermore, prosecutions of children may be transferred from juvenile to adult criminal court. D.C. tried 541 youths as adults between 2007 and 2012.[11] In D.C., transfer laws stipulate that: juvenile courts may waive jurisdiction at their discretion; in some types of cases jurisdictional waiver is presumptive (though not mandatory); and in other types prosecutors have total discretion to bring the case in criminal court.[12] The juvenile bears the burden of proof in cases of presumptive waiver. D.C. also has "once and adult, always an adult" laws, meaning a defendant who has previously been tried as an adult cannot have a subsequent case brought in juvenile court, no matter the offense.

National and global movement toward station house counsel, especially for youth: An amendment to the Policing Act that provides for counsel for youth in police custody would place the District firmly within a growing movement of jurisdictions both within the USA and around the world that increasingly recognizes the benefits of providing early access to counsel during police custody, prior to interrogation and as a necessary precursor to any effective waiver of the right to silence.

Several states and jurisdictions mandate counsel for younger children in custody (for example, up to age 15), but increasingly, states are beginning to expand access to older children, up to the age of 18. The most significant is the recent passage of SB 203[13] in California, which expands the juvenile access to counsel law first enacted as a city ordinance in San Francisco in 2018,[14] and will be enacted across the state beginning on January 1. A similar law is under consideration in New York State.[15] In Chicago, pursuant to Illinois state law[16] and the terms of a consent decree[17] (meant to address, in part, police torture of people held in Chicago police custody).

These states join dozens of other jurisdictions, including every member state of the European Union, the United Kingdom, Canada Australia and New Zealand in providing access to lawyers for arrested people of any age in police custody. Around the world, police station access to counsel is understood to be a key safeguard against police abuse, arbitrary detention, insufficient notification of rights, unlawful arrest, lack of access to medical care and sanitation, coercive interrogation, and excessive

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[9] "Racial Disparities in DC Policing: Descriptive Evidence from 2013-2017. ACLU DC (July 2019). Available at: https://www.acludc.org/en/racial-disparities-dc-policing-descriptive-evidence-2013-2017

[10] "Do Juveniles Understand what an Attorney is Supposed to Do?" NJDC (2015). Available at: https://njdc.info/wp-content/uploads/2015/09/Do-Juveniles-Understand-What-An-Attorney-Is-Supposed-To-Do.pdf

[11] "Capital City Correction: Reforming DC's Use of Adult Incarceration Against Youth." Campaign for Youth Justice (2014). Available at: http://www.campaignforyouthjustice.org/images/pdf/Capital_City_Correction.pdf

[12] "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting." NCJRS((Sep 2011). Available at: https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf

[13] Available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB203#:~:text=SB%20203%2C%20Bradford.,Juveniles%3A%20custodial%20interrogation.&text=Existing%20law%20requires%2C%20until%20January,of%20the%20above%2Dspecified%20rights.

[14] The Jeff Adachi Act, mandating both counsel and access to two phone calls for youth in custody, available here: https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-61366.

[15] Text of proposed bill available here: https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A06982&term=2019&Summary=Y&Actions=Y&Memo=Y&Chamber%26nbspVideo%2FTranscript=Y

[16] 725 ILCS 5/103-4. Available at: https://ilga.gov/legislation/ilcs/documents/072500050K103-4.htm

[17] For more information on the terms of the consent decree, see: http://chicagopoliceconsentdecree.org/

prosecutions.[18] In each of these jurisdictions police are able to conduct effective investigations alongside defense counsel in custody.

Other jurisdictions can also provide models for more effective notification of rights for youth in police custody. Alongside the presence of defense counsel, many jurisdictions with stronger procedural rights for arrested people have developed "easy read," simple and visual representations of custody rights, to help children better understand the consequences of waiver. This kind of effective, written notifications of rights go far beyond current Miranda warnings, which are poorly understood by children in particular. Examples of these simple "letters of rights" are included in annex.[19]

Impact beyond the detention context: In the context of the USA and the District, the potential benefits of opening police custody to the oversight and intervention of defense counsel can have a much broader impact than simply preventing ill treatment and protecting the right to silence. The zealous advocacy of counsel in the critical hours immediately post-arrest can have both upstream effects (on the behavior and arrest patterns of police officers) as well as downstream effects (on the course and outcome of charging, diversion, pre-trial detention, and ultimate case outcomes).

Cost Savings due to decarceration and prevention of police misconduct: The Public Defender for Cook County Ill, which has the nation's only dedicated police representation unit, reports that in 18% of cases in which public defenders assist people in custody, they are able to secure the person's immediate release with no criminal charges. A study of Cook County's early representation programs estimated that cost savings associated with early access to a lawyer could range between 12 and 43 million dollars.[20] Cost savings were realized through reduced jail time (both pre-trial and post-adjudication), reduced recidivism, and reduced liability payouts due to police misconduct effectively prevented by counsel.[21] Existing research on early access to counsel has demonstrated lower rates and duration of pre-trial detention, higher probability of a reduction in charges, higher probability of release from detention and reduced jail admissions when lawyers can quickly access arrested people.[22]

Data collection: Furthermore, in addition to the immediate oversight provided by the presence of counsel in police custody, defense lawyers can collect data on patterns of policing and police misconduct that are currently difficult to obtain. For example, defense counsel may be able to gather information on arrests that never lead to criminal charges, including those which are not charged due to unlawful, overzealous or abusive acts by police. This data can aid the work of the Office of Police Complaints and other relevant bodies, which can in turn help to improve community relations.

Conclusion: The state of justice in the District would be substantially improved by an amendment to the Policing Bill requiring counsel for youth in police custody, prior to and during interrogation and in

[18] "Access and Contact with a Lawyer." Association for the Prevention of Torture. Available at: https://www.apt.ch/en/dfd_print/636/analysis/en

[19] Annex II, "Notice of Rights andEntitlements," Hertsfordshire, UK police, available at: https://www.herts.police.uk/assets/Information-and-services/About-us/rights-and-entitlements-booklet.pdf and "Rights and Entitlements, Leaflet for Young People." Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765546/Rights_and_entitlements_-_leaflet_for_young_people__web_.pdf

[20] "The Fiscal Savings of Accessing the Right to Counsel Within 24 Hours After Arrest," Sykes, Brian et. al. UC Irvine Law Review (2015). Available at: https://www.law.uci.edu/lawreview/vol5/no4/Sykes.pdf

[21] See, "One Hour Access to Counsel: A Cost-Saving Necessity," (2020), Available at: http://www.chicagoappleseed.org/our-blog/one-hour-access-to-counsel-cost-saving-necessity/

[22] "Early Intervention by Counsel," Worden et.al. Office of Justice Programs, NCJRS (April 2020). Available at: https://www.ncjrs.gov/pdffiles1/nij/grants/254620.pdf

order for waivers of the right to counsel and to silence to be valid. Youth are particularly susceptible to police coercion, and custody is a situation of extreme vulnerability. Furthermore, defense counsel can play a pivotal role in decarceration, decriminalization, and oversight of police when they are able to access arrested people in the early hours post arrest.

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OCTOBER 2020

STATION HOUSE COUNSEL: SHIFTING THE BALANCE OF POWER BETWEEN CITIZEN AND STATE

Fair Trials

01

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INTRODUCTION

For people who have been arrested, the immediate hours spent in police custody are a time of extreme vulnerability. As recent documentaries, including *Making a Murderer* and *When They See Us* have exposed, most people in police custody in the US have limited, if any, communication with the outside world, at a time when ill-treatment, coercive questioning, and other rights violations are most likely to occur, and when criminal proceedings are set into motion.

Arrested people in the US are almost never able to access counsel until, at the earliest, the first court hearing. Until then, they are subject to the unchecked power of the police. By the time an arrested person accesses counsel, key decisions about charge, detention, diversion and dismissal have already been made by authorities, and the machinery of the criminal legal system has already irrevocably begun to grind.

As this brief shows, involving defense lawyers earlier can not only provide oversight over arrest, custody and detention but can also have a transformative effect on the entire criminal legal system. Early access to counsel has the potential to disrupt the machinery of criminalization, mass incarceration, and police control.

In 2014, only 3 out of every 1,000 arrestees in Chicago had an attorney at any point while in police custody. When individuals in custody attempt to invoke their legal rights to counsel, they report facing hostility from police.[1]

03

THE PROBLEM: HOW THE US IS FAILING PEOPLE WHO ARE VULNERABLE TO POLICE POWER

US citizens' right to counsel is protected under the US Constitution, but the interpretation of the right to counsel has failed to reach the stage of early police custody. The 6th Amendment right to counsel does not apply until later in the process, usually the first court hearing. The 5th Amendment (derived from the *Miranda v Arizona* decision[2]) has been interpreted only to mean that police must inform an arrested person of their right to a lawyer and their right to silence – not to actually provide a lawyer. An arrested person must assert the right to silence with no legal assistance. In practice, few people are able to maintain the right to silence without counsel.

80%

At least 80% of arrested people waive their right to a lawyer and to silence in the face of police pressure.[8]

Although there are guidelines recommending that a person has access to counsel as soon as is practical after they are taken into custody,[3] in most parts of the United States this is far from the reality.[4] An American Bar Association report from 2004 describes many instances of individuals waiting in jail for several months without access to a lawyer.[5] In one particularly egregious case, a woman was in jail for over a year without once speaking to a lawyer or appearing in court.[6] Some states have adopted their own laws that guarantee access to counsel within a certain period of time.[7] In no jurisdiction in the US are defendants regularly able to access counsel prior to arraignment (sometimes days after arrest).

04

Legal counsel in police stations is needed to protect the right to silence and prevent serious rights abuses, including physical brutality, unlawful arrest, coercive interrogation and denial of medical attention and basic physical needs. Without a lawyer present, these violations are unlikely to ever be remedied.

90%

Around 90% of juveniles, waive their Miranda rights.[9]

But early access to counsel does more than protect defendants from potential abuses – with early access, lawyer can help to divert unworthy cases from ever entering the system.

By the time defendants see a lawyer in court, key decisions have already been made in relation to charging and bail – decisions which will be determinative for many defendants who may be coerced to plead guilty to avoid pre-trial detention, overcharging and long sentences.

Lawyers in police custody can identify unlawful or abusive arrests, cases worthy of diversion or cases that should never be prosecuted at all, acting as a powerful agent for liberation, who can challenge the otherwise inexorable march of mass incarceration.

The Registration of Exonerations has documented that 12% of exonerations arise from false confessions – including 37% of juvenile exonerations and 70% of exonerations of people with mental illness and/or developmental disabilities.[10] A key role for lawyers in police custody is to identify these vulnerabilities and ensure that these individuals are able to withstand police coercion.

05

WHAT DO LAWYERS DO IN POLICE STATIONS?

Lawyers in police station defend the rights of their clients at the time they are most vulnerable. Through confidential and private meetings, they can:

- make sure their client understands their rights – in particular, the right to remain silent. Although the police have the obligation to notify these rights, lawyers are best placed to explain their rights to suspects, and the consequences of waiving them;
- gather information from their client, which may help them secure a pre-trial release;
- find out about detention conditions and treatment by the police and detect and challenge abuses;
- assess their client's fitness for the interrogation; and
- explain what is likely to happen during the process and why.

If an interrogation goes ahead, a lawyer's principal role is to be a check on police coercion. Lawyers can ask to privately advise their client, they can facilitate communication between the police and their client, ask for questions be clarified or rephrased, and flag the need for an interpreter. They can read and check the written records of the interrogation and correct mistakes. If procedural rights are not respected by the police, a lawyer can ask for their observations to be recorded on the interrogation transcript for later legal challenge. For example, if the transcript does not reflect the person's actual responses, the person is inebriated during the interrogation, an interpreter should have been present or the police used coercive techniques.

Lawyers can also start to advocate for their clients' rights with police and prosecutors much earlier in the process. They can make arguments about the propriety of the arrest and any charges that are being considered. They can also, encourage law enforcement not to seek pre-trial detention, to argue for diversion or other non-criminal disposition, and demand sufficient disclosure to be able to make arguments about these early decisions. They also start to build a rapport with their client, which is crucial for effective defense but virtually impossible if you first meet on the doorsteps of the court.

06

HOW STATION COUNSEL COULD BE TRANSFORMATIVE

The transformative effect of early access to counsel goes beyond protecting individuals at a time of vulnerability. Interventions that hold the police to account can have a significant impact both downstream (on the way cases are charged and plead) and upstream (on patterns of arrest), potentially leading to decarceration. Lawyers in police custody can create systematic change to a number of criminal justice outcomes, by:

- Challenging unlawful and abusive arrests, including those that do not lead to criminal charges, discouraging police from unnecessary street contact.
- Reducing prosecutions and jail admissions by encouraging police and prosecutors to drop clearly unworthy cases.
- Identifying the vulnerabilities of arrested people and promoting diversion and treatment opportunities.
- Identifying incidence and patterns of police misconduct and ill treatment of arrested people.
- Improving communication channels and trust between police, community (including victims and witnesses), defenders and prosecutors.
- Capacitating defense lawyers to prepare more comprehensively for arraignment, pre-trial detention and plea negotiations – reducing wait times and administrative hurdles.
- Improving access to medical care and other essential needs of detained people.

07

POLICE STATION ACCESS TO COUNSEL IN EUROPE

In many countries in Europe, people have the right of access to a lawyer, free of charge, prior to and during interrogation, 24 hours a day.

United Kingdom

Following a number of scandals involving police torture of IRA suspects in British custody during the Irish sectarian conflict of the 1980s, UK law was changed to give suspects in police custody a right to consult a solicitor privately and free of charge at any time. Detailed Codes of Practice require the police to: repeatedly inform detainees of this right; prohibit anything which could deter exercise of the right; and facilitate access to a lawyer. This right applies throughout police detention and a suspect has a right to have a lawyer present during interrogation. Where these rights are violated, evidence that is obtained by the police during interview will be inadmissible in criminal proceedings in most circumstances.

European Union

Access to a lawyer in a police station became a right across Europe as a result of a seminal case in 2009, involving a 17 year-old boy in Turkey who was suspected of participating in an unlawful demonstration. It was decided that his conviction, based on a confession given without access to a lawyer, was unfair. This case and subsequent European legislation, led to a revolution in police station access to counsel, which became mandatory across Europe in 2016.

In Belgium, for example, suspects now have the right to confidential communication with a lawyer in police custody before the police interview and to a lawyer being present throughout the police interview. There is a new duty scheme in place for the prompt notification, appointment and payment of lawyers who attend clients in police custody. Many different models have been created across Europe, creating a wealth of learning for the US. Fair Trials is working to ensure that the legal right to access a lawyer in police custody is being implemented across Europe.

08

HOW DOES ACCESS TO COUNSEL WORK IN PRACTICE?

Police station lawyer systems are in place in many parts of the world and can help US jurisdictions understand how police station lawyer access might be designed. While the principles behind access to a lawyer are the same, there is no perfect system. US jurisdictions have an opportunity to learn from other jurisdictions to develop a system that works for them.

How are lawyers contacted?

In some systems, a third-party contractor runs a dedicated line that connects arrested people with on-call lawyers (often through police intermediaries). In others, a bar association plays this role through an online platform. In Belgium the appointment of lawyers is made via an online platform that connects police stations with lawyers.

How long before they get to police station?

Most jurisdictions require that a lawyer who is contacted and on-call must arrive at the police station within a short period of time, usually two hours. Interrogation may not take place until then. Where there may be a delay in a lawyer arriving at the police station in person, a telephone consultation may be held as an initial step. Since COVID-19, some jurisdictions have adopted this practice so that lawyers advise their clients and participate in interrogations via videolink.

Which lawyers do this?

Public defender offices as such do not exist in most of Europe, but private lawyers take on legal aid cases in a coordinated system. Suspects can normally either choose their own nominated lawyer or the on-call lawyer from a scheduled list. Either way, the lawyer's services are provided free of charge and paid for by the state. On-call lawyers are often required to meet certain quality requirements as well as meeting ongoing key performance indicators and quality measures.

How are they paid?

Police station legal advisers are often paid a fixed fee by the State. In England and Wales, the remuneration is around $45 for telephone advice and $250 for in-person attendance.

Do they have an ongoing role in the case?

Sometimes they can help a law firm get a case and the fees for any subsequent trial, which is why there is competition for duty solicitor slots even though the fees are low.

WHAT WOULD ACCESS TO COUNSEL LOOK LIKE IN THE US?

There are few examples of true police station access to counsel programs in the USA, but some attempts have been made. The most prominent example is Cook County/Chicago, where lack of access to counsel in police custody has been persistently problematic, despite being prioritized in the 2019 consent decree developed in response to the US Department of Justice's finding that Chicago police engaged in a pattern or practice of excessive force and racial bias.[11] Even with a special police station representation unit (unique in the country) and a legal obligation to facilitate lawyer access, only 2% of arrested people in Chicago get access to a lawyer, because police have failed to provide arrested people with legally-mandated phone calls to counsel.

Beyond Chicago, efforts are being made in some jurisdictions to expand police station access to counsel for children. In San Francisco, the Jeff Adachi Ordinance, enacted in 2018, provides children with access to counsel before interrogation.[12] Similar legislation is being considered in New York State.[13] However, these limited experiments have not resulted in increased practical access to lawyers for people in custody.

The experience of Chicago suggests that at least in some jurisdictions, the "on call" system used in the UK and most of Europe may not work in the US, given the recalcitrance of many police cultures. We need to experiment to assess which models will be most effective at disrupting abusive and carceral police and legal cultures.

The existence of organized public defender offices (absent in most of Europe and the UK) creates the possibility of innovative models of police station access, for example the 24/7 presence of public defenders in police precincts. As jurisdictions experiment with different access models, some key elements should be included:

- accountability for police who fail or refuse to facilitate access to counsel;
- presumption of inadmissibility of statements obtained outside the presence of counsel;
- codification and implementation of broader custody rights and record keeping on procedural safeguards, including concrete timeframes for provision of rights including phone calls, access to medical care, sanitation, food and water, etc.
- data collection on take up, effectiveness and impact of station house lawyers on upstream and downstream outcomes;
- fee structures and attendance regimes for police station lawyers that protect their independence from police; and
- training of defense lawyers, police and prosecutors on the role of lawyers in police custody.

A study by First Defense Legal Aid in Chicago, which works to improve access to counsel during the first 24 hours following arrest, found that providing earlier access to counsel for arrested people in police custody in Cook County could create fiscal savings of between $12 and $43 million, largely in reduced jail time.[14]

POSSIBLE CHALLENGES

Global experience offers important lessons for US jurisdictions on the potential challenges to implementing police station access to counsel:

- **Independence of police station lawyers:** Lawyers who spend a lot of time in proximity to police, may find it challenging to retain sufficient independence from police interests and to be seen as independent by communities. Care should be taken to ensure that the system for appointing counsel, rotating lawyers in and out of police custody and community engagement enables robust defense.
- **Conflicts:** Some indigent defense systems may find it challenging to identify potential conflicts of interest between co-defendants at the early stage of police custody. A system for identifying and managing conflicts should be developed.
- **Police facilitation of counsel:** Most European systems rely on police initiating the request for counsel and informing arrested people of this right. The experience in Chicago suggests this may not be effective in some US contexts. Despite the fact that it is a Class 3 felony for police to fail to observe the right to counsel in Illinois, police regularly obstruct this right in practice in Cook County. These violations, among others, are the subject of an ongoing consent decree based on DOJ findings.[15] Therefore, it may be necessary, to ensure defense counsel are present and have access to people in police custody continuously, or else to appoint independent third parties to facilitate access.
- **Waivers of the right to counsel by arrested people:** Even where the right to counsel in police custody is well-established, many arrested people continue to waive their right to a lawyer.[16] Procedural safeguards are needed to ensure that waivers are knowing and voluntary.
- **Compensation for counsel:** Because police station-based legal work may be more arduous, and may occur during nights and weekends, compensation for lawyers should be sufficient to ensure they are not disincentivized from providing high quality representation. In ongoing efforts to divert funding from abusive police forces to community investment, provision for defense rights in police custody should be a priority for municipalities.

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CONCLUSION

It is time for US jurisdictions to learn from the experience of countless global jurisdictions that have rebalanced the relationship between police and citizens. We must ensure that in the vulnerable moments after arrest, people's rights are safeguarded and that there is oversight of police behaviour, by the advocacy of a defense lawyer. The police can no longer be permitted to operate in the shadows. There must be accountability at all stages of criminal legal proceedings, and Americans' Constitutional right to counsel must be fully implemented.

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. For the past 20 years, Fair Trials has worked to develop and implement improved procedural rights standards for criminal defendants across Europe and around the world. Fair Trials is uniquely placed to lead this work, given its experience working with jurisdictions in the EU to implement programs providing access to a lawyer upon arrest, in the police station. For more information, please contact Rebecca Shaeffer, Legal Director of Fair Trials (Americas), at rebecca.shaeffer@fairtrials.net.

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3. American Bar Association, Standards for Criminal Justice: Providing Defense Services, Standard 5-6.1, 1992
4. American Bar Association, Gideon's Broken Promise: America's Continuing Quest for Equal Justice, 2004
5. Id. at 23. This report is now several years old, but practicing lawyers have assured me that people still wait for long periods of time in police custody without access to a lawyer.
6. Id.
7. See, e.g., 725 Ill. Comp. Stat. Ann. § 5/103-3, LexisNexis 2017, providing the right to communicate with counsel "within a reasonable time".
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15. http://chicagopoliceconsentdecree.org/wp-content/uploads/2019/02/FINAL-CONSENT-DECREE-SIGNED-BY-JUDGE-DOW.pdf
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So you've been arrested

When you arrive

In the cell

Interview

What might happen next

Leaving the police station

A guide to custody for young people

When you arrive:

At the police station you can:

- Speak to a solicitor (this is free and the solicitor does not work for the police)
- Get help if you feel unwell or are hurt

You are in a safe place. If there is something that is worrying you, you can talk to someone

If you are a girl, you can ask to speak to a female member of staff.

The police will tell your parent or carer that you are at the police station.

If you don't understand your rights you can ask a police officer.

Any items you have with you when you are arrested may be taken from you.

The police will keep these safe. You may get these back when you are released or they may be kept as evidence.

The police will ask you about your health – it is important you give as much information as possible.

You may be searched when you get to the police station.

The police will find you an appropriate adult to be with you when you are interviewed. It can be your parent or carer, a family member over 18 or someone from the Youth Offending Team.

A solicitor is someone who makes sure that you understand all of the legal words and also can give you advice. You have a right to speak to a solicitor for free.

Things the police may do:

- Measure your height
- Take your photo
- Take a sample of your DNA
- Scan your fingerprints

In the cell:

If you have any health needs, or take medication, you should tell the police officer.

You may ask for a shower and exercise, and will be offered food.

If you have any religious needs the police will try and make sure you have everything you need.

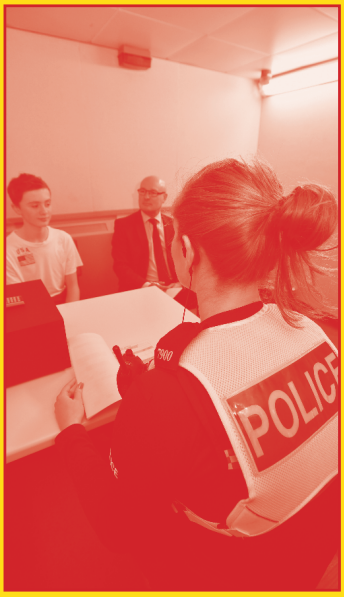
The custody sergeant will check on you to make sure you are ok and have everything you need.

The police won't always know how long you will be kept in for – it is usually around 2-3 hours.

The police can usually keep you in for up to 24 hours – one whole day and night.

The interview:

- You can speak to your solicitor before the interview and the solicitor and appropriate adult can be in the interview with you
- There might be two police officers in the interview
- If you answer "no comment", the police will still ask all of their questions
- You can ask for a break if you want one.



You will be taken back to the cell while the police make a decision – they will try and do this quickly.

What might happen next:

RELEASED	If the investigation is not complete, you will be released, you may be given a date to come back to the police station You might have some rules to follow e.g. being back home for a certain time or not going to certain places If you are charged, you will be given a date to go to court.
REMAND	The police have decided to charge you with the offence You may be given somewhere to stay overnight or, as a last resort, kept in a police cell.
NO FURTHER ACTION	The police have decided not to charge you and you are free to leave the police station.

LEAVING THE POLICE STATION:

Before you leave the police station, the police officer will make sure you are safe when you are released.
You will be given your property back (e.g. your mobile phone and your wallet) unless it is being kept for evidence.
The police officer and your appropriate adult will discuss how you are getting home. The police may be able to take you home, or ask your parent/carer to come and collect you.

CI4935v3_May_2017

Rights and Entitlements

Easy Read booklet

This booklet is about your Rights and Entitlements. It tells you:

- What will happen to you after you have been arrested.
- The rights you have and the help people can give you.

The Law Society

Developed by Hertfordshire Constabulary - version 3 - December 2019

Contents

Some rights you have in Police custody.

You have the right to talk to a solicitor.

A solicitor understands the law and can give you advice.

See page 11 for more information.

You have the right to medical care.

Tell the Police if you are hurt or feeling ill.

See page 23 for more information.

You have the right to an interpreter who will explain things in your own language.

See page 25 - language interpreters.

See page 29 - sign language interpreters.

You will be given food and drink.

You can have breakfast, lunch and dinner.

See page 20 for more information.

You can ask the Police to tell someone where you are.

You may be allowed to speak to someone on the phone.

See page 32 for more information.

Some people can have an Appropriate Adult.

An Appropriate Adult gives vulnerable people extra help.

See page 15 for more information.

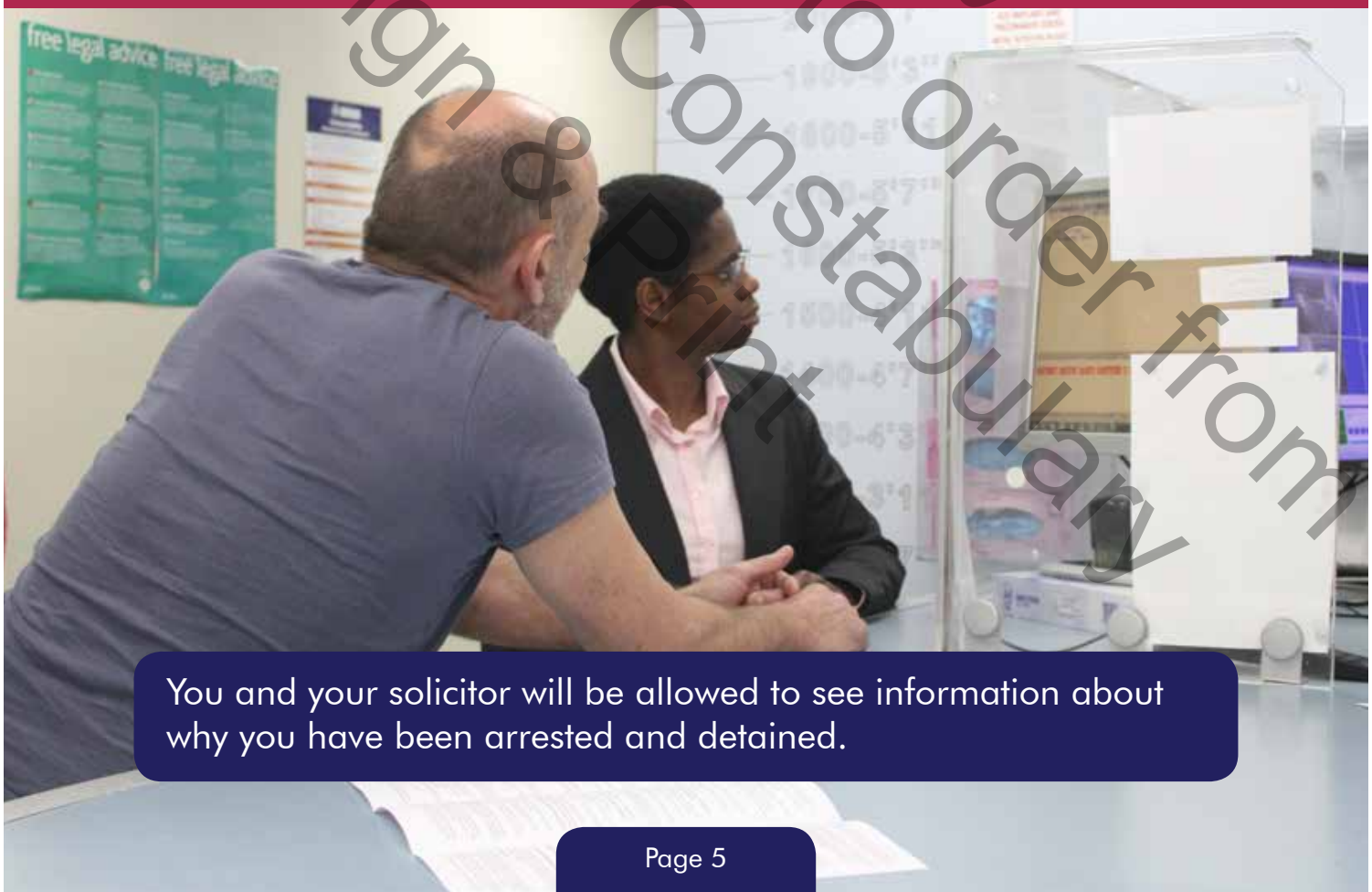
If you are aged under 18 or are over 18 and find it difficult to talk about or understand what is happening, the Police will always find you an Appropriate Adult.

You will be booked into Police custody.

Being kept at the Police station is called ‘being detained’.

You can ask why you have been arrested and detained.

The Police must tell you what you have been arrested for and why they need to keep you at the Police station.



You and your solicitor will be allowed to see information about why you have been arrested and detained.

The Police will take some things from you.

These will usually be returned to you when you leave custody or at the end of the investigation.

Things like your phone, money and jewellery will be put in a bag and kept safe.

You may have to take your shoes off. The Police will give you other shoes to wear.

You may have to take your belt or other clothing off and give it to the Police.

If the Police take your clothes they will give you other clothes to wear.

Things the Police will do

The Police will measure how tall you are.

The Police will take a photograph of you.

The Police will take a sample of your DNA.

They will take some saliva from inside your mouth using a stick. This does not hurt.

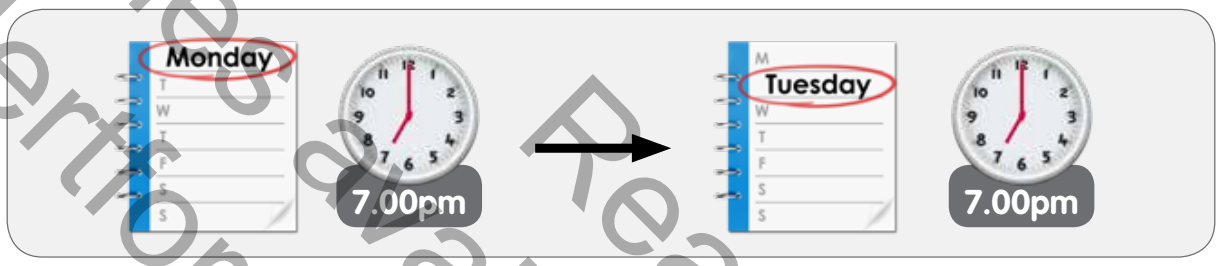
The Police will scan your fingerprints using a special machine.

If you have an Appropriate Adult, they will be with you when your DNA is taken and your fingerprints scanned.

How long you can be kept in custody

Usually the Police can detain you for up to 24 hours (1 day) without charging you with a crime.

This gives the Police time to investigate the alleged crime.



When you first come into custody the Police may not know how long you will be detained for.

Most people are only kept in Police custody for a few hours.

The Police will let you go home as soon as they can.

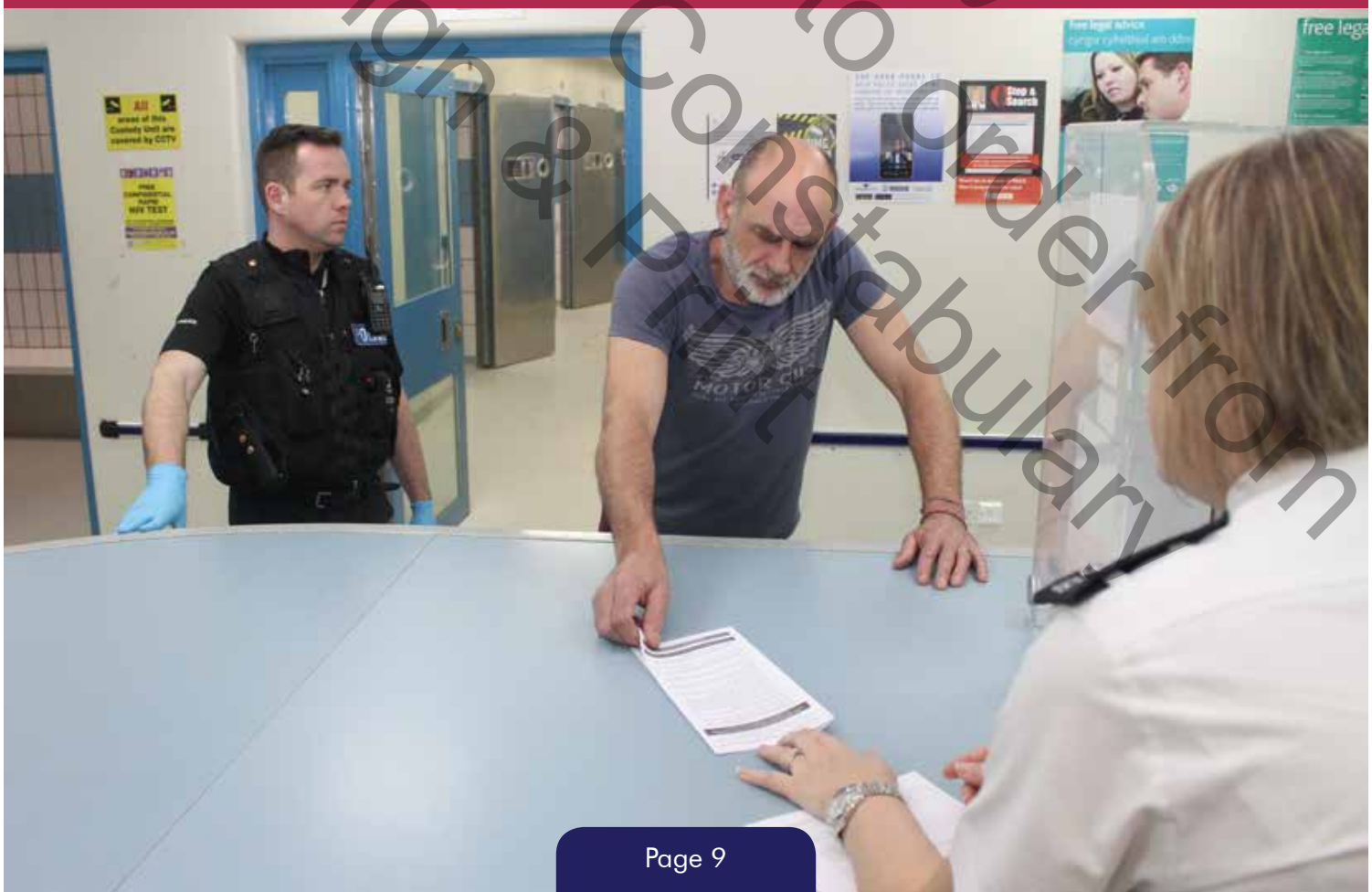
A senior Police officer or a court has to agree for you to be detained longer than 24 hours.

Your ‘Rights and Entitlements’ in Police custody.

The Police will give you a leaflet about how they should treat you and look after you.

Rights and Entitlements are:

- how the law says you must be treated in Police custody, and
- things you can have while in Police custody.



Rights and Entitlements

Understanding your Rights and Entitlements.

The Police must give you time to read the Rights and Entitlements leaflet.

The Police will help you to understand the Rights and Entitlements leaflet.

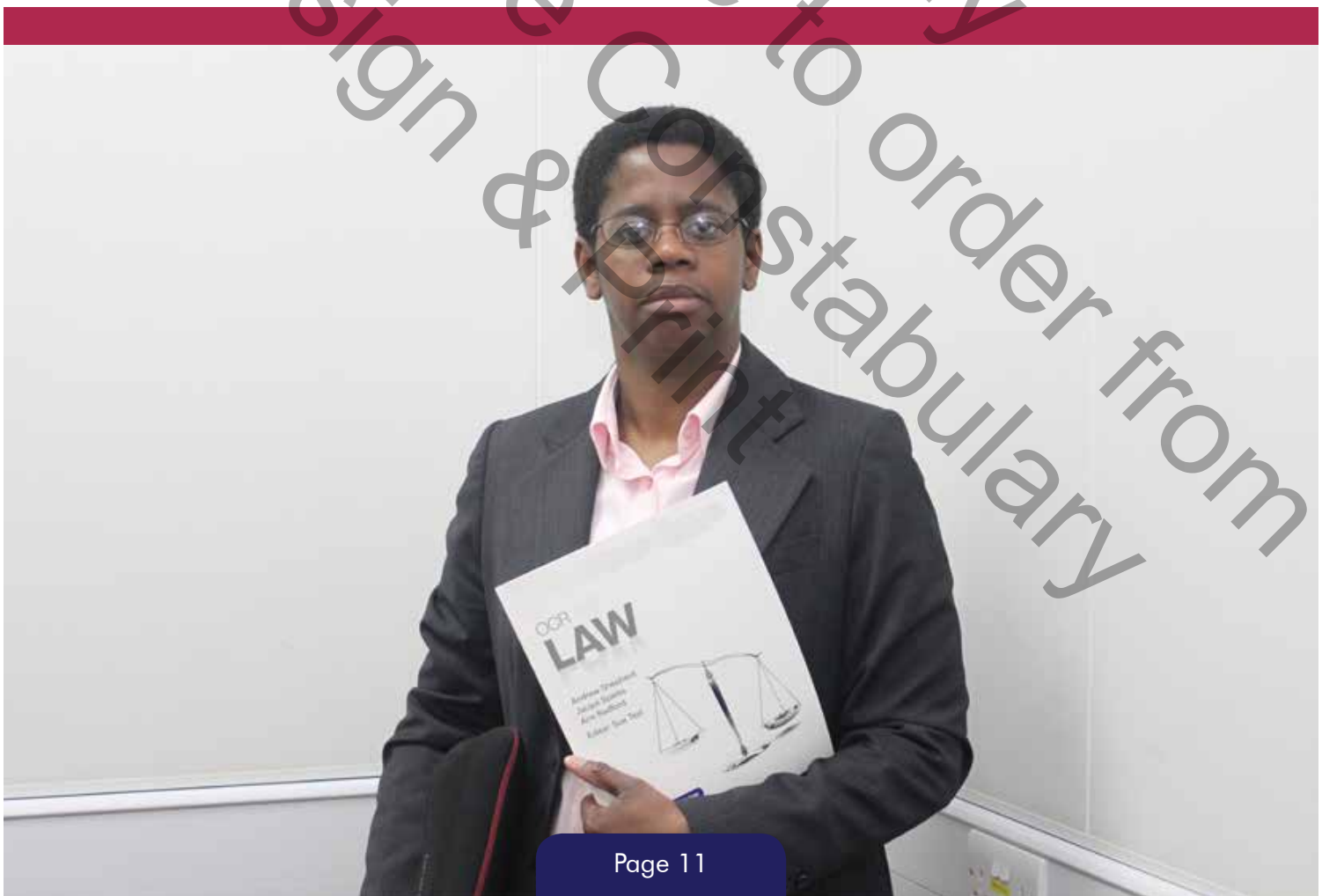
This booklet can also help you understand your Rights and Entitlements.

You can ask to read the 'Codes of Practice'.

This is a book that explains your Rights and Entitlements in a lot of detail.

You have the right to talk to a solicitor.

A solicitor understands the law. They can give you advice and help you if the Police interview you.



A solicitor can give you advice

The Police must ask you if you want a solicitor.

The solicitor will usually talk to you on the phone.

The Police will not think you have done anything wrong because you want to talk to a solicitor.

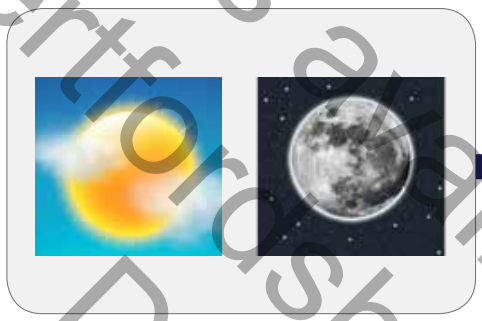
If the Police want to interview you the solicitor will usually come to the Police station.

The solicitor will talk to you before the interview.

Before you are interviewed, you and your solicitor must be given some information about the offence, and the evidence the Police have.

Tell the Police if you want to talk to a solicitor.

You do not have to pay to talk to a solicitor.



You can ask to talk to a solicitor during the day or at night.

Do you want to talk to a solicitor?

Talking to a solicitor

Some rules about talking to a solicitor.

You can talk to the solicitor in private before the Police interview you.

The Police are not usually allowed to interview you until you have talked to the solicitor.

The solicitor will usually be with you when you are interviewed by the Police.

If you said you didn't want a solicitor you can change your mind. You can say that you do want a solicitor.

Some people can have an Appropriate Adult.

An Appropriate Adult gives extra help to people who are vulnerable.

If you are aged under 18 or are over 18 and find it difficult to talk about or understand what is happening, the Police will always find you an Appropriate Adult.

The Appropriate Adult will help you to understand what is happening.

Appropriate Adults do not work for the Police.

Their job is to help you.

They could be a relative, volunteer or a social worker.

They will make sure you understand why you have been arrested.

They will be with you when the Police talk to you about your rights.

They will explain your rights to you.

The Appropriate Adult will make sure you are treated fairly.

An Appropriate Adult will support you.

They will be with you when the Police do things like take your, photo, DNA and fingerprints.

They can ask for a solicitor for you if they think you need one.

They will be with you if the Police interview you about the crime.

They will help you if the Police ask you to sign any papers.

Letters, numbers and clocks.

This page may be useful for an Appropriate Adult to use when communicating with the person they are supporting.

A B C D E F G H I

J K L M N O P Q R

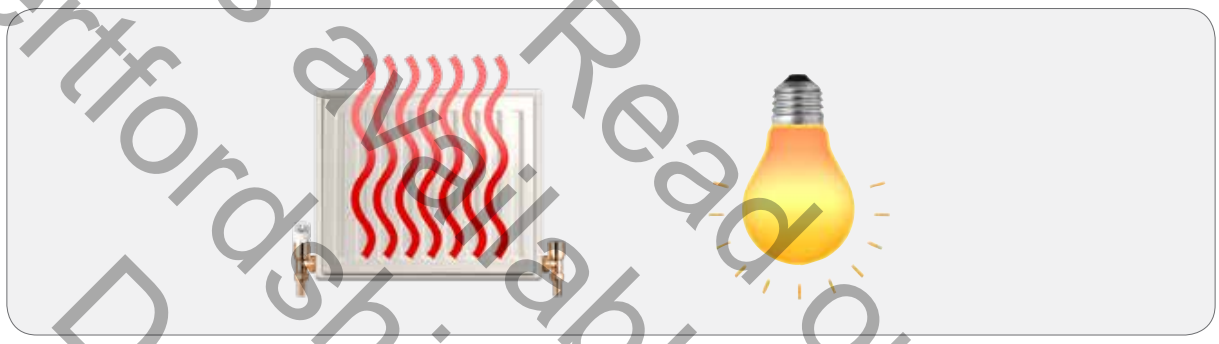
S T U V W X Y Z

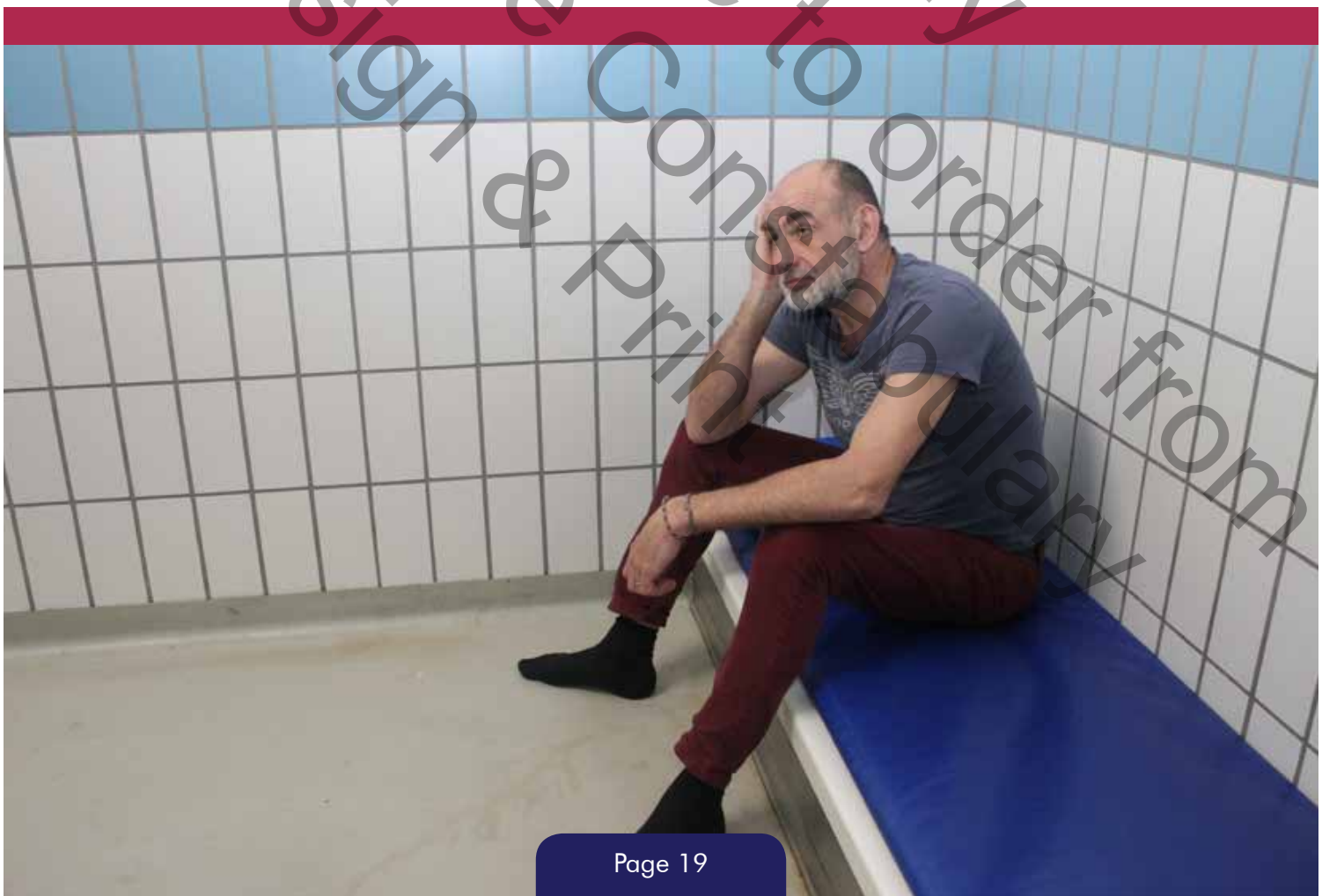
0 1 2 3 4 5 6 7 8 9

You may have to spend time in a Police cell.

Your cell should be clean and warm.

Your cell should have a light.





The Police will help you to stay well.

You can rest and sleep in your cell. The Police will give you a blanket.

You will be given drinks.

You will be given food.

You can have breakfast, lunch and dinner.

You can ask for something to read.

Independent Custody Visitors sometimes visit you in your cell to check you are being looked after properly.

The Police will help to keep you safe.

They will check to make sure you are okay while you are in your cell.

Press the button in your cell to tell the Police if you need help or feel unwell.

They will come to your cell and ask you what you need.

After 6 hours a senior Police officer will decide if you should still be detained.

You or your solicitor can talk to the senior officer about this.

A senior officer will talk to you again later if you are still being detained.

You can speak to a member of staff alone about anything private.

They will help you.

If you are male you can ask to talk to a man.

If you are female you can ask to talk to a woman.

If you are female and have your period, you can have sanitary towels and tampons. These are free.

If you are a girl under 18, you will be looked after by a woman. You can ask to speak to them at any time.

Other things you can ask for

You can ask the Police for these things.

You are allowed out of your cell to have some fresh air and exercise.

You can ask for a pen and paper.

You are allowed things you need to help you practice your religion.

Tell the Police if you need the toilet or want a shower.

Some cells will have a toilet in them.

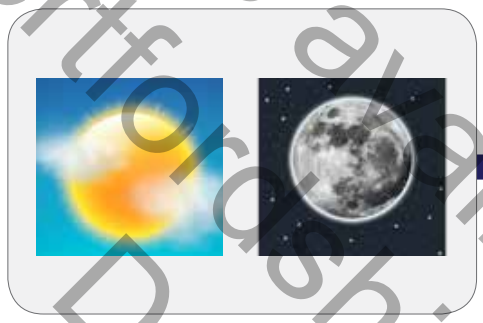
You can have medical help if you need it.

If you are hurt or ill the Police will call a nurse or doctor to help you.

Tell the Police if you have medication you need to take.

Tell the Police if you need medical help.

You do not have to pay for medical help.



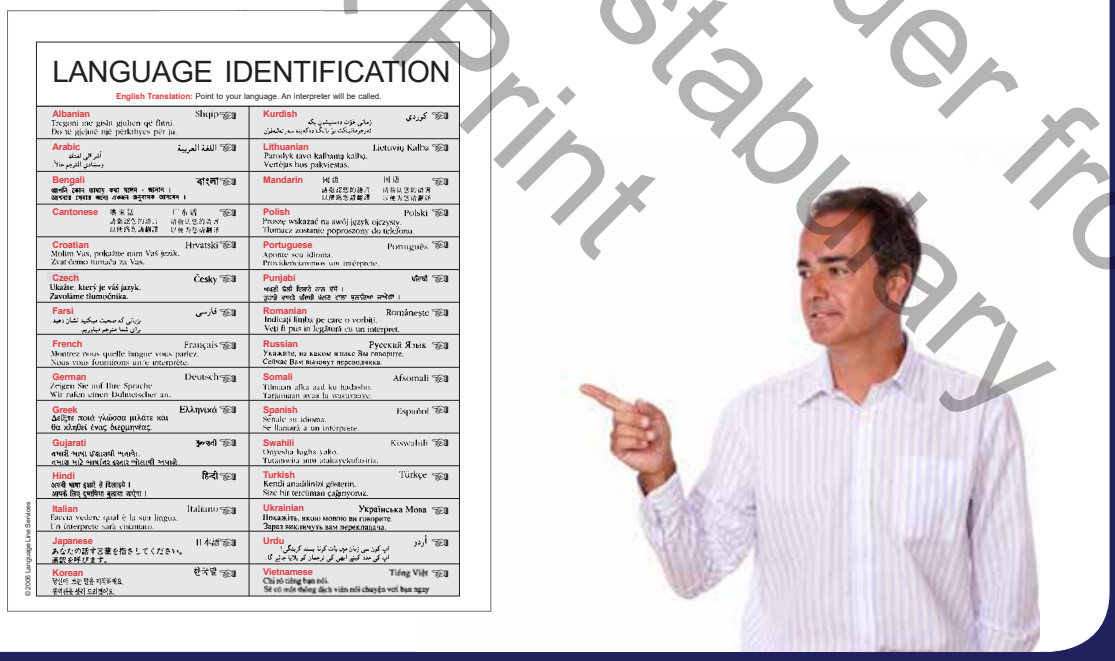
You can ask the Police for medical help during the day or at night.

Do you need medical help?

The Police will get a language interpreter if you need one.

Use these pages to tell the Police if you need an interpreter who speaks your first language.

The Police will find out what language you speak.



Language interpreter

A language interpreter will speak your first language.

You can have a language interpreter if you do not speak or understand English.

The Police have a leaflet to help you say what language you speak.

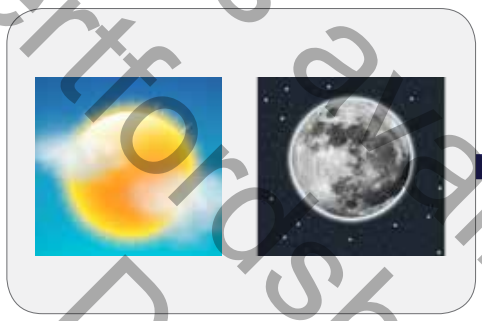
The Police will find someone who speaks your first language.

They will help you to talk to the Police.

The interpreter may also translate some important written information into your first language.

Tell the Police if you need a language interpreter.

You do not have to pay
for a language interpreter.



You can ask for an interpreter
during the day or at night.

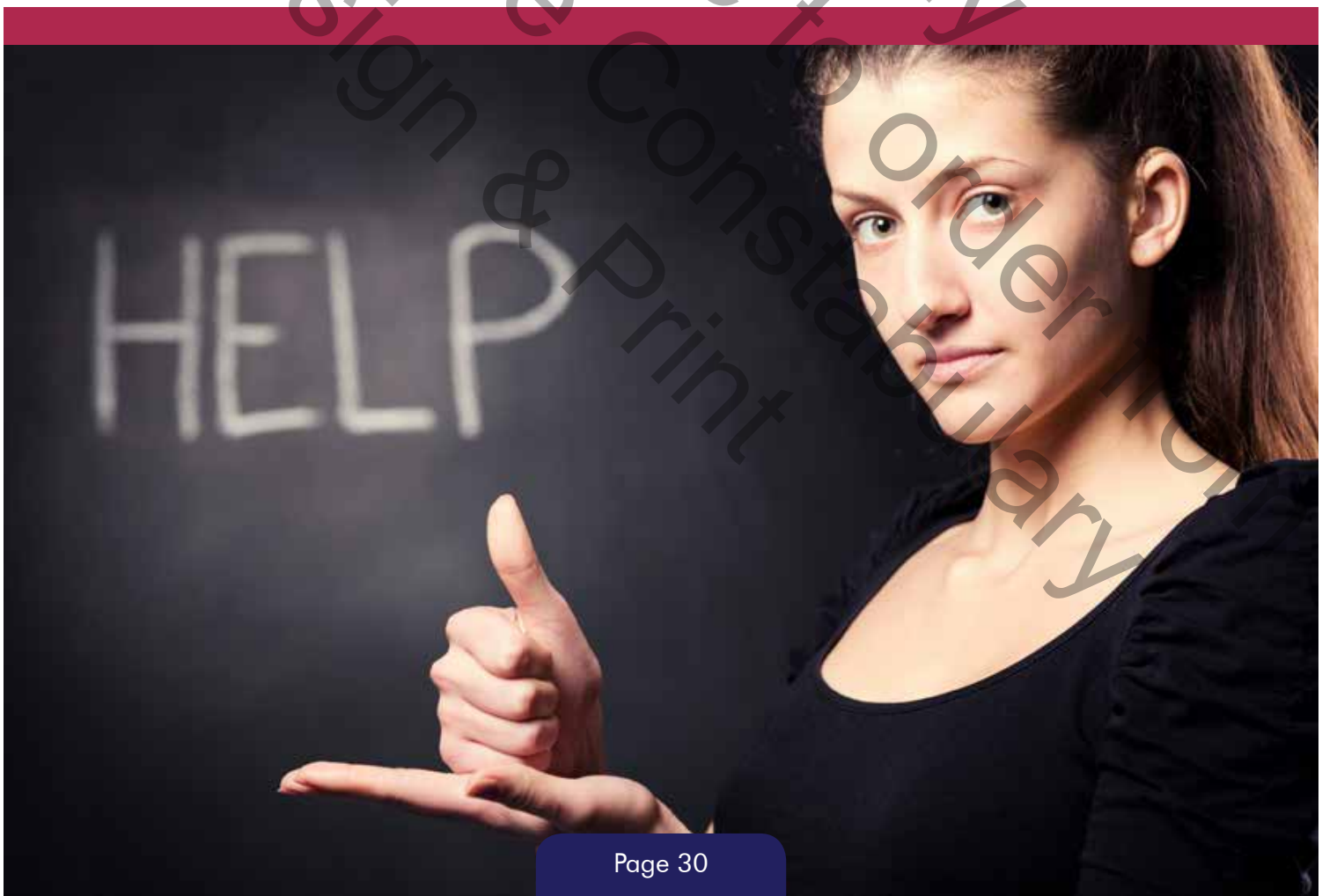
Do you need a language interpreter?

This map may be a useful aid to help people to point out their country of origin.

The Police will get a sign language interpreter if you need one.

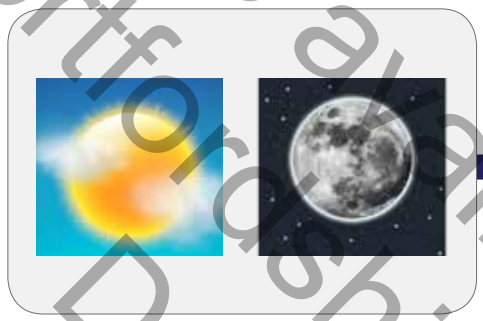
Use these pages to tell the Police if you need an sign language interpreter.

If you use sign language the Police will film any interview they have with you.



Tell the Police if you need a sign language interpreter.

You do not have to pay for a sign language interpreter.



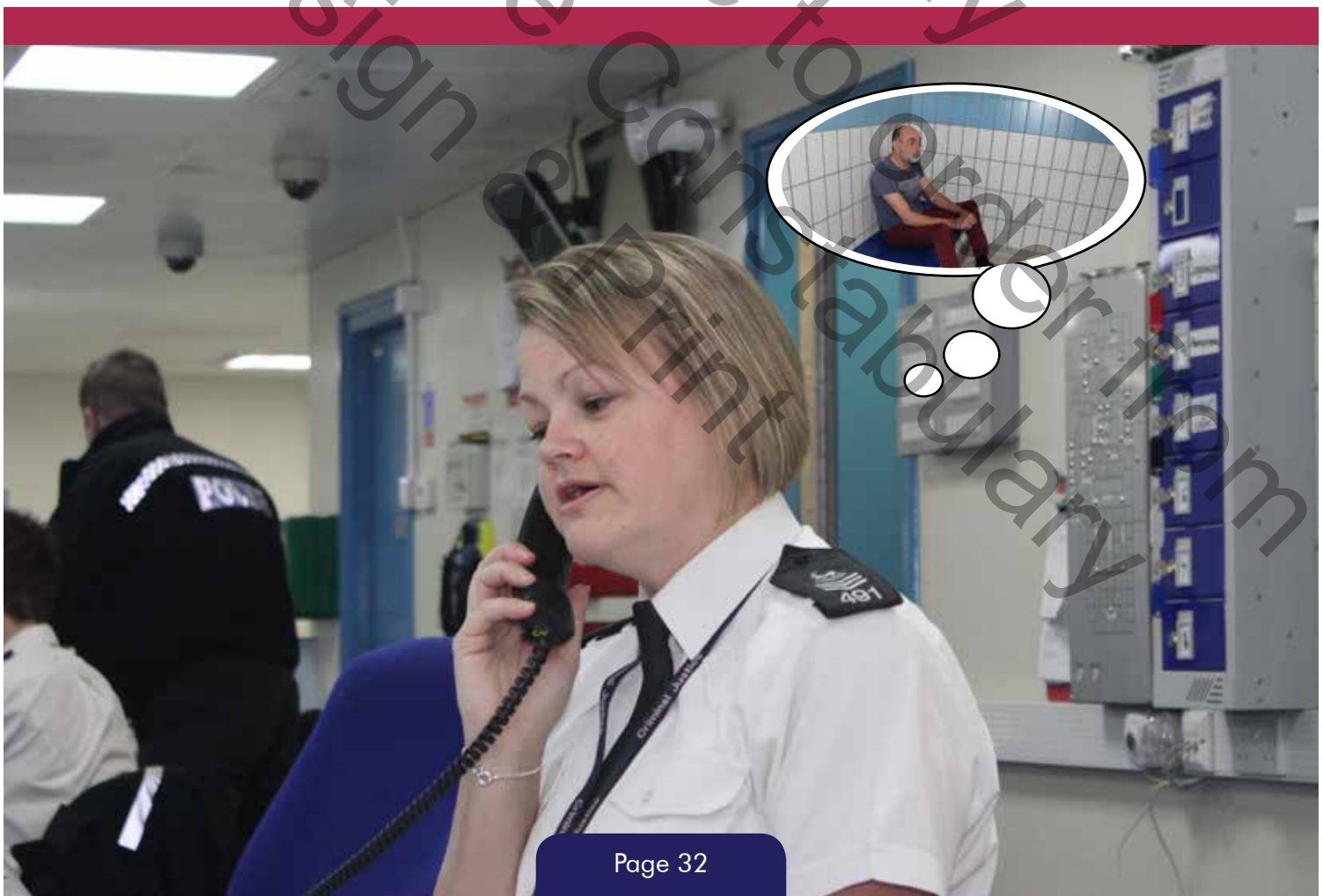
You can ask for a sign language interpreter during the day or at night.

Do you need a sign language interpreter?

You can ask the Police to tell someone where you are.

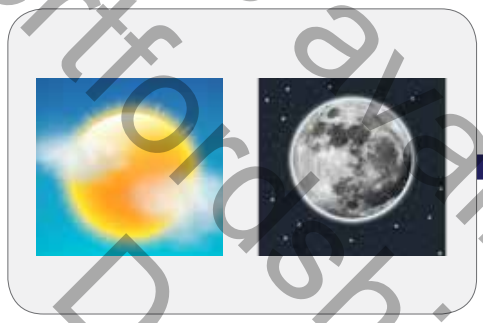
The Police may not be able to contact someone straight away if they are still investigating the crime.

You may be allowed to speak to someone on the phone.



Tell the Police if you want them to contact someone.

You do not have to pay for the Police to contact someone.



You can ask the Police to contact someone you know during the day or at night.

Do you want the Police to contact someone, like a relative, for you?

If you are not British the Police can contact your Embassy.

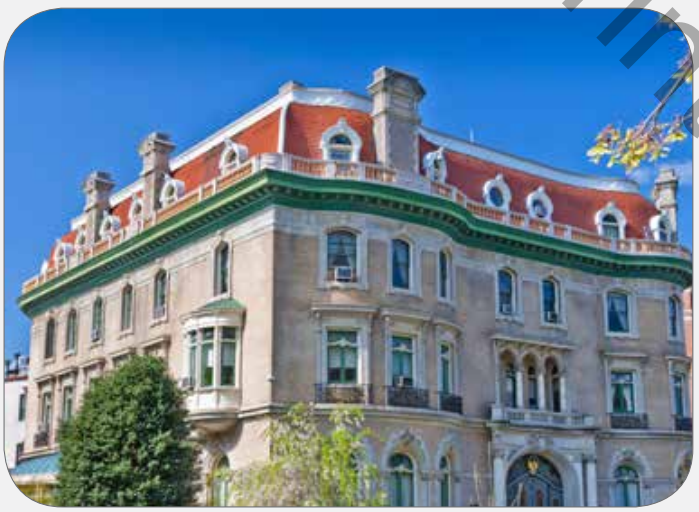
Tell the Police if you want your Embassy or Consulate to be told where you are.

The Police will phone your embassy for you.

You do not have to pay to contact your Embassy.

You can tell us if you are seeking political asylum from your country.

? Do you want the Police to tell your embassy or consulate where you are?



The Police may want to interview you about the crime.

You have the right to remain silent.

You do not have to say anything when the Police interview you.

Your solicitor can give you advice.

It may harm your defence if you do not mention, when questioned, something you later rely on in court.

The photo story below explains this difficult sentence.

This photostory is an example of how not talking to the Police could harm your defence in court.

John chose not to tell the Police where he was when the crime happened.

When he went to court John said where he was when the crime happened.

The magistrates wondered why he hadn't told the Police where he was.

The magistrates thought John might not be telling the truth in court.

Anything you do say may be given in evidence.

Your solicitor can give you advice about talking to the Police.

You can choose to answer the questions the Police ask you.

The Police will record their interview with you using a machine like this.

If your case goes to court the Police will read out what you told them as evidence.

This will help the court decide if you are guilty of the crime or not.

Police interviews

Some rules about Police interviews.

The interview room must be warm, clean and have a light on.

You must be allowed to sit down when you are being interviewed.

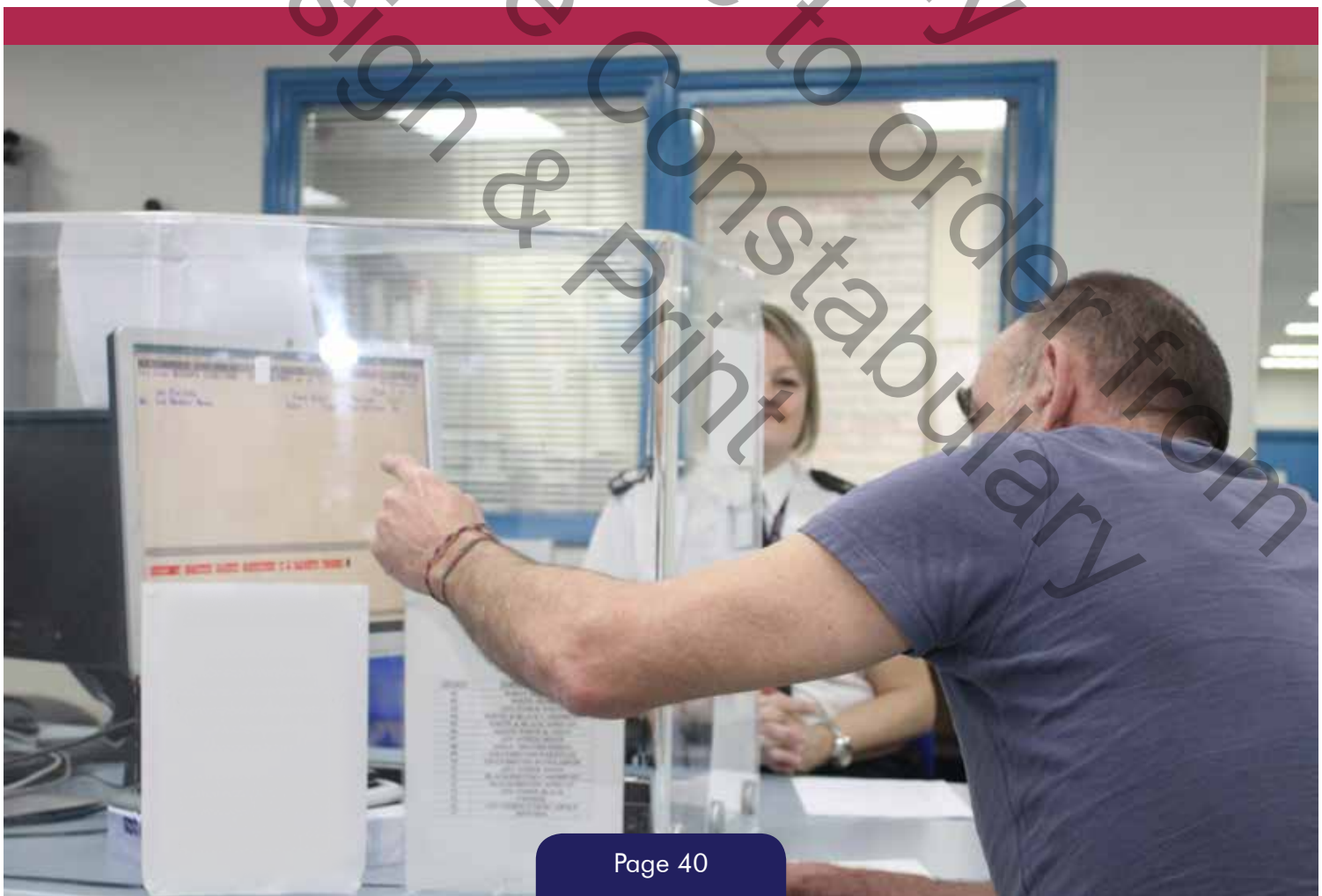
The Police officers usually have to tell you their name and their rank. For example 'Sergeant Andy Jones'.

You will have a break at meal times. You will also have a drinks break after two hours.

You have the right to see your custody record.

Your custody record is the notes the Police write about you at the Police station.

Your custody record is kept on computer at the Police station.



Your custody record

You can look at your custody record on computer.

Your solicitor and your appropriate adult can ask to see your custody record.

Your custody record will say why you were arrested and detained at the Police station.

Your custody record will have notes about everything that happens to you at the Police station.

You can ask for a copy of your custody record up to 12 months after you leave the Police station.

The Police will post it to you.

If the Police have enough evidence they may 'charge' you with a crime.

If you are charged with a crime you will need to be seen in court. This may be done via a video link from the Police station.

Some people are taken to court from the Police station.

Some people are released from custody.

Some people are released on bail.

They have to come back to the Police station, or go to court another day

Some people are released 'under investigation'.

They may not have to come back to the Police station but could be sent a letter to go to court on another day.

Some people are released without being charged.

The Police evidence

If you are charged with a crime you can see the Police evidence before you go to court.

Evidence can include things like statements from witnesses, fingerprints, medical evidence and CCTV film.

You and your solicitor will be able to see the evidence the Police have about the crime.

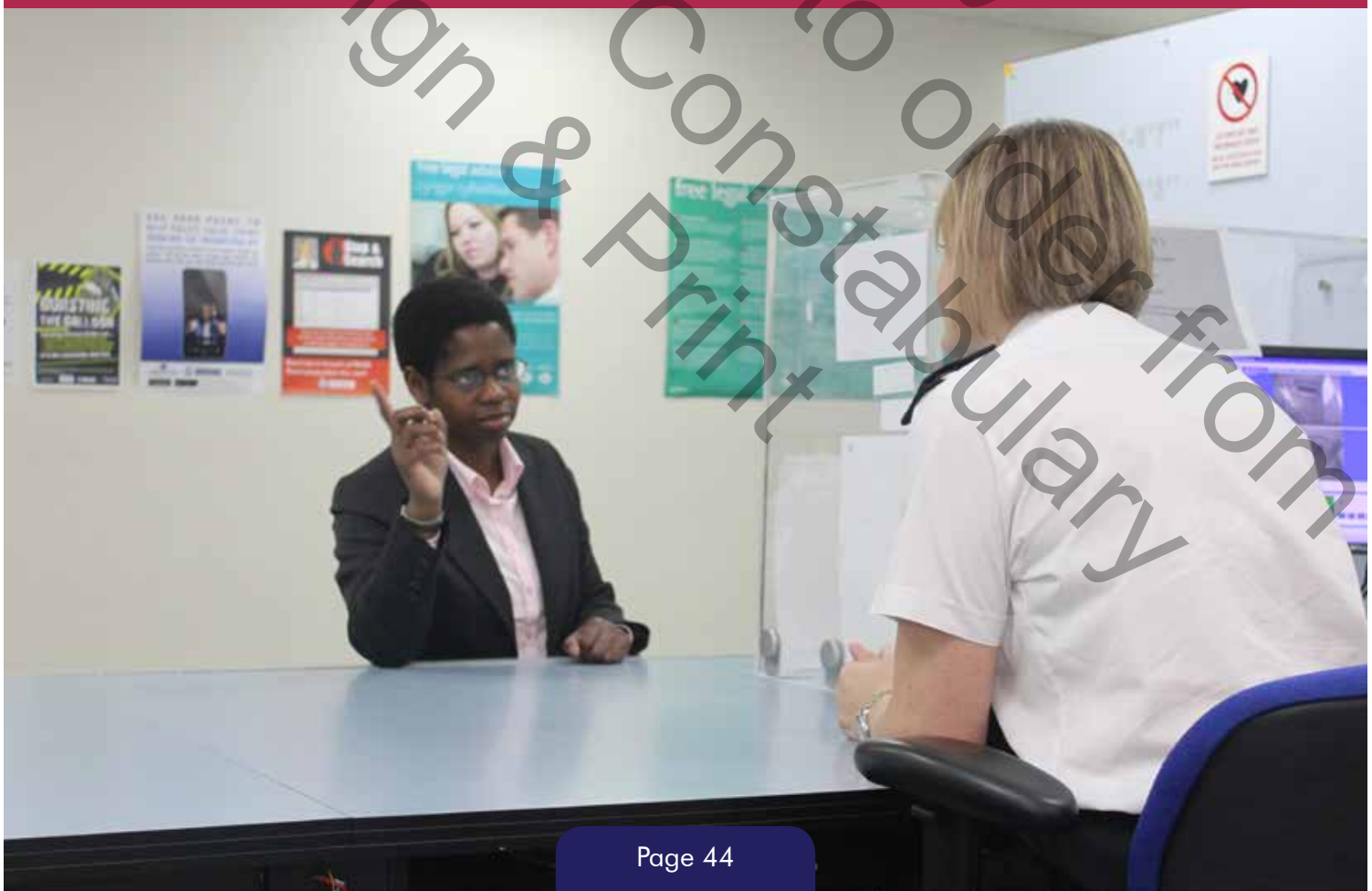
If you have to go to court you can ask your solicitor to go with you.

How to make a complaint about your treatment.

You can complain if you feel the Police have treated you badly or unfairly.

Complaint

You or your solicitor can ask to speak to a Police Inspector, or a Police officer of a higher rank.



You can also make a complaint after you have been released from custody.

You can go to any Police station and make a complaint.

You can complain to the Independent Office for Police Conduct (IOPC).

You can ask your solicitor to make a complaint for you.

You can contact your local MP to make a complaint.

Dear Judiciary Committee Members,

I gave live testimony on Oct 15th, and I am writing to provide further, more detailed input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. The bills currently under consideration are nowhere near enough. Even the reforms I have outlined above, if adopted, will not solve the problem, but they are at least a good step forward as we move towards the only possible full-scale solution to police violence: steadily defunding the police until we have abolished them outright.

Thank you,

Benjamin

Benjamin Merrick

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

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DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Kate Taylor Mighty

Good afternoon Councilman Allen and members of the committee.

My name is Katherine Crowder. I don't have any titles or represent any groups. I'm a wife, a mother, a full time essential worker, and a concerned citizen actively involved in my community. I would like to use my time to testify about the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020" and personal experience with sections of "The Comprehensive Policing and Justice Reform Amendment Act of 2020" in regard to first amendment assemblies.

As our country faced a pandemic and had collectively come to a pause, we watched together in horror as George Floyd cried out for his mother while Derek Chauvin kneeled on his neck for 8:46 seconds. "I can't breathe" was a plea heard around the world, bringing thousands of people in every state and several different countries, pouring out into the streets with a united voice demanding one thing - justice.

In late May, I joined thousands of those voices in Washington DC and marched for hours without incident or interruption. During this time, I saw hundreds of law enforcement officers from different departments, with different uniforms, and different cars. At no point had I witnessed any acts of violence, property damage, arrests, or any form of interruption from law enforcement.

When I was two blocks away from going back to my car, there was a line of police in riot gear in the middle of the street. There was no largely identifiable or visible indication that they were local law enforcement on the front of their uniforms, only the back of their helmets. They didn't appear any different from the dozens of officers I'd seen throughout the day.

I didn't hear a word from any of the police officers in riot gear. They were silent, and other than one officer I could see, all stood stationary. I didn't hear any orders given, any direction where to go, there was no indication that force had been authorized, and no real reason at all to even believe any force was about to be used.

Without warning, one officer began pepper spraying young Black protesters near where I was standing, who were visibly non-threatening. They were in regular clothes - shorts, tshirts, tank tops - it was hot - carrying nothing but signs and cell phones.

Again, without warning, officers began tossing grenades indiscriminately at people, sending sparks, deafening bangs, clouds of smoke, and shrapnel flying through the air.

I was injured by one of these devices. My hand was cupped around my mouth when the first device went off right at my feet. Something from it hit my inner elbow, leaving it bleeding and with a large contusion the size of my hand. Had my arm not been there, it could have hit me, or anyone nearby, in the neck, face, or head, causing much more serious injury.

As officers continued throwing explosives, people screamed and shouted, "They're still trying to kill us!" That was the impression left by MPD that night. "They're still trying to kill us" as people demanding police accountability recorded and were likely livestreaming these interactions to their friends and family.

The reason I chose to bring this day up is because the Constitutionally protected right to assemble and to petition the government for a redress of grievances is exactly what finally brought us here to able to tell you people are tired.

Tired, because George Floyd, Breonna Taylor, Tamir Rice, Philando Castile, Deon Kay, and TOO many others - never should have died at the hands of law enforcement, and many of their interactions never should have happened at all. Because their families deserve answers, transparency, and accountability and it shouldn't take millions of people watching, sharing, marching, and demanding justice - for justice to occur. It should just be the right, expected, human thing to do and DC has the opportunity today to lead by example.

The first step is being taken by admitting there's a problem and although I support the legislation proposed in the Police Reform Act, there’s room for improvement, as seen by the many recommendations presented here today.

This is - just - a step, and in order for change to continue to happen, it is critical the ban against local law enforcement using chemical irritants, impact munitions, and stun grenades to disperse first amendment assemblies be upheld vigilantly and to the highest standard.

Over the years, MPD has continued to demonstrate little discipline in regards to safety when using these weapons and cost the city millions of dollars over their response to first amendment assemblies. People deserve a strong guarantee that their voices can rightfully and respectfully continue to be heard without threat of excessive force, indiscriminate targeting, and serious injury by law enforcement.

A people united, are a people undeterred, and it is vital within a democracy that displays of might don't overtake or overshadow the rights of the people that brought us together today to finally discuss much needed and long overdue reform.

Thank you for your time and allowing me to testify today."

Sincerely,
Katherine Crowder

Dear Committee Members,
Following up on my testimony from last week, please find below three recommendations for B23-0771. Happy to discuss with you or your staff if there are any questions.

As a Ward 1 resident and scientist who has worked in nonproliferation for several years I provide these recommendations in my personal capacity. The purpose of these recommendations is to make sure that others in the future do not misinterpret the statute **to excuse the use of these agents by law enforcement. Below are straightforward changes to definitions and additional oversight suggested to manage these risks**.

Recommendation #1

The definition of chemical irritants (Line 33) in the bill is consistent with the CWC language covering "riot agents" and should be sufficient to cover all standard "chemical irritants". I **recommend either removing or clarifying the second portion of the clause beginning on line 35.**

Recommended text:

> "Chemical irritant" means tear gas or any chemical which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure. **For the purposes of this bill "chemical irritants" includes any such substance prohibited for either law enforcement or warfare use by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, which entered into force in the United States on April 29, 1997**. (or remove this bolded sentence entirely, see below for reason)

Reasons:

1. The word "prohibited" (line 35) is ambiguous because of the CWC. The CWC defines "purposes not prohibited" to include law enforcement use including domestic riot control. Although riot control agents are banned in warfare to prevent escalation, the treaty does not ban law enforcement use. Specifically law enforcement uses are not prohibited. Someone later on could try to argue that the application of these chemicals is legal because it is not prohibited by the treaty. Therefore I suggest clarifying the word "prohibited" in the bill.
2. The relevant chemical irritants all fall into the general description that is already covered by the language of the bill (e.g., pepper spray, CS, CN, CR, etc). No additional specific chemical irritants are "scheduled" (i.e., banned) under the CWC. Scheduled chemicals tend to be even more dangerous chemical weapons and their precursors (e.g. nerve gas, mustard gas), and their use is already banned by US law. **I recommend either removing the "or" clause altogether or clarifying it.** If keeping this clause, I also suggest using the date the treaty went into force which was several years after the signature date**.** I would not specify the chemicals - the definition of chemical irritants is future proof as originally written in this bill.

Recommendation #2

The bill limits use of chemical irritants to *disperse* a First Amendment assembly. What about other purposes, and who defines "dispersal"? For example, is it intended to prevent use of pepper spray (OC) on individuals at such assemblies too? That seems ambiguous in the text because one could argue that pepper spray use on an individual is not "dispersal". **Consider if**

the intent of the legislation is to prevent ALL uses of chemical irritants at First Amendment assemblies or what uses specifically are intended to be allowed.

Recommendation #3

What are the criteria being used by law enforcement to decide whether an assembly is a First Amendment assembly? We have seen instances in DC and across the country where peaceful assemblies have been deemed riots by police. Once police have determined an assembly is no longer a First Amendment assembly, what is prohibited? **Consider how the following factors impact this bill: (1) the definition of what is/isn't a "First Amendment activity", (2) who is making the determination in the moment, and (3) what checks, balances, and transparency is involved in making and documenting that decision.**

Thank you for your consideration of these recommendations.

Regards,
Gautham Venugopalan, Ph.D.

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee.

As an infectious disease biologist at Walter Reed, I am compelled to testify on DC's public health crisis. It is prevalent and ongoing. It disproportionately affects poor people and people of color. Of those it disproportionately affects, it comes with an intensified risk of mortality. We do not yet have a cure. However, we can assess the efficacy of the measures the council has funded to counter this crisis of racial and wealth inequity.

DCPS has a $23 million contract with MPD, enlisting armed police at schools. But according to the School Survey on Crime and Safety, police presence in schools increases reporting of non-serious violent crimes to law enforcement, which leads disproportionately to arrests of Black students.

In 1965 the McCone Commission identified access to transportation as critical to racial equity and yet, in DC in 2018, Washington Lawyers' Committee for Civil Rights and Urban Affairs found that 90% percent of Metro Transit Police citations for fare evasion were issued to Black residents.

As a response to a public health crisis, policing in DC does not meet even a minimum standard of efficacy for a therapeutic.

But it doesn't have to be this way.

For example, the Piscataway Project, which implemented and evaluated school-based violence prevention approaches, found that these strategies consistently reduced delinquent behavior in schools (Hunter et al., J School Psych, 2001).

San Francisco Muni's Community Transit Assistants Program resulted in a 98% drop in high-risk incidents.

And in Bogotá, Colombia, traffic mimes (with red noses) used de-escalation tactics through performance art, leading to a 50% drop in traffic fatalities (Caballero 2004).

None of these successes required a single ticket, arrest, or firearm.

It makes as much sense to send police officers to defend against coronavirus infection as it does to send them to defend against racial and wealth inequity. We have rightly identified that the coronavirus, and not its victims, should be the target of our efforts to stem the virus' affliction on this

city. In the case of the ongoing crisis of racial and wealth inequity that afflicts DC, I urge the council to pass legislation that targets the disease and not its victims.

I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Eric Lewitus

POLICE EXECUTIVE
RESEARCH FORUM

Chuck Wexler
Executive Director

September 30, 2020

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue NW
Suite 110
Washington, DC 20004

Dear Chairman Allen:

Thank you for the opportunity to submit comments on behalf of the Police Executive Research Forum (PERF) regarding Bill 23-882 (the "Comprehensive Policing and Justice Reform Amendment Act of 2020").

The Police Executive Research Forum is a national independent research organization, based in Washington, that focuses on critical issues in policing. Since its founding in 1976, PERF has identified best practices on issues such as reducing police use of force, de-escalation tactics and strategies, new technologies in law enforcement, and the role of police on issues such as the opioid epidemic and homelessness. (See https://www.policeforum.org/ for further information.)

I would like to comment on one section of this legislation, which would amend Section 3900 of District of Columbia Municipal Regulations to provide that "Members [of the Police Department] may not review their Body-Worn Camera recordings or BWC recordings that have been shared with them to assist with initial report writing."

In 2014, PERF released a major report and guidelines on police use of body-worn cameras, Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned. Our report, which was produced with support from the U.S. Justice Department's Office of Community Oriented Policing Services, was based on extensive research and a national conference in which more than 200 law enforcement officials, academics, and other experts helped produce our 33 guidelines for a model BWC program.

One of the more complex issues was whether officers should be permitted to review BWC footage of an incident prior to making a statement or report on the incident. As detailed on pages 29-30 of our report, we considered various points of view on this point, but most police chiefs we consulted said that allowing officers to review BWC footage results in the best evidence of what actually took place.

For example, Charles Ramsey, at that time Police Commissioner in Philadelphia and previously Chief of the Washington, DC Metropolitan Police Department, told us, "When you're involved

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in a tense situation, you don't necessarily see everything that is going on around you, and it can later be difficult to remember exactly what happened. So I wouldn't have a problem with allowing an officer to review a video prior to making a statement."

Based on the recommendations of Commissioner Ramsey and many others, our report recommends the following in Guideline 20, on page 45:

20. Officers should be permitted to review video footage of an incident in which they were involved, prior to making a statement about the incident.

This can occur, for example, if an officer is involved in a shooting and has to give a statement about the shooting that may be used in an administrative review or a criminal or civil court proceeding.

Rationale:

- Reviewing footage will help officers remember the incident more clearly, which leads to more accurate documentation of events. The goal is to find the truth, which is facilitated by letting officers have all possible evidence of the event.
- Real-time recording of the event is considered best evidence. It often provides a more accurate record than an officer's recollection, which can be affected by stress and other factors. Research into eyewitness testimony demonstrates that stressful situations with many distractions are difficult even for trained observers to recall correctly.
- If a jury or administrative review body sees that the report says one thing and the video indicates another, this can create inconsistencies in the evidence that might damage a case or unfairly undermine the officer's credibility.

In the years since our guidelines were released in 2014, we have not had any occasion to revisit or reconsider Guideline 20. We have not become aware of any major incidents in which officers' review of BWC footage has resulted in falsification of reports or created problems with prosecutions or with officer discipline.

I hope this information will be useful to you as you consider BWC policies and other reforms in your legislation. Please let me know if you would like any additional information from PERF.

Sincerely,

Chuck Wexler
Executive Director
Police Executive Research Forum

Cc: *Committee on the Judiciary and Public Safety*
At-Large Councilmember Anita Bonds
Ward 3 Councilmember Mary M. Cheh
Ward 7 Councilmember Vincent C. Gray
Ward 2 Councilmember Brooke Pinto

Re: Bill 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020

Greetings Committee Chairman Allen and Councilmembers of the District of Columbia.
My name is Patricia Stamper. I live in Ward 7 in the Deanwood neighborhood with my husband and two boys. Thank you for providing District residents with an opportunity to participate in our democracy and for bringing the conversation of public safety to the forefront of our community. After reviewing Bill 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020, here are my recommendations and why:

1. As a wife of a man that is Black and a mother of two Black boys I worry about their safety constantly because of the historical perception of Black bodies are viewed by law enforcement as a threat. However, I see my husband as a kind-hearted and hard working man who provides for his family. I would like to recommend ALL body camera footage that is currently collected by MPD officers to be made available to the public in 3-6 months.

2. I would like to recommend that instead of sending MPD officers to domestic issues that DC Council mandate that a Dept of Health or Dept of Behavioral Health Social worker, therapist or psychologist be sent out in tandem with MPD to respond to the call for service.

Thanks so much for your time. I am available to answer any questions.

Best,

Mrs. Patricia Stamper

Date: 10.15.2020

To: Ms. Kate Mitchell, Director
Committee on the Judiciary & Public Safety
Councilmember Charles Allen, Chairperson
Council of the District of Columbia

From: DeVaughn Jones, Chair
Legal Redress Committee, NAACP D.C. Branch

Re: Written testimony regarding B23-0723, B23-0771, B23-0882

To the Committee Director, Membership, and D.C. City Council,

I do not have much independent testimony regarding the above-three bills. Rather, I write to ask you to give particular attention to the testimonies of the D.C. Justice Lab, headed by Ms. Patrice Sulton on Panel 4 of today's hearings. I've had the pleasure of reviewing the Lab's multiple proposals, and am excited that the Council will be able to review such well-prepared, good-intentioned, and civic-minded proposals for law enforcement reform. I've had the pleasure of meeting a handful of the participants personally, including Ms. Katrina Jackson, Ms. Sabrin Qadi, and Ms. Sulton herself. Each of them has a passion for justice rooted in personal experience - and like many Justice Lab participants, their proposals speak to the urgency of today's hearing. They have seen and felt the consequences of D.C.'s law enforcement status quo - and unlike many of the people they're fighting for, they are still alive to share their stories.

Similarly, Ward 8 Commissioner Salim Adofo's testimony deserves particular attention. The Commissioner requires no introduction in his hometown, but I do offer one observation from my experience working with Salim in my role at the NAACP □ he speaks on behalf of the people. He works on behalf of the people. And indeed when he presents his testimony today, it will be on behalf of his District neighbors □ your and I's neighbors, too. And like the Justice Lab, Salim's testimony comes from feeling the consequences of law enforcement regulation in the District. As you hear from the Justice Lab and Commissioner Adofo, I implore you to connect their testimony with their lived experiences □ and the lived experiences of the District at-large.

Many people have benefitted from the policing status quo. Many of those beneficiaries will provide compelling testimony to you, too. But the utilitarian in me concludes with this: as we move forward to reform how police can and cannot conduct themselves in our communities □ **our** communities □ we owe deference to the voices of the majority. Not the voting majority, or the taxpaying majority, but the **human** majority. We must listen to the majority of lived experiences in the District now and throughout the short time this great city has existed. I dare say that millions of people that have lived in the District over the past five years would present overwhelming evidence to reign back MPD's monopoly on deadly force.

Unfortunately, the people with the most compelling evidence are not here to give it. Fortunately for us, and for the quality of the Council's impending legislation, we have people like the Justice Lab and Commissioner Adofo to listen to.

Hello,

As a DC resident in Ward 4, I'm happy to see that changes are being made in response to the overwhelming need of the people for an end to police brutality.

Initially, I support all of the comments submitted by the ACLU-DC, Black Lives Matter DC, DC Justice Lab, the Working Families Party DC, Stop Police Terror Project DC, Black Swan Academy, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

As a young person growing up in schools today, where being surveilled by School Resource Officers became a common daily practice, I can say firsthand that a uniformed officer's presence in school halls never made me feel safer. Instead, it brought a dark tension into a place where children are meant to grow, learn, and interact safely -- a looming threat that was a constant reminder that we were viewed not just as students, but as potential threats that could be quickly cracked down upon.

As a white student, though, the tension I felt was never, ever as likely to become a hard reality. Like any child, there were times in school when I was distracted, disinterested, or disruptive. But these behaviors that got me a light slap on the wrist are the same ones that get Black and brown children put into the carceral system.

Studies show that the presence of police officers in schools may actually increase safety and disciplinary problems. According to the ACLU, schools employing police officers have seen increases in student offenses and student arrests by as much as 400 percent.

Students arrested at school are much likelier to experience incarceration as adults. And nationwide, Black students are 4 times more likely to be suspended than white students and 3.5 times more likely to be arrested within school than white students, despite exhibiting similar behavioral patterns -- so, **with increased policing comes scientifically increased likelihood that Black students will end up incarcerated later in life.**

If the goal is to keep DC schools peaceful, safe, and productive, the research shows that putting more police in schools has the opposite effect. Instead, to truly keep students safe, we need more trained professionals who don't respond to disciplinary issues with force.

In this summer's debates over the role and number of security guards and police officers in city schools, DC Councilmember David Grosso noted that **the ratio of security guards and police officers per student is much higher than those for counselors, psychologists, or social workers**. D.C.'s combined $32 million in police department and school district security spending could have hired an additional 215 school psychologists, 335 guidance counselors, or 322 social workers -- each of which would make a huge difference to the DC school system. It's not conjecture, it's proven -- that's what real investment in student safety looks like.

Again, I'm happy to see that changes are being made in DC, but when the changes don't use researched solutions addressing the root of the problem, it begs the question of what they're meant to fix. **Police didn't exist in schools for centuries and shouldn't be there now -- we need to defund school police budgets and invest instead in guidance, mental health, and care**. The health, safety, and futures of DC's children depend on it.

Thank you.

Sarah Gertler

When legislation is required to prevent the police from using chokeholds against the people they are charged to protect and serve, then we must recognize that something more than policies must be changed; we need social, political, and economic transformation. My name is Bill Mefford and I am the Executive Director of the Festival Center. We are a hub for organizations seeking to build justice movements and we train and mobilize faith leaders to serve in those movements.

I certainly hope the DC City Council will pass the Comprehensive Policing and Justice Reform Amendment Act of 2020 as a first and necessary step in addressing police violence, but we also must examine the values associated with the current system that pits the police against local communities, particularly communities of color.

From a Christian perspective, Scripture describes one of the intentions of a system of justice is to be a means of healing for society as a whole. This happens because all people, regardless of any social, political, cultural, or economic barriers imposed on them, have access to fair and equal justice. Justice is meant to fairly distribute societal resources according to need more than merit. The result of justice should be that none are left out, none are marginalized, and all people have access to happiness. Thus, grievances are settled and authentic peace is created because all have confidence in the system of justice.

We as a city and especially as a nation are far away from this intended reality.

However, the Comprehensive Policing and Justice Reform Amendment Act of 2020 is a necessary step towards the healing we need as a city. Importantly, the legislation will strengthen procedural protections when the police seek to search a person’s vehicle, home, or property, and it will also strengthen the District's use of force standards by clearly defining non-deadly and deadly force while limiting the situations in which both non-deadly and deadly force can be used.

Also significant, this bill will restrict the ability of District law enforcement agencies to acquire or request certain military equipment like armored vehicles, grenades, or drones, and it requires agencies that currently possess such equipment to return it. Since 1990 the United States government has transferred $6 billion worth of military equipment to local law enforcement agencies and it is time for DC to put an end to this for our residents.

Still, so much more needs to be done. We need to examine the values underlying the current system that has sought to attain the military-style weapons for the police in the first place. How is peace ever truly attained through sheer force and intimidation? Instead of policing through fear and overwhelming force, we should shift our resources to transformative justice approaches that work to bring real healing to survivors of crime and accountability to the person responsible for the harm committed. Restorative justice models have a much greater track record in lowering recidivism than our current retributive models, which only serve to spread harm further. Under restorative justice models, community members are allowed to work together to keep each other safe.

I should be clear: shifting resources means we must defund the police. Defunding the police is a necessary step towards achieving authentic peace in our city. Defunding the police means recognizing the historical role of the police as one rooted in racial oppression and systematic

abuse of Black and Brown people. Defunding the police means investing in our communities so that we can finally allow resources to be given to areas which will enhance the quality of life. Quality of life, in turn, will result in a decrease crime, which will dramatically reduce the spaces for police to be involved in peoples' lives. Affordable housing, accessible healthcare, available mental health services, quality education for all students, and a secure safety net for vulnerable people can be attained if we truly value the welfare of DC residents over and above the funding of armed forces roaming the streets of our neighborhoods.

Our over-investment in policing over and above our communities has had a very real cost in all areas of the lives of DC residents. We have helped to perpetuate an over-reliance on policing as the answer to our problems, calling the police not only in emergencies, but also in response to white people's fears or annoyance in many situations where people of color are simply trying to live their lives. Police occupy far too many areas of our lives including the schools our children attend. It should not be surprising that our current system of policing only exacerbates conflicts and deepens entrenched racism. By reducing the spaces occupied by police we give greater opportunities for community leadership to flourish and community resources to be utilized.

The Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020 will not solve all of our problems, but it is a necessary first step of a long journey towards healing and authentic peace. The only obstacle in our way to having a peaceful city is political will and the answer for those challenges rests in your hands.

UNIVERSITY OF
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Seth W. Stoughton
Associate Professor
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October 15, 2020

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 110
Washington, DC 20004
via email: judiciary@dccouncil.us

Dear Chairman Allen,

I am writing to submit comments regarding Bill 23-882, the Comprehensive Policing and Justice Reform Act of 2020. Specifically, my comments are directed to the portion of the proposed legislation that would amend Section 3900 of the District of Columbia's Municipal Regulation to prohibit officers employed by the Metropolitan Police Department from reviewing police body-worn camera ("BWC") video "to assist with initial report writing." I respectfully advise that while officers should *not* be permitted to review their BWC videos prior to writing use-of-force reports, they generally should be able to do so in other contexts.

I have studied policing as an academic for more than eight years. I am a tenured member of the faculty of the University of South Carolina School of Law, where my research focuses on the regulation of policing, including the use of force, investigative procedures, agency policies, police culture, and industry practices. My previous academic appointment was a two-year teaching fellowship at Harvard Law School, where I researched the same topics. In that time, I have published extensively on policing. I am the principal coauthor of *Evaluating Police Uses of Force*, a book published by NYU Press in May 2020, and my articles have been published in a number leading academic journals. In presentations, articles, and other writings, I have championed a range of significant police reforms.[1] I am also a former city police officer and state investigator, having served in those capacities for more than seven-and-a-half years.

[1] *See, e.g.*, Seth W. Stoughton et al., *How to Actually Fix America's Police*, THE ATLANTIC (June 3, 2020), http:\\bit.ly\PoliceReformEssay.

As is relevant here, I have written and presented extensively on police BWCs. In *Police Body-Worn Cameras*, an article published by the North Carolina Law Review in 2018, I identified and critically examined the potential benefits, capabilities, and limitations of BWCs, providing a framework for police agency executives and policymakers to consider whether to adopt BWCs and how to successfully implement a BWC program. I have served as a BWC subject matter expert pursuant to a Bureau of Justice Assistance grant to develop technical assistance related to police body-worn cameras; in that capacity, I provided verbal and written consultation to CNA Analysis & Solutions and presented, by invitation, a keynote address on BWC systems. By invitation, I have conducted trainings and presentations specifically on police BWCs to a variety of audiences, including the Conference of Chief Justices; the American Judges Association; judicial conferences in Arizona, Indiana, Kansas, Missouri, North Dakota, Ohio, South Carolina, and Tennessee; the Crown/Defence Conference in Manitoba (CAN); the Federal Law Enforcement Training Center; a group of federal Inspector General Investigators; the South Carolina Police Chiefs Association; the Peace Officers' Association of Georgia; senior executives at the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives; the command staff of the Kansas City (MO) Police Department; and investigators, lawyers, and supervisors with Chicago's Civilian Office of Police Accountability, among others.

The issue of whether and to what extent officers should be allowed to review BWC video prior to writing a report—that is, to engage in "pre-report review"—is a controversial one. On the one hand, there is a legitimate interest in ensuring that officers' reports are complete and accurate. On the other hand, there is a legitimate interest in ensuring that officers do not engage in gamesmanship by using video to manufacture *ex post* justifications for their actions or unconsciously contaminate their contemporaneous perceptions of events.

In my opinion, this balance is best struck by prohibiting officers from engaging in pre-report review in the context of use-of-force reports but permitting pre-report review in other contexts. As I have written elsewhere:

> The core concern relates to the potential for officers to base their reports on the body-camera video itself instead of their own perceptions or recollections. In the context of incident or arrest reports, which turn on objective facts rather than the officer's perception, a pre-report review may be relatively unproblematic. An officer writing up a burglary report, for example, should be able to review the recorded interview with the victim so that the officer can include in the report a complete list and description of any stolen items. In the same vein, an officer writing up a DUI arrest would benefit from the ability to review BWC footage so that she can accurately record the ways in which the stopped motorist failed field sobriety exercises. Although officer reports are generally accurate, the availability of video can make them even more accurate, allowing agencies to reap the informational benefits of BWCs.

> Use-of-force reports, however, are a different story. The propriety of a use of force does not turn on the objective facts of the situation, but on the reasonableness of an officer's perceptions and actions. In this context, officers should not be able to review BWC footage before writing a report. Most obviously, it creates both the opportunity for deception and, even more importantly, the perception that there is nothing to prevent officers from engaging in deception. To the extent that deception occurs, it may well occur in some occasions as a result of the officer being put in a moral dilemma. Consider, for example, an officer who is interacting with a bellicose subject and notices, out of the corner of her eye, the subject ball his hands into fists. Fearing an attack, the officer preemptively uses force, bringing the subject to the ground. Upon reviewing the video, however, the officer sees that the subject's hands, more clearly visible in the video than in her peripheral vision, were never balled into fists after all. What is that hapless officer to do? Ideally, perhaps, the officer would document her perceptions as well as her knowledge that her perceptions were inaccurate. Officers are only human, however, and it is entirely plausible to suspect that some number of officers in that position would leave out any mention of balled fists and instead find *something* in the video that they could use to justify their actions.[2]

This difference in treatment between use-of-force reports and other reports (e.g., arrest or incident reports) reflects the differences in those two contexts. At the risk of over-simplification, what matters in most contexts and for most reports is what *actually happened*; the list of items reported missing by the burglary victim, the eyewitness's description of the alleged perpetrator, whether and how quickly an individual left the premises after being told to do so, *et cetera*. In the use-of-force context, however, an officer's report is supposed to reflect what the officer *perceived*. It is my understanding that, prior to the emergency legislation passed in June 2020, officers could not review BWC videos prior to preparing reports regarding a "police shooting." I would recommend expanding that to all uses of force and in-custody deaths or, at a minimum to uses of force resulting in serious injury and in-custody deaths.

Importantly, however, the concerns that justify a prohibition on pre-report review in the use-of-force context—primarily concerns related to self-interested gamesmanship or deception—may exist, but they are less salient in contexts other than the use of force. Further, there can be significant benefits to allowing pre-report review. As a threshold matter, I am personally familiar with or have communicated with colleagues in other countries about how foreign national, provincial, or local police agencies use BWC systems. So far as I am aware, no modern Western democracy prohibits officers from reviewing BWC videos prior to preparing reports (outside of the use-of-force context). There are at least three reasons to permit pre-report review outside of the use-of-force context.

[2] Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C.L. REV. 1363, 1418-19 (2018) (citations omitted).

First, most police reports are neither intended nor expected to be an auto-biographical account of a single officer's perceptions. Instead, arrest and incident reports are intended to document a range of evidence and information that was been observed or collected not just by the reporting officer, but also by other officers. Consider a few common scenarios. When multiple officers investigate a single incident, often a single officer—the "primary" officer—does the report, relying on and documenting information provided by the other officers. The primary officer investigating a burglary, for example, may speak to the victim but include in her report information obtained from other officers' during their respective interviews of the neighbors. The primary officer may rely on the what they're told by the other officers and the written notes taken by those other officers It would be to everyone's benefit if the primary officer could also review the other officers' BWC videos of those interviews. In domestic dispute or domestic violence investigations, it is almost universal for one officer to speak with one party and another officer to speak, out of hearing, with the other party. Here, too, one officer typically writes the report and includes information gathered and shared by the other officer. Again, the officer writing the report may rely on the other officer tells them and the written notes taken by the other officer. Here, too, it would be to everyone's benefit for the officer writing the report to have access to and review the other officer's BWC footage. When officers change shifts, it is not at all uncommon for officers who have made arrests or started an investigation as they are ending their shifts to turn those arrests or investigations over to officers who are coming on shift. The same point holds; it would be to everyone's benefit if the officers taking over the arrest or investigation could review the other officers' BWC videos in much the same way that they listen to the other officers' statements and rely on their written notes. The same thing is true when a supervisor gets involved in an incident and makes an arrest, then turns the arrest over to a subordinate officer, who handles the paperwork. This is not just true in the context of arrest and incident reports, but also in affidavits supporting officers' applications for search or arrest warrants. Generally speaking, a single officer will submit a single affidavit in support of a warrant, but that affidavit will often have information from multiple officers and sometimes multiple reports.

As these examples suggest, the vast majority of police reports are based on far more than the authoring officer's unaided memory of their own personal observations. Instead, arrest or incident reports are, and are intended to be, compilations of accurate information gathered from a number of different sources, often by a number of different officers. If an officer can rely, when preparing an arrest or incident report, on his own memory, his written notes, any still photographs that were taken, information orally provided by other officers, the written notes of other officers, *et cetera*, it makes little sense to exempt BWC video from the information that the officer can review as they write that report.

Second, keeping in mind that the primary goal of most police reports is to convey accurate information, not necessarily a particular officer's limited observations, pre-report review can increase the accuracy of police reports. The best available evidence suggests that BWC video can serve an essentially mnemonic function. In one study, researchers outfitted participants with a "SenseCam," an outward-facing, body-mounted camera that takes periodic still images (but not

video); when wearers reviewed the images, they were able to better recall details about the relevant event even when those details were not reflected in the images themselves.[3] Thus, not only is there good reason to believe that video may be more accurate than human memory, there is also reason to believe that video may actually *aid* human memory. An unpublished study from the Netherlands compared the quantity (meaning the number of statements) and quality (meaning the accuracy of statements) of police reports when officers did and did not engage in pre-report review, finding a marked improvement in both quantity and quality when officers could review their BWC videos prior to writing the report. It is worth pointing out that the study showed there was a similar benefit when officers could write their reports, review the video, and then supplement their reports (a "write, review, revise" approach), but that process both takes additional time and creates additional reports that the eventual audience must sift through. To the extent that body-worn camera video accurately captures information or prompts an officer to include accurate information, it makes little sense to deprive an officer writing the report—or, just as importantly, the prosecutor, defense attorney, civil rights attorneys, judges, jurors, and others who may read and rely on that report—of the benefit of that information.

Third, to the extent that there is a concern about officers selectively *excluding* certain information from reports, such as evidence that would tend to exculpate an arrestee, that concern is distinct from the issue of pre-report review. Officers are *always* supposed to include relevant evidence, whether inculpatory or exculpatory, in their reports and their affidavits in support of warrants. Any failure to do so is indeed serious and merits being taken seriously, but depriving officers of a source of what can be accurate and relevant information—*including* exculpatory information—does not advance or address that concern.

For the foregoing reasons, I believe that the best policy is to prohibit officers from reviewing BWC video prior to preparing use-of-force reports, but to permit pre-report review in other contexts.

Respectfully,

Seth Stoughton

Disclaimer

Please note that any opinions offered in this letter are solely those of the author and do not necessarily reflect the views of the University of South Carolina, the University of South Carolina School of Law, or any affiliated entities or personnel.

[3] Steve Hodges et al., *SenseCam: A wearable camera that stimulates and rehabilitates autobiographical memory*, 19 Memory 685 (2011), https://doi.org/10.1080/09658211.2011.605591

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Christopher Bangs

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Runal Das

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support this attempt at police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

First of all, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

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Sincerely,

Lisa Pahel

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Nell Geiser

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Stuart Karaffa

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Michael Swistara

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
PUBLIC HEARING
1350 Pennsylvania Avenue, N.W.,
Washington, D.C. 20004

October 15, 2020

Good day Councilmember and Chairperson Charles Allen and Committee members of the Judiciary and Public Safety. The following is my written testimony that I present for inclusion of Bill B23-0882 - The Comprehensive Policing and Justice Reform Amendment Act of 2020.

Indoctrination of the Constitution of America's with the Bill of Rights have paved the way of white privilege and has caused undue harm too many nationalities; with misinformation written in history books, and constant brutal attacks on POC. The Black Lives Matter movement resurrected anti slavery, oppression and police brutality in July 2013, starting with the use of the hashtag #BlackLivesMatter on social media after the acquittal of George Zimmerman in the shooting death of African-American teen Trayvon Martin 17 months earlier in February 2012. The movement became nationally recognized for street demonstrations following the 2014 deaths of two African Americans, that of Michael Brown—resulting in protests and unrest in Ferguson, Missouri. Most recently the murder of George Floyd by the hands of police officers during a pandemic caused global upheaval whereby citizens who care said enough is enough.

People are calling for a process to defund the police departments. Our MPD is not like other jurisdictions and should not be included as such. However, DC Council jumped on the bandwagon by make immediate budget changes and legislation that may not have been in the best interests of DC. The MPD structure here in the district has an additional 10 agencies including 4 sub agencies. MPD's budget affects this entire group and sub group. Taking any funding will no doubt have a trickle down effect on the agencies that follow.

I have however come to realize why Cathy Lanier nominated Peter Newsham for Chief of Police. It wasn't because he was the best candidate or more qualified it was because Newsham would continue Lanier's agenda without her. There are black American males on the police force who are overlooked because of the way the nomination system is set up. Then we have Chairman Mendelson following in Lanier's footsteps. Why?

During election time seniors are the super voters are always being courted with blacks in Wards, 5,7, and 8; but we have to have a white privileged person heading up MPD who is less qualified. I have worked constantly with MPD since 1996 as a volunteer. I have seen some reforms. However, with qualified immunity and a police union who protects the cocky behavior and misconduct of their police officers there lies the problem. Moreover, great black police officers are being overlooked since MPD recruits college graduates; these individuals come in get trained by long term street experienced officers and then are promoted. Systemic..

The way in which things are thought out with our city leaders and those who are wanting to lead needs to be addressed. This past primary election DC had a male running for Ward 7 Democratic Councilmember who was known as a big time drug dealer in DC. Further, this person is a core leader of the BLM DC Chapter. Then the DC Chapter of BLM has one main vocal female who is not a native Washingtonian; who is constantly tapped by local media to speak about BLM. She constantly bashes the DC police department, won't speak to the Mayor and during a recent WTOP interview was asked if she cared about diners eating peacefully, minding their business only to be surprised and verbally attacked by a group chanting BLM don't they? Her response was No. Then we have Ward 5 CM who claims on a resume and upon initial installation of his council seat to be a civil rights attorney when in fact he only worked in the Justice Department and never performed any civil rights litigations nor wrote. These are the people who our prestigious District Council follows and acts?

This writing is on behalf of all of the Senior citizens who are law abiding citizen in the District of Columbia. Most of us, including me, appreciate law and order. However, current times has allowed returning citizens more opportunities than us. Moreover. Councilmembers need to be honest about who is actually committing brazing gun violence in our beautiful city – young black Americans; stop covering it up. I remember a couple of years back during a hearing with MPD CM Vincent Gray was on the diaz grandstanding about how Black males were being harassed by police officers in front of a barbershop; Vincent Gray asked Chief Newsham to have his officers to go hug these guys. A week later gun violence erupted in his Ward with 10 year old Makiyah Wilson being shot dead by several black males.

Systemic racism has played a major part in all of this I agree. I just recently received my AncestryDNA results that determines I am 33 % Nigerian and 12% Congo Bantu. Meaning my ancestors were brought over on the slave ships in 1750 to build America. I still work hard I know the difference between right and wrong I struggle financially but I have never attempted to kill another person for money. My beliefs are that the Universe will work through people and others to help. I did ask CM McDuffie for a job after I was the one who initiated his run for Council, got his campaign office on RI ave and brought awareness to the Ward about him since his was totally unknown. Then once he wins he tells me .. a lot of people volunteered on my campaign.

So I pen this writing to give the Council a clearer picture of what could possible help with making changes and to actually know who are some of the people you give the honor system and how they truly operate.

Regards,

Debbie Smith Steiner,
Prior ANC in Ward 5 for 19 years
Past Edgewood Civic Association President

Dear Judiciary Committee Members,

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the revisions below, as well as those proposed by the above-listed organizations below. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding

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Franklin Roberts

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Jonah Furman

Police Reform Testimony
Tamika Spellman
HIPS Policy and Advocacy Director

I am less than ecstatic that this conversation is happening and sad at the same time because of the overwhelming number of lives lost and the lives that have been negatively affected by current and past policing. Going forward, I see nothing good coming from reform and I will explain why.

Black men infiltrated police departments in America with the premise of 'changing them from within'. The mission to reform them from the inside never happened despite the overwhelming longevity of policing issues where people of color are concerned. It is needless to say that that reform never happened. At varying times, reform has been a topic of discussion over the years, varying laws created and implemented- but nothing seriously changed. Instead the police union strengthened the ability to continue brazen lawlessness within policing agencies, gaining more and greater abilities to not be held responsible for failures, abuse of power, homicides/murders or rapes and other offenses they commit. To alude that prosecuting bad cops will reduced officer moral is ludicris, as what other job can you get away with literally murder or rape and not have any legal repercusions or financial burdens? Only Law Enforcement enjoys that privilege. We pay them healthy salaries with benefits and then we pay for liability insurance for those instances that they break the law, kill someone or cause harm that results in financial burdens to the citizens they are sworn to protect and serve. That is one hell of a sweet deal.

Accountability is laughable as well, having their cohort investigate themselves is a joke, as they never find them guilty- even when there is overwhelming evidence of guilt. So punishments never happen, and back to doing what they do best, terrorize the citizens of the District. Yeah, terorism is a strong word, but that is just how communities of color see MPD. You will find only a handful of people of color that supports policing in its current form, and they see reform as good, whereas the overwhelming majority see it as laughable when thousands said clearly they want them defunded to the point of not existing.

The real solution is decareation in the sense of removing or decriminalizing laws that do not affect/effect public safety or public health. But since we are pushing reform, here are elements I suggest to bridge a few gaps:

No more liability insurance for officer misconduct, murders, rapes etc. They should pay for their own. How can we as a city go forward carrying huge liability insurance bills for an agency that exhibits reckless abandon? Never admit wrong doing, no punishment of any sort, keep their jobs and we pick up the bill for what is really state sanctioned murder, rape or whatever offence of the day they commit. They should carry personal liability insurance to cover damages they cause instead of making the city liable for their actions as criminal behaviors should be subject to equal punishment under the law, not us supporting their lawlessness or reckless behaviors. It's insulting to ask us to pay for liability insurance for someone who has killed your child or best friend, raped you or someone you know or beat you or your neighbor's kid for no reason. Whenever an officer is guilty of breaking laws, found guilty of murder or any other offence where monitary dmages have been awarded, it is on the officer to pay them, not the city. Tax dollars should never be used to make good for bad police/policing behaviors. Maybe this will make them think before they act and stop them from using the lame excuse of fearing for their lives in the presence of unarmed/non threatening Black people.

Transparency and public participation in contract talks: Absolute must have going forward because this is where we get shafted and police build these unrealistic and unethical protections against lawless behaviors and misconduct upon the people who pay the taxes used to pay them. That relationship of shutting taxpayers out of the contract talks has to change in order to be taken seriously. I know most people of any race wouldn't agree to these elitist powers nor any of these outrageous demands and protections they have already been given. Full resident participation is a must going forward.

Accountability assurance: Body cameras are public property, ultimately paid for with tax dollars no matter local or federal, we the people made it possible so it's ultimately our property. There should be 100% transpanance at all times on all footage, available within a reasonable time by any citizen for any reason. Not only is this necessary, so is the compliance with the law and not built in protections negotiated in a contract against transparency and providing publicly owned and maintained property available with little to no restriction in a timely manner. Maybe

put it in the hand of a neutral outside entity since MPD has a history of denying access to public property.

Deliverables: At long last! The golden egg! Exactly what do they promise us for all we pay and provide for them? Nothing! That should change. And in that changing, I hope to prove the need to defund them and place resources in place to address issues policing has no power to effect change on. Chief Newshame said it best that police aren't peace officers, which is true because they are property and revenue protectors and genorators, not crime preventers or protectors of people. They do not de-escalate situations but are good at arresting you after things have gone too far. They don't prevent crime or criminal activities from happening but they sure can arrest you after the fact. So what is it they deliver? Safety? Most of the Black and Brown people in DC do not feel safe in the presence of police, as our outcomes are more often than not not very favorable. The ridiculously over bloated police budget is a joke, and the same results they currently produce can be had with a significantly smaller police presence and monies from that budget put in places that will actually address poverty that can stop mostly all crime/criminal acts. Resources are key to this, told by many of my colleges so I won't go into that but appeal more so the a common theme that the people said what they want, and that is defunding MPD. That should happens and HIPS will have something to present in the spring to showcase how it can be done, but for now we will echo what the constituents are telling you they want resources, education, training, programs, services, harm reduction methods, decriminalization of sex work, drug use and paraphernaila, healthcare, mental healthcare, living wage jobs for everyone that wants one, and most of all, housing as a human right by ending homelessness. Of all these things we need, no police/policing agency has power to give, change or effect change on. And again by Chief Newshame's own admission, has no interest in doing anything related to being peace officers. However what they can do when they are protecting property and revenue is to conduct themselves in a respectful manner that doesn't traumatize human beings or leave them dead or maimed for life. Be mindful these are flesh and blood living beings, not property that is insured to be replaced or rebuilt like property looted and ransacked by protesters and rioters. They are insured, remember. Business owner's are required by law to have insurance and those objects are ultimately replaceable. Maybe if Black lives carried more sentimental value than objects that are insured we wouldn't be having these conversations as often as we do. Not that I condone it but I understand it and why it happens. It's the response to it that is inappropriate and has to be addressed. Harsher policing isn't de-escaltion, it's aggravation. Then the police murdering another citizen happens and you think we

sympathize with things damaged or looted that are insured when Black lives are continuing to be lost at the hands of police? Using banned tactics and then ordering a stockpile of tear gas? Replacing Newshame is a must because he is ineffective at controlling his officers and following directives, law and mandates from the mayor or council on conduct, policy and actions to not be used or employed in the District, and cut their budget by ⅓ and reduce the force by 1500 officers, unarming and implementation of resident oversight of the special police and put those resources back into the people as we have so overwhelmingly requested be done. Just because Newshame is an eloquent speaker and plays nice with the media doesn't make them effective at their job. Mind you, this is what the people want and I will be presenting the blueprint on how this is to be accomplished in the spring. But for now these are priorities I would like considered and explored.

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Sara Buettner-Connelly

Planned Parenthood
Care. No matter what.
Planned Parenthood of Metropolitan Washington, DC

Testimony of Serina Floyd MD, MSPH, FACOG
Medical Director, Planned Parenthood of Metropolitan Washington, DC

Written testimony in support of B23-0771, Internationally Banned Chemical Weapon Prohibition Amendment Act of 2019
DC Council Committee on the Judiciary and Public Safety
Public Hearing, Wednesday, October 15, 2020

Thank you for the opportunity to provide written testimony on this important legislation. I am the Medical Director at Planned Parenthood of Metropolitan Washington, DC (PPMW) and a board-certified obstetrician-gynecologist who has been providing reproductive health care for 19 years. PPMW understands that access to sexual and reproductive healthcare transforms people's lives, and for over eighty years, has provided comprehensive reproductive healthcare across the Metropolitan Washington region, serving over 18,000 patients annually.

I testify in support of B23-0771, the Internationally Banned Chemical Weapon Prohibition Amendment Act of 2019, and thank Councilmembers Nadeau, Grosso, Trayon White, Robert White, Silverman, Todd, and Allen for their leadership on this bill. Tear gas is a weapon of war that has no place on civilian streets and should not ever be used on anyone, particularly those exercising their right to protest in the District. PPMW is concerned about the use of tear gas in protests because of the many detrimental health effects it has been shown to have on skin, eye, respiratory and gastrointestinal systems; effects that are intensified in those who already suffer from chronic medical conditions.[1]

In addition, there is an emerging concern about the impact of tear gas on reproductive health. There have been multiple reports that exposure to tear gas has been correlated with miscarriage.[2] Over the last several months, as tear gas has been used on protesters across the country, both cisgender women and transgender male protesters have reported menstrual irregularities including multiple periods in one cycle, extremely heavy bleeding, unusually long periods, or cramping soon after exposure.[3][4] These reports are currently being studied through research being conducted at Planned Parenthood North Central States, which serves the region

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[1] Tear gas: an epidemiological and mechanistic reassessment. doi:10.1111/nyas.13141
[2] *Ibid.*
[3] Tear gaslighting: is there a link between protesting and messed up periods? https://www.marieclaire.com/health-fitness/a33648135/tear-gas-effects-reproductive-system/; Irregular periods and horrible headaches: how tear gas is making Portland sick. https://www.vice.com/en/article/4ay5mn/an-endless-barrage-of-tear-gas-is-making-portland-sick
[4] 'It's like they're testing it on us': Portland protesters say tear gas has caused irregularities with their periods. https://www.opb.org/article/2020/07/29/tear-gas-period-menstrual-cycle-portland/

including Minneapolis, Minnesota.[5] There is cause for significant concern about the impact of tear gas on the health of all individuals but particularly the health of reproductive-age persons, and that is why PPMW supports this legislation to ban the use of tear gas against protesters in the District.

Thank you again to Chairman Allen and members of the Committee for the opportunity to provide testimony.

5 https://www.plannedparenthood.org/planned-parenthood-north-central-states/about-ppncs/research/tear-gas-and-reproductive-health-study

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. These reforms do not go far enough, and I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

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2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. As a white person in DC, I essentially live free from police interactions unless I intervene in them harassing my Black neighbors. We know that police just aren't need in most situations. Conflicts can be resolved peacefully amongst neighbors. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Thank you for your time.

Vick Baker

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Thomas Boland-Reeves

STND4YOU, Inc. Forensic Speech-Language Pathology Clinical Opinion Letter

To: D.C. Council Committee on the Judiciary and Public Safety
Bill: B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"
Re: A More Mature Miranda Doctrine

October 15, 2020

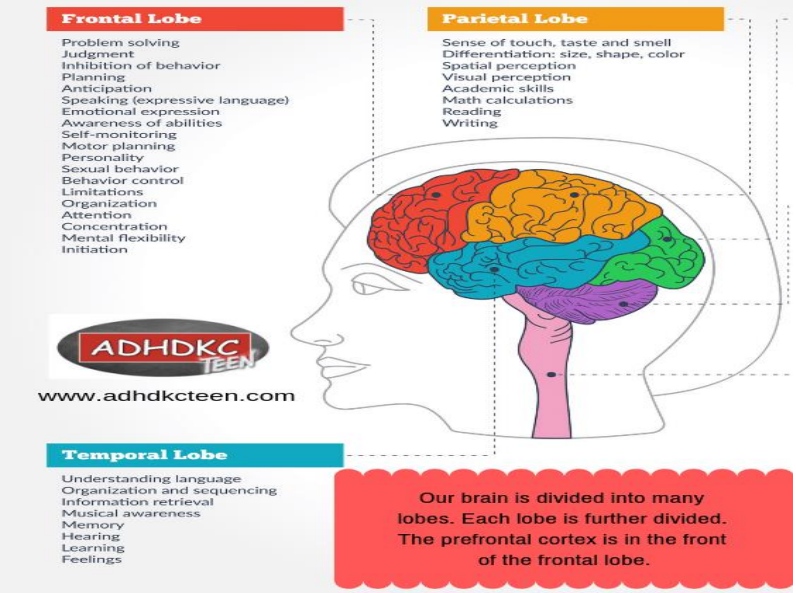
STND4YOU, Inc. is a Nonprofit organization developed to address diversion, advocacy and free wrap-around clinical services for Black and Latinx youth who are placed at-risk for delinquency and involvement with the justice system secondary to their overlooked cognitive and communication disorders. There is a portion of the need for more mature Miranda Rights that we believe should make mention of the number of Black youth who are also overrepresented in the special education system who do not understand their rights due to varying language and learning disorders. Clinicians like Speech-Language Pathologists should be consulted to discuss what and how the youth's understanding can be impacted during this process. We would like to be involved to add this piece to a very powerful movement you are creating. Our founder, Dr. Shameka Stanford is an associate professor in the department of Communication Sciences & Disorders at Howard University, and a juvenile Forensic Speech-Language Pathologist (the first and only in the United States) with a clinical specialty in in juvenile law and special education law.

This letter is written to support the More Mature Miranda Initiative. In support of the more mature Miranda initiative, it is important for me to highlight how the presence of cognitive and communication disorders can increase a youth's vulnerability to waive a right they do not inherently have the knowledge, intelligence, and cognitive ability to comprehend. My opinions are based on my education in the area of communication sciences and disorders and forensics, clinical training, and clinical forensic experience in relation to these matters. Research has demonstrated that children account for an increased amount of coerced confessions secondary to their developing cognitive abilities. However, the discussion about coerced confessions cannot be had without addressing the prevalence of children living with learning disabilities, cognitive and communication disorders who are coerced or falsely confess to crimes. Communication and Cognitive disorders (CCD) is defined as a deficit or significant impairment in the primary functions of attention, memory, problem solving, emotional functioning, comprehension and production, literacy, pragmatics, social skills, and expressive and receptive language (American Speech-Language-Hearing Association, 1997). Cognitive-communication disorders can impact an individual's communication and comprehension status in a way that affects their ability to fully participate in their (Stanford, 2019). More specifically, during the Miranda rights, cognitive and communication impairments affect the individual's comprehension, judgement, consequential thinking, and decision-making skills. This is most prevalent in children with cognitive and communication disorders during a time where their brain is also concurrently developing.

Maturity of language and cognitive skills occurs with the development of the frontal lobe, particularly the prefrontal cortex (PFC), which is a continuous process from childhood until late adolescence (Ciccia, Meulenbroek, & Turkstra, 2009). The frontal lobe in a typically developing brain controls the child's ability to emotionally regulate as well as, problem-solving, process information/think, and comprehend information. However, the brain and particularly the frontal lobe does not fully develop until approximately 25 years of age or older. Consequently, this means the prefrontal and temporal cortexes of the child with a cognitive and communication impairments that responds to and utilizes good judgement and comprehension is not consistently and automatically activated when engaging with law enforcement. In a child with cognitive and communication disorders, there are areas of the brain that are necessary for the ability to comprehend, functionally problem solve, and think rationally that will never be fully developed (Johnson, Blum, & Geidd, 2009; Stanford, 2018). Explicitly, secondary to cognitive and communication disorders, areas of the brain that regulates the child's verbal-reasoning skills, problem

solving skills, and comprehension during the reading of Miranda rights may take longer than the 25 years old to fully develop, if at all.

The visual below presents the **frontal and temporal lobe areas** of the typically developing brain where children with cognitive and communication disorders experiences significant impact in the areas where consequential thinking, problem-solving, judgment, self-monitoring, concentration, attention, and most importantly understanding language are control are activated.



In the area of **cognition**, memory, reasoning, judgment, attention and concentration impairments can impact the child's ability to understand the Miranda rights. In the area of **executive functioning,** impairment in problem-solving, decision-making, organization, and planning can impact the child's ability to understand the Miranda rights. As aforementioned, to inherently understand Miranda Rights to the extent you make a conscious decision to waiving your rights would require; (1) functional critical thinking, (2) executive function, (3) and comprehension skills. At a micro level the child with underlying language impairments would also need to possess strong vocabulary, verbal reasoning, inferencing, and recalling information skills. In the areas of **communication,** impairments in thinking and processing, difficulty understanding language, and vocabulary deficits can impair the child's ability to understand the Miranda rights. For instance, in a 2018 (not yet published) research study in which I analyzed the confluence of cognitive and communication disorders and increased risk of referral to the justice system for black youth, 85% of the participants demonstrated vocabulary impairments. Further, data from the research study demonstrated that 90% of the participants were unable to define 70% of the words presented in the Miranda Rights. For example, a 70% of the participants were unable to define the words attorney, appointed, and afford. The findings of this analysis identified six key domains of communication and cognition that when impaired can increase the risk of youth being coerced into confessions, and false or forced waivers of their rights. These areas included: 1) age-appropriate vocabulary development and skills; 2) abstract language comprehension; and 4) processing and organizational planning. This demonstrates that although the youth may verbalize understanding and demonstrate a surface level comprehension of the words of the Miranda rights in isolation; it is more likely than not, a significant portion are unable to comprehend the words contained within it well enough to understand the overall context.

Lastly, the inability to functionally track and participate in conversations with peers and adults can impair the child's ability to understand the Miranda rights. This information is most relevant to understanding how cognitive and communicative disorders in children can impact their understanding of the information presented in the Miranda rights. The Miranda rights are built on the expectation that the individual can demonstrate and process what is requested of them and what will occur during the law

enforcement interaction. To do this, the individual must be able to follow directions, comprehend the words used, recall information, and infer the consequences of what may occur if they choose to waive their rights. Consequently, children with cognitive and communication disorders are significantly unable to decipher what is expected of them resulting in misunderstandings which can increase their risk of waiving their rights. Especially when the child is engaged in a situation that causes frustration, anxiety, tension distress. During heightened situations of distress, like being arrested or unexpected law enforcement interaction, children with cognitive and communication disorders will primarily rationalize and respond with the emotional parts of their brain, not taking the time to determine if the communication lacks comprehension.

Therefore, it becomes necessary that as we determine a more mature Miranda, we keep in context that just because children may be able to periodically demonstrate the ability to determine what is happening, does not mean that their cognitive and communication limitations and impairments are not consistently present and likely to impact their ability to understand their rights and the consequences of waiving their rights.

Thank you,

Shameka Stanford, Ph.D., CCC-SLp

Shameka Stanford, Ph.D., CCC-SLP/L
COO, STND4YOU, Inc.
Juvenile Forensic Speech-Language Pathologist

References:

American Speech-Language-Hearing Association. (1997). Preferred practice patterns for the profession of speech-language pathology. *ASHA*.

Ciccia, A. H., Meulenbroek, P., Turkstra, L. S. (2009). Adolescent brain and cognitive developments: Implications for clinical assessment in traumatic brain injury. *Topics in Language Disorders, 29* (3), 249-265.

Stanford, S. N. (2019, June 12). Who Was Really "Wilding" When They See Us Highlights The Wrongful Conviction of Black Youth with Language and Learning Disorders. Coalition for Youth Justice: http://www.juvjustice.org/blog/1127

Stanford, S. & Muhammad, B., (2018). The Confluence of Language and Learning Disorders and the School-To-Prison Pipeline Among Minority Students of Color: A Critical Race Theory. *Journal of Gender, Social Policy, and the Law,* 691-718.

Date: Wednesday, October 21, 2020

Name: Holly Rogers
Mailing Address: 1538 New Jersey Ave NW
Washington, DC 20001

To: Councilmember Charles Allen
Chairperson of the Committee on the Judiciary & Public Safety
1350 Pennsylvania Ave NW
Washington, DC 20004

Re: Bills 23-0723, 23-0771, & 23-0882

Committee Chairman Allen and Councilmembers of the District of Columbia,

My name is Holly Rogers, and I am a resident of Ward 6. Thank you for providing District residents with an opportunity to participate in this conversation to bring public safety to the forefront of our community. After reviewing Bills 23-0723 - Rioting Modernization Amendment Act of 2020, 23-0771 - Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020, and 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020, the following are my questions, criticisms, and recommendations:

1. In B23-0771, it is stated that the use of chemical irritants will be banned at "First Amendment Assemblies". What is a "First Amendment Assembly"? Who decides what a "First Amendment Assembly" is? This choice of phrasing seems to suggest that this ban may only apply to what some authority figure determines is a *peaceful*, *organized*, *permitted* assembly where citizens are exercising their First Amendment rights. What if MPD decides the assembly isn't peaceful, is riotous, or doesn't fit their definition of proper exercising of First Amendment rights? Without a clear line delimiting exactly when chemical irritants cannot be used, the interpretation of this bill is far too subjective.

   This bill should contain a **complete, absolute** ban on the use of chemical irritants by MPD in **all** cases, not just those vaguely defined as "First Amendment Assemblies." If chemical irritants are not allowed in war according to the Geneva Protocols, they shouldn't be allowed to be used on residents of our city. Under what circumstances would you feel comfortable having MPD use tear gas and other chemical irritants on your constituents, neighbors, and family members? It is beyond time to instate a complete ban on use of chemical irritants by MPD.

   Please note that this criticism is also applicable to B23-0882 Subtitle P.

2. In B23-0882 Subtitle F, the limitations on consent searches are outlined clearly. However, as has been acknowledged previously when the Council passed Bill 23-0825 (Comprehensive Policing and Justice Reform Second Emergency 77 Amendment Act of 2020), when police obtain consent

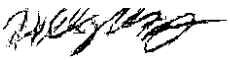
to search a person, vehicle, home, or property, the cooperation by the subject is not truly consensual. Often people waive their rights against unreasonable searches because they believe they do not have a choice, as was argued in Jones *v.* United States (154 A.3d 591, 595-96 (D.C. 2017)). People often give consent to police officers because: they feel coerced, they feel that they have no other option, and/or they are legitimately afraid for their safety should they refuse consent. Furthermore, by obtaining a subject's consent, the officer no longer needs probable cause to conduct the search—they just need consent. In this way, consent searches bypass our Fourth Amendment rights.

I ask that the Council please consider the potential ramifications of consent searches. People most in need of protection from police overreach—especially BIPOC—are likely to waive their rights and consent to a search. The Council must consider eliminating consent searches in D.C.

3. In B23-0882 Subtitle F, after all the limitations on consent searches, it is stated that "nothing in this section shall be construed to create a private right of action." Although I agree that as long as consent searches are permitted, definitive proof of consent is essential; however, to be effective and fully enforceable the Bill must allow for legal action from private citizens if the search was nonconsensual. If there is no recorded proof of consent and it therefore is presumed that the search was nonconsensual and subsequently illegal, the proposed limitations on consent searches do not truly protect subjects from illegal searches if they cannot pursue legal action after the illegal search. Enforcement of the proposed limitations on consent searches is lacking in B23-0882.

   Again, as outlined above, the inability to truly enforce the proposed limitations on consent searches further indicates the problematic nature of consent searches in D.C. The Council must consider eliminating consent searches in D.C.

Thank you for your time,



Holly Rogers

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Linda Gomaa

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DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Eamon McGoldrick

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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Bart Sheard

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Laura Van Dyke

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, moving towards defunding the Metropolitan Police Department entirely.

To start, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

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Ben Lee

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David Herman

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Laura Jaghlit

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I am writing to you regarding the three police reform bills currently under consideration before the Judiciary Committee. I support police reform, but the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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Connor Czora

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Eric Peterson

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Kaela Bamberger

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Deidre Nelms

Dear Judiciary Committee Members,

I am a Ward 2 resident writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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Robert Cline

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Alexandra Seymour

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DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Madeleine Stirling

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Sincerely,
Marli Kasdan

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Shivani Desai

The Police Reform bill was written too quickly, covers too many topics and much of its potential implementation hasn't been thought through. I ask that the Council/Committee please spend more time flushing out the facets of the bill and work more collaboratively with the Mayor and MPD.

The Rioting Modernization bill should not be enacted immediately before the Presidential election and the inauguration - two events expected to include protests which may devolve into serious riots. We don't want a police force contending with riots only a few weeks after all the rules have changed.

Thank you,
Sarah Bever, DC resident

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Ryan Anderson

Committee on the Judiciary and Public Safety
B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"
Submitted on October 23, 2020
Jayme Epstein, Ward 3

My name is Jayme Epstein, and I am a resident of the Woodley Park neighborhood of Ward 3. I'm a member of Jews United for Justice, a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. I urge you to support the Comprehensive Policing and Justice Reform Amendment Act of 2020. I also, however, know that the proposed legislation does not go far enough. I also support the demands to defund the police from Stop Police Terror Project DC, Black Swan Academy, and other groups in DC's Movement for Black Lives, such as reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls and moving funding for school resource police officers to pay for mental health care and trauma-informed services. I urge the Council to re-prioritize where the city puts its money, redirecting money from an ever-expanding police force, that actually makes our communities less safe, to programs that will increase safety and decrease both violence and the structural racism that so inhibits the lives of DC's Black residents.

As a White person living in a mostly White community in this highly and shamefully segregated city, I have no dealings with the police. I grew up hearing that if I became lost or needed help, I should find a man in a uniform to help me, tell him my address and phone number, and he'd make everything okay. As an adult, I have learned that this is not what Black parents tell their children. I have taught Black men and women, many of whom are parents, in the Congress Heights neighborhood in Southeast DC, who have told me their stories of police harassment. I have attended meetings and previous Judiciary Committee oversight hearings where Black DC residents describe both daily harassment and physical abuse from police in DC and their anguish at the failure of government leaders to investigate and hold the police accountable for the police killings of Black people.

I am the parent of a young man who towered over me by the age of 13. At age 16, he began driving. Like all parents, I worried about where he was and what he was up to and was relieved when he came home at night. But I never really worried about whether he would come home. I simply cannot fathom what it must be like to have to think every day that when my son walks out the door he might not not come back, or might come back physically or emotionally damaged -- simply because of the color of his skin. And that the perpetrators of the violence against him -- whether physical or the daily harassment wearing down his self-confidence and sense of security -- would be the police I had so revered as a child.

Here in DC right now, and all over the country, we've witnessed a tremendous outpouring of protests and public comments by local and national leaders grieving the murder of George Floyd. The mayor has painted Black Lives Matter on the street. But I have to ask: will anything

change for the residents of DC? We've been through this before and nothing has changed. We have to grasp this moment and show Black DC residents that their specific lives do actually matter, so we're defunding the police and increasing the funding of programs that will keep them safe and allow them and their children to thrive.

In addition, although the proposed bill includes several important steps, it is important that the Council go further to reduce the harassment and over-policing of DC's Black residents by removing police from schools (as urged by Black Swan Academy), limiting police enforcement of traffic stops, creating a non-police crisis response system, expanding the role of violence interruption and trauma-informed approaches to public safety, and rehauling the District's criminal code to decrease penalties and decriminalize offenses.

Please do not let this moment pass. Please do not once again tell DC's African American community that their lives matter and then do nothing to invest in their lives. Please listen to the anguish, and then use your power to redirect funds to programs that actually work to make us all safer and stronger.

Thank you for the opportunity to submit testimony.


BLACK LIVES
D.

FOR IMMEDIATE RELEASE

June 6, 2020

“Black people are allowed to be joyful or feel seen with DC renaming a street after Black Lives Matter. It's also our responsibility to let you know what we are fighting for, who has the power to change things and that power concedes nothing without demand.”

-Kiki Green, a Core Organizer with Black Lives Matter DC

as always those we have lost to police here in DC:

- **Jeffery Price,** age 22, was chased to his death in DC by the Metropolitan Police Department on May 4, 2018.
- **D’Quan Young**, age 24, was shot and killed in DC by the Metropolitan Police Department (MPD) on May 9, 2018.
- **Marqueese Alston**, 22, was shot and killed in DC by the Metropolitan Police Department (MPD) June 12, 2018
- **Terrence Sterling**, 31, was chased, shot and killed by DC by the Metropolitan Police Department (MPD) on September 11, 2016

- **Ralphael Briscoe**- age 18, as shot and killed in DC by the Metropolitan Police Department (MPD) on April 26, 2011
- The names of more loved ones lost have been compiled here by Stop Police Terror Project DC.

These are the names of the people that performative Black Lives Matter street art leaves out. These are the names that fuel our commitment to #DefundPolice and #StopMPD. We know that for some DC is the seat of power and imperialism, the symbolic representation of harmful systems but it is also home to hundreds of thousands of Black people who are oppressed by the very systems people claim to be against. It never fails that in the National discourse people ignore those killed right here in DC by police while protesting police brutality and muder in our city.

We stand by our critique of the DC Mayor Muriel Bowser after the unveiling of the Black Lives Matter Mural and the renaming of Black Lives Matter Plaza. “Black Lives Matter” is a complete statement. There is no grey area or ambiguity. We hold that we have a duty to the loved ones named above to ensure that they are not forgotten and their deaths are not exploited for publicity, performance, or distraction. Mayor Muriel Bowser must be held accountable for the lip service she pays in making such a statement while she continues to intentionally underfund and cut

services and programs that meet the basic survival needs of Black people in DC.

To chip away at the investments in communities that actually make us safer while proposing an additional $45 million dollar increase in funding for the Metropolitan Police Department's budget a few weeks ago is NOT making Black lives matter. Bowser justifies the over policing of Black bodies by pointing to the heart breaking number of Black people who have died as a result of violence in our streets. Simultaneously she publicly admits that increased police presence has little effect on violent crimes, especially homicide. Homicides continue to increase despite the MPD budget growing every year and more and more officers on the streets. In a continuation of her intentional efforts to first not fund, then dissect, and now lie about implementing the Neighborhood Engagement Achieves Results Act (NEAR Act), that threats community violence as a public health issue, she just proposed to cut $800k from the Office of Neighborhood Safety and Engagement that the Act created and where the violence interruption program sits. Additionally, she still has not opened the stand alone Office of Violence Prevention also required by the Act. Stop Police Terror Project DC and Black Lives Matter DC were instrumental in the creation, passage, funding of the NEAR Act.

I.

Some areas that the policy budget money is going to include:

- Funding for even more police officers, despite DC already having more officers per capita than almost anywhere else in the country
- Seventeen additional school resource officers (or police officers who work in schools)
- Additional funding for unspecified work with Homeland Security
- Additional funding to the Narcotics and Special Investigations Division (NSID), an extremely violent division of the MPD that operates with almost no accountability.

(To make matters worse, one of the only areas of the MPD budget that appears to have been cut is its office in charge of responding to Freedom of Information Act (FOIA) requests, one of the few ways the MPD is accountable to the public.)

At the same time violence prevention programs in DC, which already made up a tiny percentage of the DC budget, have been cut significantly, including $800,000 taken from the Office of Neighborhood Safety and Engagement (ONSE), $1.4 million cut from the Roving Leaders program and what seems to be the elimination of the Cure the Streets program.

The solutions:

This is not just about MPD getting increased funding while specific programs get cut, however. It's about the need to radically shift our priorities. We don't just want to halt increases to the MPD's bloated budget, we want to defund it and shift that money toward non-police resources that actually make us safer. These include:

- Maintaining and **increasing** funding for the Office of Neighborhood and Safety Engagement and violence interrupter programs.
- Reallocating funding from the MPD budget to pay for medical and mental health professionals and social workers to respond to emergency calls.
- Cutting funding for school resource officers and reallocating that funding to pay for mental health care and trauma-informed services in DC public schools, along with technological support for remote learning.
- Increased services for formerly incarcerated DC residents including housing, education, and job assistance.
- Maintaining a permanent budget item for public housing repairs. This year, the council should put $60 million to repair public housing.
- Increasing the availability of high-quality childcare.
- Maintaining and increasing funding for vital nutrition and food access programs.
- Suspending rent and mortgage payments in DC until the COVID-19 crisis is over

- Providing COVID-19 relief funding to all DC residents, including undocumented residents.

Just a third of the current MPD budget could fund many of these programs for years – think how much housing could be built with 190 million, or people fed, how many school counselors and nurses could be hired.

To submit your testimony

Upload a 3-minute video of your testimony to the Judiciary Committee's Dropbox via this link
Submit voicemail testimony to the Committee's GoogleVoice number at (202) 350-1362.
Email written testimony to judiciary@dccouncil.us

Additional resources

More information on testimony submission and process

Full DC budget

Activists push for tax increases, more child care spending in D.C. budget

DCFPI budget priorities

Fair Budget Coalition FY21 report

DC Tenants Union Cancel Rent campaign

The Pandemic Is the Right Time to Defund the Police

No More Money for the Police (NYT piece that specifically mentions DC's violence interrupter program as a good alternative to policing that needs more funding)

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Elizabeth Sawyer

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sarah Greenbaum

Testimony of Katherine Myer
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
Moms Demand Action / Everytown for Gun Safety
October 23, 2020

Dear Chairperson Allen, Committee members, and Staff,

Thank you for the opportunity to offer testimony. My name is Katherine Myer, and I am writing as a representative of Moms Demand Action and Everytown for Gun Safety.

Police reform in this country is long overdue. We are glad to see these proposals being set forth to ensure law enforcement is supporting all communities in the District equally and fairly.

We have a gun violence crisis in our community—and that was true long before the pandemic hit and families were thrust into poverty, job loss, illness, and more. We saw longstanding tensions boil over this summer, further damaging the already precarious relationship between communities of color and the Metropolitan Police Department. We have been encouraged by our conversations with several Council members, but those conversations take time. **We need immediate action to save lives in our community.**

Put simply, police violence is gun violence, and we cannot end gun violence without addressing this crisis. A single incident of police violence can plant the seed for fear and community distrust of police, making it harder to prevent or solve violent crime, and in turn, making communities already fighting systemic and structural barriers more at risk for violence

Moms Demand Action specifically applauds the inclusion of the following provisions:

- Improving Access to Body-Worn Camera Recordings
- Prohibiting the Use of Neck Restraints
- Office of Police Complaints Reforms
- Use of Force Review Board Membership Expansion
- Mandatory Continuing Education Expansion
- Reconstituting the Police Officer Standards and Training Board
- Use of Force Reforms
- Restrictions on the Purchase and Use of Military Weaponry
- Metro Transit Police Department Oversight and Accountability

In addition to reforming the police department, our city must stop funding the militarization of police. Instead, we should increase funding for critical programs, such as de-escalation and implicit bias training, addressing domestic violence, and preventing hate crimes. The money saved from ending the militarization of our police department should be reinvested in community-based programs such as violence interruption and hospital-based initiatives, so that police intervention is avoided in the first place.

Police violence is gun violence and we must fight the toxic combination of systemic racism, America's gun culture and the militarization of law enforcement that has resulted in the tragic death of so many—particularly Black people.

Moms Demand Action will thoughtfully follow the lead of the organizations that have been in the fight against police violence for many years, especially Black-led organizations.

We urge the Council to do the same.

KATHERINE MYER

Testimony by

Racial Justice Action of All Souls Church, Unitarian

On B23-0288, The Comprehensive Policing and Justice Reform Amendment Act of 2020

October 23, 2020

Chairperson Allen, Councilmembers, and Staff of the Committee on the Judiciary,

We are members of All Souls Church, Unitarian – a D.C. congregation that has supported the struggle for justice for the last 199 years: from the abolition of slavery, to civil rights, to marriage equality, to the movement for Black lives.

We affirm the inherent worth and dignity of every person. We join our voices to those who have been victimized by policing and violence. And we proclaim loudly that Black lives matter!

We call on the DC Council to pass laws that make sweeping changes to the administration of justice, that end police violence, and that redirect funding to areas of the budget that actually contribute to community safety and well-being.

We believe the Comprehensive Policing and Racial Justice Reform Amendment Act of 2020 includes provisions that have the potential to reduce the harm caused by police violence. Thus, we support passage of the legislation.

Yet, we emphatically assert that this bill, despite its name, is not comprehensive. More is needed in order to end the cycle of police and community violence that afflicts our city.

We say the names of Archie "Artie" Elliott III, D'Quan Young, Marqueese Alston, Alonzo Smith, Terrence Sterling, Ralphael Briscoe, and Gary Hopkins Jr., all of whom were murdered by the Metro Police Department. When saying their names, we know these are among the multitude of Black, Brown, and Indigenous People of Color who have been killed and traumatized in other ways at the hands of those who have sworn a civic duty to protect and serve us all.

We believe the current moment challenges our city to make truly comprehensive changes so that violence can cease, and justice may thrive.

To that end, we call on the Council to keep listening to those who have been victimized by police violence and to those who have been working for decades to re-imagine and redefine justice. This includes Black Lives Matter (BLM), Black Lives of Unitarian Universalism (BLUU), Black Swan Academy (BSA), Black Youth Project 100 (BYP100), Diverse and Revolutionary Unitarian Universalist Multicultural Ministries (DRUUM), Movement for Black Lives (M4BL), Stop Police Terror Project DC (SPTP-DC), Undocublack and other organizations by and for Black people.

With them, we imagine communities where conflicts are settled largely by members of those communities, amongst themselves, without the involvement of the police or the justice system. We

imagine communities where justice is not punitive, but restorative. We imagine communities where the role of police is limited as a last resort, not as first responders expected to perform multiple roles.

We look forward to Council hearings planned for December focusing on alternatives to policing.

The impulse to call the police whenever there is conflict is a habit we, as citizens, must kick. In our own congregation at All Souls, we have begun the process of changing past policies and practices that led us to call the police for help. We are increasingly aware that calling the police does not ensure safety for all members of the community. All of us must be involved in this work of transformation.

We ask the Council to improve the current proposed legislation by ending stop-and-frisk "jump- out" tactics, prohibiting "knee to the back" tactics, and shoring up alternatives to the police. We support redirecting funds to community-based first responders, violence interrupters, credible messengers, mental health and social workers. We support the elimination of police in schools.

We call upon the Council to provide effective oversight of existing legislation, such as the NEAR Act, and, provisions of the current law, if passed, such as:

- civilian protections when police search a vehicle, home or property,
- restrictions on police use of deadly force, and
- restrictions on the purchase and use of military weapons and equipment.

All too often, essential programs are defunded, while police budgets remain intact or grow. This must change. Do we need to spend more than $40 million in 2021 to replace police vehicles? We believe police funding should be redirected in ways that actually improve peoples' lives. We ask the Council to invest in our citizens':

- education,
- healthcare,
- affordable and accessible housing,
- medical and family leave,
- food access, as well as
- meaningful employment.

We join the call to immediately defund the police.

Building what Rev. Dr. Martin Luther King, Jr., called the Beloved Community is an ongoing and ever evolving process. Too many have died at the hands of police to continue doing things the same way. We commit to staying in this work for the long haul to create the trust, safety and well-being that all individuals and communities deserve.

Sincerely,

Racial Justice Action

All Souls Church, Unitarian

1500 Harvard Street, NW

Washington DC 20009

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Greg Afinogenov

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Tamara Vatnick

TO: DC Council
FROM: Laura Killalea, GW Law Student and D.C. resident
RE: Support for the Comprehensive Policing and Justice Reform Amendment Act of 2020
DATE: October 23, 2020

Dear Members of the D.C. Council,

I am a proud D.C. resident and student at George Washington University Law School, writing in support of the Comprehensive Policing and Justice Reform Act of 2020. I'm grateful to the DC Council for taking action in June of this year and passing this emergency legislation, and I hope that you will heed the cries across the nation and in the District, and make it permament. I urge you to enact the act as passed in June, and particularly hope that you will include the provisions on the use of deadly force. These provisions are essential to creating equity in enforcement and in justice under law.

Thank you very much for your time and consideration.

Sincerely,
Laura Killalea

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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2) The people who perform basic public services in DC shouldn’t carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants. To be clear, it is often the case that the presence of a firearm escalates a situation that might have otherwise remained calm. Removing firearms from basic interactions between citizens and police might help in shifting the adversarial, "thin blue line" mentality that many officers bring to their jobs.

3) Police reform shouldn’t just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren’t needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

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George Tobias

Judiciary Committee Oct 15 Hearing Written Testimony

October 23, 2020

Yael Nagar, Ward 1

My name is Yael Nagar and I live in Columbia Heights in Ward 1. I'm a member of Jews United for Justice, a community of thousands of Jews and allies committed to advancing social, racial, and economic justice in DC. I serve on Jews United for Justice's racial equity team because I believe in the inherent dignity and value in all human life, and know if our city prioritizes these values, we can only grow stronger. Part of this means ensuring that those in our city who have traditionally been oppressed by systems and structures of power like the Metropolitan Police Department, primarily our Black and brown residents, are protected from those structures.

It is for this reason I write to you today: to support the Comprehensive Policing and Justice Reform Amendment Act of 2020 and to urge the Council to take further steps to defund MPD and reallocate funds to other essential services that improve the lives of DC residents and help address the root causes of crime. As our city grapples with the systemic and institutional racism recently highlighted by the uprising this summer and the killing of Deon Kay, I ask that the DC Council do everything in its power to protect all DC residents, hold police accountable, and create transparent policing processes. I support the recommendations made by Black Lives Matter DC, ACLU-DC, DC Justice Lab, DC Working Families Party, HIPS, Metro DC DSA, Defender Impact Initiative, and others, and urge the Council to adopt them.

I am inspired to speak up about these issues because my Jewish tradition teaches me that each and every life is important and valuable. As the Mishnah teaches, "He who takes one life it is as though he has destroyed the universe and he who saves one life it is as though he has saved the universe" (Mishnah Sanhedrin 4:5). Police violence has destroyed so many worlds in our city, and too many laws protect police, not residents. The Torah teaches me "Do not stand idly by while your neighbor's blood is shed" (Leviticus 19:16); it pains me that the Black community has been oppressed and killed by MPD for far too long, and I cannot stay silent any longer.

Since moving to Ward 1 three and half years ago, I have heard debates among neighbors about crime and law enforcement. Some of my neighbors feel that crime is too high and police presence must be increased. These concerns are not entirely unfounded nor are their fears invalid--just earlier today my husband heard gunshots at the dog park near our house on Park Road NW--but I question the immediate turn toward increasing police presence. This is an instinct we need to move away from, as we have seen time and time again that more police does not equal more public safety. Despite the fact that MPD's budget has grown consistently through the years, to the current proposal of $580 billion, and DC has more police per capita than any other city, the homicide rate in DC has grown, reaching the highest murder count in a decade in 2019 with 166 homicides. As of today, October 22, 2020, the number of homicides in DC has already reached 163. Clearly, increasing the police budget and number of police on the streets is not making us safer. At the same time, police violence, and lack of accountability to the public, has put the lives of Black residents at risk, and too many have been lost. This is fundamentally not

acceptable. We need to be shifting resources toward other essential services that prevent crime, such as violence interruption programs and broad access to mental health professionals and social workers.

The Comprehensive Policing and Justice Reform Amendment Act of 2020 encourages increased police accountability, limits use of force, and raises minimum standards for MPD appointment, all of which are critical reforms that I support. However, it does not go far enough; police reform is not sufficient. Following the lead of BLM DC, Stop Police Terror Project (SPTP) DC, and the Defund MPD campaign being led by the Movement for Black Lives DC, I support the call to divest from the police and instead invest in human needs and violence prevention that will actually make all of us safer. Some of the recommendations SPTP has provided that I want to highlight are increasing funding for the Office of Neighborhood and Safety Engagement; reallocating funding from MPD toward funding more mental health professionals and social workers to respond to emergency calls; increased services for formerly incarcerated DC residents including housing, education, and job assistance; and increasing funding for vital nutrition and food access programs. These are crucial steps toward increased safety for all DC residents and the implementation of these recommendations is urgently needed. Thank you for the opportunity to submit written testimony.

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

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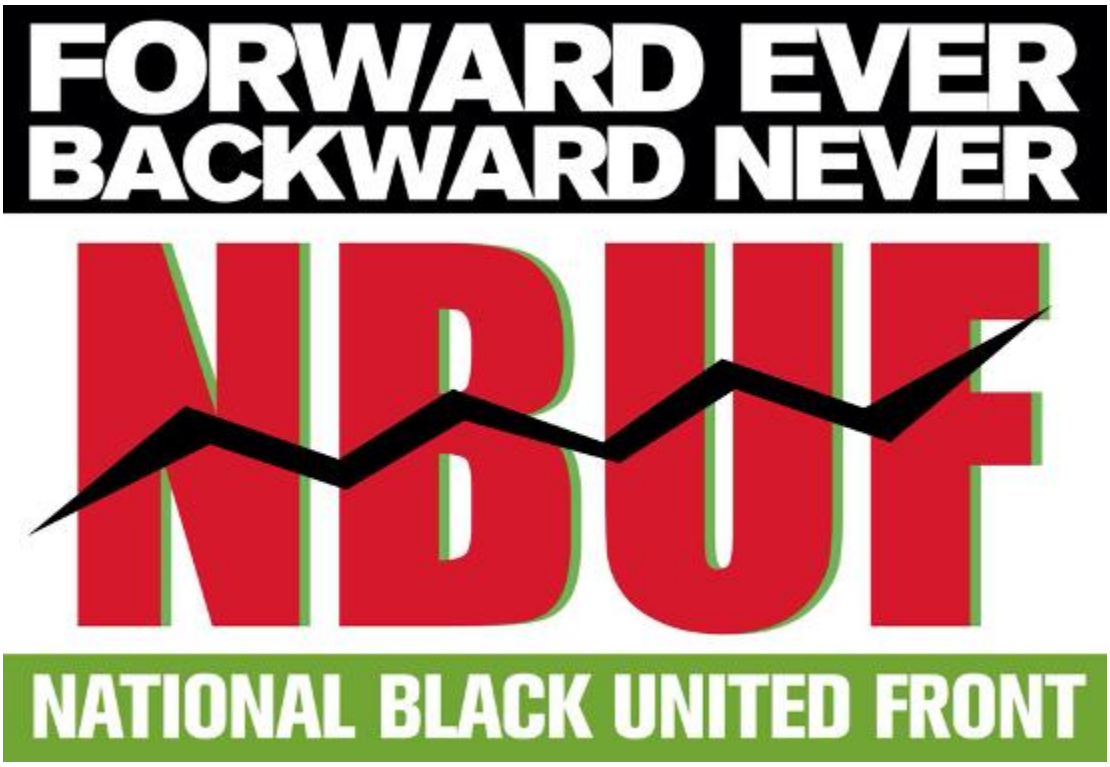
Ben Davis

National Black United Front

Comprehensive Policing and Justice Reform Amendment Act of 2020

Official Testimony to the
District of Columbia
Committee on the Judiciary & Public Safety



Chairperson Charles Allen and the Committee of the Whole, my name is Yafet Girmay and I am testifying as Vice Chair of International Affairs for the National Black United Front (NBUF), an all-volunteer organization that includes all social, political & religious sections of the Black community.

I am here today on behalf of NBUF in support of bill B23-0882 Comprehensive Policing And Justice Reform Amendment Act, which is to provide for comprehensive policing and justice reform for District residents and visitors, and for other purposes.

As we understand history, we are committed to not making and allowing the same mistake twice. From the shooting death of unarmed teenager Michael Brown, to the heavily militarized police response, to the protests in the wake of Brown's death, to the failure of the grand jury to indict Officer Darren Wilson for his role in the shooting, the events in Ferguson, Missouri. These events have turned up the intensity on a consistent simmering debate over the persistent inequalities in our criminal justice system. The recent events have made the urgent need to act even more clear: In the Eric Garner and Tamir Rice cases where no officers were held accountable for their actions.

We understand the center of this debate has always been a conversation about inequities in the basic functioning of the criminal justice system including police practices, the use of force and aggressive policing, arrest and prosecution policies, the severity of criminal sentences, and the disparate impact many of these policies have on the black community. It is blatantly obvious there is a deep-seated sentiment within the black community that the criminal justice system is inherently rigged against them and that the institutions supposedly designed to protect them are failing them, or even worse, targeting them. Moreover, the gap between black and white views

on law enforcement, the criminal justice system, and race relations in this country only seems to be growing. This ever-widening gulf further complicates our attempts to understand exactly what is at issue in cases such as the deaths of Brown and Garner, the failure of the grand juries in those cases to indict the officers responsible, and the opportunity to think through ideas and options for concrete solutions to address the underlying problems.

The Bill points out one aspect that can be pushed further for example in which an officers justification for a search is based on the person's consent and they have to explain that the person is being asked to consent and that they can refuse the search; Fines and complaints should be added to that and accumulated so repeat violators aren't able to be rehired.

Policymakers across the country have targeted several major areas in their reform discussions, Specific actions to incorporate include:

- Ensuring more transparency about police use of force and disciplinary records
- Banning chokeholds
- Making it easier to sue or prosecute officers who commit abuses
- Requires the Mayor to publicly release the names and body-worn camera recordings of any officer who committed an officer-involved death or serious use of force, unless the subject or their next of kin objects to its release at least within 24 hours
- Education on racism and white supremacy
- Incorporate three strikes rules for police officers who receive over 3 complaints/write ups.
- Strengthen the fine imposed on officers who use the illegal method of chokehold to the Maximum penalty instituted by DC code.
- As it pertains to the Police Reform board, while adding a representative from each ward is impactful. A stronger approach would be a fair process that allows active community voices, those who can speak to the needs of the wards being represented. As well as, increasing the representation of Wards 7 and 8 who are most affected by unfair application of policing policies.

Activists and some Democratic officials want to reimagine the system to root out structural racism, calling to redirect chunks of police funding to social services or even replace whole departments with a new public safety system. A current report "A Roadmap for Reimagining Public Safety in the United States: 14 Recommendations on Policing, Community Investment, and Accountability," it recommends shifting investments from policing to social services, affordable housing, schools, community-based healthcare systems, especially mental health and voluntary drug treatment – and local economic development. Redirecting resources from policing to services that effectively address underlying and overwhelming societal problems, along with establishing effective, independent oversight of police, would hold police accountable for their tactics of brutality and would improve public safety.

Police reform efforts should address racial and economic inequities and other societal problems, some caused by policing itself, to be effective. Poverty in the US has stratified along racial lines and profound disinvestment in social services and community development have contributed to homelessness, untreated mental health conditions, unemployment, lack of quality schooling, and other issues. They have also contributed to higher crime rates in Black and poor neighborhoods.

Particularly since the "tough on crime" approaches and "war on drugs" of the 1970s, governments at all levels have for decades invested in policing, prosecutions, and prisons as their primary tools in some cases for profit, rather than investing in addressing these root problems to improve public safety and quality of life. These approaches have left underlying societal problems unresolved, while creating a system of mass incarceration and heavy policing that have had a devastating and disproportionate impact on Black people.

As a U.S. criminal legal system researcher put it “Police violence, especially toward Black people, ranging from killings to abusive stops and searches, is a major way that structural racism manifests itself in the US, and until governments invest in supporting communities rather than criminalizing and controlling them, that violence will not stop.”

We appreciate your time, thank you.

Forward Ever Backward Never,

Yafet Girmay

National Black United Front

Written Testimony on B23-0288
The Comprehensive Policing and Justice Reform Amendment Act of 2020
From 56 Individual Religious Leaders

October 23, 2020

Chairperson Allen, Councilmembers, and Staff of the Committee on the Judiciary,

As religious leaders that represent people from across the religious, theological, and political spectrum, we urge you to pass legislation that makes sweeping changes to reduce police violence, including a significant redirection of funding to other areas that can actually achieve community trust, safety, and well-being. We believe the Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020 includes some positive and necessary measures, but more—so much more—is needed.

When we hear the names of Archie "Artie" Elliott III, D'Quan Young, Marqueese Alston, Alonzo Smith, Terrence Sterling, Ralphael Briscoe, and Gary Hopkins Jr., all of whom were murdered by the Metropolitan Police Department, our hearts are broken for their families and our resolve is strengthened that we must see fundamental change now. It is time—indeed it is far past time!—for the DC City Council to ensure Black lives matter and that our communities are protected and served by our public institutions, especially the police.

According to our holy texts, the distribution of justice is intended to be a means of healing for all people. We believe there should be an emphasis on restorative justice rather than retributive justice. Restorative justice is designed to alleviate conflict and reconcile aggrieved parties. Restorative justice seeks to bring healing to the individual and their community who have been harmed while holding those who committed the harm accountable. While retributive justice results in hostility, violence, and distrust, restorative justice leads to the building of the Beloved Community, which is what we aspire to as faith leaders.

The current role of the police in Washington, DC, exacerbates conflict and leads to violence all too often. Because of federal funding we have overly militarized the police. Far too often police show up to peaceful gatherings outfitted for conflict. As a society, we have become too dependent on the false belief that conflicts are best solved through military force; that overwhelming police violence will crush societal harm of any kind. This is partly because of the easy access to military hardware and partly because the police have been assigned too many roles in our local communities; roles that many leaders already in our communities can and should fill.

One significant area the role of the police must recede is the practice of stop and frisk, which targets Black people at a dramatically higher rate than others in DC. In a study published this past June, the ACLU found that though Black people make up 46% of the DC population, they composed 72% of individuals stopped by DC police over a five-month period. Not only are Black people targets of this broken form of policing, young people, members of the LGBTQ community, homeless people, and immigrants are at risk as well. It is time for stop and frisk to end.

The Comprehensive Policing and Justice Reform Emergency Amendment Act of 2020 is a necessary step towards a community where peace and justice are attainable. Importantly, the legislation will strengthen procedural protections when the police seek to search a person's vehicle, home, or property, and it will also strengthen the District's use of force standards by clearly defining non-deadly and deadly force while limiting the situations in which both non-deadly and deadly force can be used. Equally crucial, this bill restricts the ability of District law enforcement agencies to acquire or request certain military equipment like armored vehicles, grenades, or drones and it requires agencies who currently possess such equipment to return it.

These and other aspects of the legislation are important to pass, but there is so much more to be done. Thus, we echo the call put forth by our siblings in Black Lives Matter and Black Youth Project 100 to defund the police. We need to invest the current resources used to intimidate members of our communities to instead actually improve peoples' lives. This can be done by using those resources to provide affordable and accessible housing, healthcare, education, and meaningful employment. Too many people have died at the hands of the police to continue to do things the same way anymore. Sweeping change is needed to create trust and the kinds of safety that all individuals and communities deserve. We are ready and willing to work with you to ensure that meaningful and lasting change is realized.

Sincerely,

Rabbi Aaron Alexander
Adas Israel

Rev. Aundreia Alexander
Covenant Baptist United Church of Christ

Dr. Ann Barnet
6th Day Faith Community

Rev. Karen Brau
Luther Place Church

Jerry Brown
Augustana Lutheran Church

Rev. Michael Bryant
Former Staff Chaplain DC Jail - Currently Catholic Chaplain -

Rev. Andrew Cheung
Washington Community Fellowship

Rev. Tony Coleman
All Souls Church Unitarian

Rev. Rachel Cornwell
Dumbarton United Methodist Church

Rev. Lyn Cox
Washington Ethical Society

Rev. Cornelius Ejiogu
Josephite

Rev. Renata Eustis
Christ Lutheran Church

Rev. Patricia Fears
Fellowship Baptist Church

Rabbi Charles Feinberg
Interfaith Action for Human Rights

Rev. Diane Ford Dessables
Founder, Gemstones in the Sun

Rev. Ginger Gaines-Cirelli
Foundry UMC

Rev. Delonte Gholston
Peace Fellowship Church

Rev. Louise Green
All Souls Church Unitarian

Rev. Mark Greiner
Capitol Hill Presbyterian Church

Rev. Graylan Hagler
Plymouth Congregational United Church of Christ

Rev. Ruth Hamilton
Westminster Presbyterian Church

Rev. Amanda Hendler-Voss
First Congregational United Church of Christ

Rev. Benjamin Hogue
Lutheran Church of the Reformation

The Rev. Peter Jarrett-Schell
Calvary Episcopal Church

Rev. Ellen Jennings
Cleveland Park Congregational UCC

Rev. Dr. Paul Johnson
Hughes Memorial UMC

Rev. Garrick Jordan
Plymouth UCC

Rev. Robert Keithan
All Souls Church Unitarian

The Rev. Margrethe Kleiber
Augustana Lutheran Church

Rev. Thomas Knoll
First Trinity Lutheran Church

Rev. William H. Lamar IV
Metropolitan African Methodist Episcopal Church

Rev. Cynthia Lapp
Hyattsville Mennonite Church

Pastor Mike Little
Bread of Life Church

Rev. Kaeley McEvoy
Westmoreland Congregational Church UCC

Rev. Terrance M. McKinley
Campbell AME Church

Dr. Bill Mefford
The Festival Center
Lay Pastor Sandra Miller
Seekers Church and Festival Center

Rev. Darryl Moch
Sr Associate Minister, Inner Light Ministries, UCC

Rev. Dr. Sterling Morse
Church of the Redeemer Presbyterian DC

Ryane Nickens
The TraRon Center

Rev. Julie Pennington-Russell
The First Baptist Church of the City of Washington, D.C.

Rev. Ben Roberts
Foundry UMC

Rev. Kathleen Rolenz
All Souls Church Unitarian

Rev Sally Sarratt
Calvary Baptist Church

Louis Sawyer Jr
DC Reentry Task Force

Rev. LeeAnn Schray
Christ Lutheran

Merikay Smith
The Church of Jesus Christ of Latter-day Saints

Rev. Donna Sokol
Mount Vernon Place UMC

Sandy Sorensen
UCC Justice and Witness Ministries

Rev. Maria Swearingen
Calvary Baptist Church

Rev. Aaron Wade
The Community Church of Washington, DC-UCC

The Rev. Susan Walker
St. Stephen and the Incarnation

Denise Walker, Esq.
Augustana Lutheran, Comunidad Santa Maria

Rev. Dr. Rose Wayland
Sixth Presbyterian Church

Rev. Michael Wilker
Lutheran Church of the Reformation

Elaine Wilson
Friends Meeting of Washington

Submitted by: Rev. Rob Keithan
All Souls Church Unitarian
1500 Harvard St NW
Washington, DC 20009
202.517.1468
rkeithan@allsouls.ws

Dear Judiciary Committee Members,

I am writing regarding the three Police Reform bills currently before the committee. I am encouraged by the extent to which the Council has taken the issue of police violence seriously and promised that the conversation that began with the passage of the emergency act did not end there.

My name is Niq Clark. I have lived in SMD 6A02 for nearly nine years, and in DC for approximately sixteen years. During my years here I have been assaulted several times. I believe this happened primarily in 2007 and almost entirely near my home at the time on the 1100 block of I St SE. All of those incidents were single punches to my face. All of the people who punched me were Black. I am white. I lost teeth, days of work, medical bills, and a sense of stability in my neighborhood. On each of these occasions I summoned MPD. On one occasion two youths blocked my path on the sidewalk and raised their fists to me. I said “What are you doing?” and one of them punched me. They then let me continue on my way, just as an MPD cruiser passed, which I waved down, pointing to the group of youths they had rejoined. The officer in the cruiser leapt out, roughly handcuffing the youth who had raised a fist without punching me, ignoring protests that the cuffs were painfully tight. The other youths scattered and ran. Events since that day - particularly the events of this year - have made it clear to me how much danger I placed those kids in. Their behavior should absolutely not be tolerated, but neither should a system that would injure them or place them in mortal danger over what they did. Had those kids had the kind of favorable treatment I received automatically by dint of my race, they would not have been in that position. I did stupid things that hurt people as a kid, and no one ever called the police on me. If they had, I doubt the police would have handled me as roughly as MPD handled the kid who raised a fist without even taking a swing. Moreover, I imagine that kids who had the kinds of opportunities, comfort and leeway I had enjoyed would be a lot less likely to go around punching people out of resentment.

This year I investigated ways that I could help ease the threat of police violence in my neighborhood. Much of the burden that we place on police officers would be better performed by unarmed professionals in their respective areas such as mental health, suicidality, substance use, conflict mediation, domestic violence intervention to name a few. I learned that the first step to reducing police interactions is to get to know your neighbors, so I sent letters to everyone on my block introducing myself and listing alternative numbers to call for a variety of situations. I walked around my neighborhood in a face shield and gloves checking in on my neighbors and learning about how we could help each other cope with the many hardships that have emerged this year.

Broadly, I support the positions and comments of Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to consider the following in formulating revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The DC Auditor could catalogue and track the MPD spends on its many functions, and issue a report before the upcoming budget cycle to facilitate assessing appropriate police functions and budgets.

2) Invest in new approaches to community safety like mental health responders for people in crisis and programs that provide communities with the tools that they need to interrupt violence and abuse. Follow the lead of the CAHOOTS program in Eugene, Oregon by making more appropriate responses to these kinds of emergencies available through DC's 911 service.
    a) Cut crime off at the roots by investing in the health, wellbeing, housing, education and prosperity of our most vulnerable neighbors.
    b) Focus on the harm done by both crime and overpolicing in our neighborhoods and invest on repairing it and creating a robust system of accountability for officers and officials.

3) We must assess the actions of our police officers honestly with regard to when, where, how and for whom they promote stratification and exacerbate inequality, prioritize property over life and health, and fail to promote safety. A recent report from the DC Police Complaints Board found that very few of the complaints of police misconduct that are sustained result in discipline more serious than a mild reprimand or additional training. We need to be able to break through the code of silence and hold offices accountable.
    a) The entity DC entrusts to investigate misconduct needs the authority not just to make disciplinary recommendations - a power the Office of Police Complaints currently lacks - but to enforce reasonable disciplinary measures targeted to address both the causes and the results of police misconduct.
    b) Disciplinary powers of the investigating body should include removal from duty subject to a nontrivial appeal, and the filing of criminal charges where appropriate.
    c) Officers must also be prepared to provide recompense to communities injured by their misconduct by - for example - providing service to help repair the damage to that community, apologizing to injured parties, and hearing victims' statements.

4) We should decriminalize sex work. It would:
    a) reduce violence by enobling sex workers to report violent police and violent clients;
    b) provide a path to health care for sex workers and end the disincentive for condom use that carrying condoms is sometimes cited as evidence of intent to do sex work;
    c) advance equality for vulnerable populations such as Black trans women who report being frequently profiled as sex workers by police seeking to harass them;
    d) reduce the incarceration of nonviolent people from a group that tends to be disproportionately Black and trans.

5) We must remove armed security including police, security guards and special police from schools, stores and housing except as summoned to address incidents or credible threats of violence. Considerable research points to stronger correlations between the severity of school discipline with a student's race than with that student's behavior; enforcing this kind of discipline by force of arms is a recipe for racially disparate police violence.
    a) Provide schools and communities with alternatives like community mediation, violence interruption and restorative justice. Make these alternatives easy to reach by including them in DC's 911 service.
    b) Engage students in every phase of the disciplinary process they will be held to. Enlist their imaginations to forge alternatives that address the issues they are concerned about.

6) The District must abolish or set strenuous limits on the use of grand juries, particularly when a police officer faces indictment.
    a) In homicides by police officers deemed "justified" by grand juries, the evidence comes from the officer's co-workers - frequently participants in a "code of silence" that seeks to excuse misconduct.
    b) Of all the nations to inherit English common law from colonization, only the United States has failed to abolish grand juries.

7) The District must place clear and rigorous limits on the use of consent searches, including Stop and Frisk tactics.
    a) The people most likely to waive their Miranda rights are from the most vulnerable groups of citizens: unhoused people, sex workers, trans people, poor people and disproportionately Black people. As vulnerable citizens are those most in need of protection from police overreach, it is clear that those involved know that the enumerated rights provide no real protection when the threat of an armed officer confronts them.
    b) Courts regularly presume on little evidence that Miranda rights were waived voluntarily. The District needs more strenuous protection of these rights for our neighbors who feel they have no choice but to waive them.
    c) The DC Justice Lab has crafted proposed statutory language that seeks to address this issue in part by limiting consent searches to occur only after a person has an opportunity to consult with a lawyer. The following reflect further recommendations regarding Stop and Frisk or Jump Out tactics.
        i) Reassign all officers in paramilitary units, and disband those units.
        ii) Prohibit plainclothes policing and the use of unmarked cars except as necessary to a targeted and justified undercover operation.
        iii) Prohibit demands to see someone's waistband without probable cause.
        iv) Prohibit pretextual excuses for reasonable articulable suspicion or probable cause including:
            (1) presence in a high-crime neighborhood;
            (2) apparent nervousness around officers;

(3) furtive movements, gestures or running;
(4) generic bulges in clothing;
(5) time of day.

v) Suppress the use of evidence gathered using discriminatory Stop and Frisk tactics.

8) The District must prohibit the use of public funds and of funds from any common carrier or utility operating in the District for donations or payments to any union representing one of the law enforcement agencies operating in the District.
9) Overuse of warrants leads to terrorization of communities and preventable use of deadly force by officers and civilians. I support the following recommendations regarding the use of warrants:
    a) Require strong evidence, due diligence and transparency.
    b) Prohibit issuance of warrants for drug activity alone.
    c) Ban no-knock and limit quick-knock warrants.
    d) During the execution of a warrant, prohibit handcuffing, drawing weapons and searching individuals unless the officer is prepared to face a robust process to prove that the action was based on a reasonable belief that the act was necessary to prevent imminent physical injury.
    e) Hold officers personally liable for the compensation of victims. Do not pay officer liability from the District's coffers unless a given threshold is met based on a fraction of the officer's income.

The streets of Washington DC have felt safer to me since I endeavored to meet all of the people on my block and to share together as neighbors, but the more I learn about law enforcement, the less safe I feel I and my neighbors will be when an officer arrives. I urge you to take seriously the unique moment before us to begin to bring about real change away from a system that continues to privilege race and property over community and safety. I hope you will take these suggestions seriously as you move into the next phases of these three bills.

Thank you very much for your time

Niq Clark

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

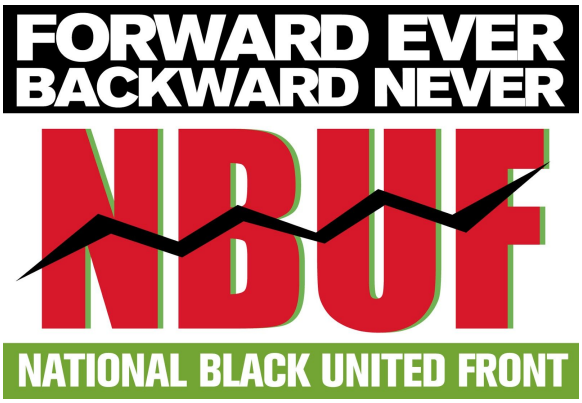
2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

geraldine galdamez



National Black United Front
Official Testimony to the Council of the District of Columbia

Committee on

Judiciary & Public Safety Public Hearing

Bill 23-882 Comprehensive Policing and Justice Reform

Amendment Act of 2020

October 15, 2020

Public safety is a very important issue for the residents of the District of Columbia. Many of the residents have that it is one of their primary concerns. Realizing that the Metropolitan Police Department (MPD) is the primary agency dedicated to the physical security of the residents, it is critical that we understand the historical context of the police and its role in the community.

"How the U.S. Got Its Police Force" is the title of an article in the May 2017 issue of Time Magazine. The article states, "In the South, however, the economics that drove the creation of police forces were centered not on the protection of shipping interests but on the preservation of the slavery system. Some of the primary policing institutions there were the slave patrols tasked with chasing down runaways and preventing slave revolts, Potter says; the first formal slave patrol had been created in the Carolina colonies in 1704. During the Civil War, the military became the primary form of law enforcement in the South, but during Reconstruction, many local sheriffs functioned in a way analogous to the earlier slave patrols, enforcing segregation and the disenfranchisement of freed slaves."

It is important to provide context to the development of law enforcement because it gives an understanding of the origins and intent of the role of police. To be clear, the intent and origin of the police department were to protect the economic interests of White male landowners over the age of thirty - because of these origins, police, crime, and economics will be forever linked in this society.

As we move into a space to correct historical wrongs, it is my main objective to ensure that MPD fulfills its commitment to the District of Columbia and that is protecting all of its

residents and guests. Therefore, on behalf of the residents of the members and supports of the National Black United Front, we make the forthcoming recommendations on Bill 23-882 Comprehensive Policing and Justice Reform Amendment Act of 2020.

Statements Made by Minors

To better protect children from the current inadequacies of the Miranda doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless:

(1) the minor was advised of their rights by the interrogating law enforcement official,

(2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and

(3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any Miranda right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Stop and Frisk

The most callous example of stop-and-frisk in the District of Columbia is the Metropolitan Police Department's jump-out squads. Specialized paramilitary units such as the Gun Recovery Unit ("GRU") in the Narcotics and Special Investigations Division ("NSID") use tactics often

referred to as “jump-outs” by community members because of how they operate in D.C.’s predominantly-Black neighborhoods: Officers jump out of unmarked cars to surround, stop, and search individuals without basis. These routine patrols drive around demanding that people who are doing nothing wrong stop, lift up their shirts, and display their waistbands to prove that they are not carrying firearms. Jump-outs often work in plainclothes with tactical vests, however, a similar tactic has also been observed from marked cars. This unlawful and discriminatory treatment undermines community trust in law enforcement and does not improve public safety. This tactic must be ended immediately to ensure the safety of our community members and to preserve the constitutionality of policing in D.C. MPD’s paramilitary units jump-out tactics are in line with a larger culture of celebrating police violence and the idea that D.C. residents from certain neighborhoods should be treated as inherently dangerous. Although D.C. leadership denies that jump-outs are still a pervasive aspect of Department culture, these units brag about the often-violent practice.

Therefore the District must:

1. Disband existing paramilitary units and reassign those officers.
2. Require officers to work in full uniform and marked police cars, unless they are conducting a justified and targeted undercover operation.
3. Prohibit officers from demanding to see a person’s waistband without probable cause.
4. Suppress all evidence seized as a result of “jump outs” and other discriminatory stop and frisk tactics.

5. Disallow the following common pre-textual basis for reasonable articulable suspicion or probable cause:

- Presence in a high-crime neighborhood;
- Apparent nervousness around police officers;
- So-called furtive gestures or movements or running;
- A generic bulge in a person's clothing; and
- Time of day.

Special Police

D.C. has the most police per capita of any large city. We have no need for armed guards patrolling the same communities that police already oversaturate. These officers lack the training and accountability to safely patrol properties and should be disarmed to protect the community. To solve this problem, it is recommended that D.C. Council:

• Disarm special police officers;

• Increase the quantity and quality of training required;

• Pass the Special Police Officer Oversight Amendment Act; and

• Disallow pursuit beyond property boundaries.

Forward Ever Backwards Never
National Black United Front
Central Committee

Dear Judiciary Committee Members,

I wanted to write to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough to achieve the necessary outcome to keep all residents of DC safe and free of racism and harassment by law enforcement. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. Let me say that again: DC residents deserve to live free from police violence, brutality, and racism.

I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

Best,
Olivia Valdez

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Network for Victim Recovery of DC

Committee on the Judiciary and Public Safety

Hearing on Bill 23-0882, The "Comprehensive Policing and Justice Reform Amendment Act of 2020"

Testimony of Kristin Eliason, NVRDC Director of Legal & Strategic Advocacy

October 15, 2020

Thank you Chairman Allen, other Committee members, and staff for the opportunity to submit testimony on the "Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020" (hereinafter "the Bill"). My name is Kristin Eliason and I am submitting testimony on behalf of the Network for Victim Recovery of DC (NVRDC) in my capacity as Director of Legal & Strategic Advocacy. This testimony is to serve as a supplement to the testimony submitted by the DC Coalition Against Domestic Violence (DCCADV) and joined by NVRDC. Since May 2012, NVRDC has provided holistic victim services, including free legal representation, advocacy, and case management to over 4,400 victims of crime[1] in the District.

As an organization dedicated to empowering victims of crime to achieve survivor-defined justice with the assistance of our services, we know that experiencing a crime is just one part of a survivor's various intersecting identities—our clients live, work, and go to school in this community and being a crime victim doesn't make them immune from directly or indirectly experiencing the systemic violence and racism inherent in this country's current methods of policing and our criminal legal system; therefore, it is imperative that the values of our clients and our community are reflected in how we address crime and victimization. We know that much like the various paths survivors take to heal from crime, our community must address crime not only by providing for victims' needs in the aftermath of a crime but also exploring ways to hold folks who commit harm accountable and understanding and addressing the root causes of crime. While hundreds of victims of crime come to NVRDC for assistance every year, we know that many of our clients are impacted and experience harm as a result of the ways in which our city has historically responded to crime. We also know that crime statistics are based on reported crime and don't fully reflect the experience of violence in DC, especially in Black and Brown communities.[2] According to US Census Bureau, 46% of DC's residents identify as Black or African American and it is important for the District to understand and account for the fact that its Black residents' experiences with white supremacy forging anti-blackness, especially in policing, compounds the barriers they often face in accessing support, services, and justice following a victimization.

[1] NVRDC recognizes that people who experience crime may use a different term when describing themselves, such as survivor; however, crime victim in our local and Federal laws is a legal term of art and therefore NVRDC will be using this term throughout this testimony. Using this term is not meant to invalidate or discount the experiences or perspectives of any person who has experienced crime.
[2] *See National Crime Victimization Survey, Victimizations Not Reported to the Police, 2006—2010,* Langston, L., Berzofsky, M., et. al., United States Department of Justice Office of Justice Programs Special Report: National Crime Victimization Survey (August 2012), https://www.bjs.gov/content/pub/pdf/vnrp0610.pdf

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As an organization dedicated to the empowerment of crime victims, we advocate to ensure that victims' experiences are dignified in every way they might choose to access their self-defined justice. For some of our clients, justice involves police interaction and the criminal legal system. As such, NVRDC relies on working and collaborative partnerships with entities involved in the detection, investigation, and prosecution of crime, including MPD. We are grateful for the times these partnerships served to benefit our clients but it is also our responsibility to name the ways that police/community/victim relationships can shape perceptions and impact the experiences of our clients. In working with our BIPOC clients, we witness every day the immense hardships experienced by survivors with one or intersecting marginalized identities, whether it be bias from government agencies tasked with providing resources to crime victims, fear of interacting with law enforcement as a result of personal experiences with police, witnessing hard done to family, friends, or neighbors by various government entities, inappropriate or reprehensible behavior directed to the crime victim by the police investigating their case, or the knowledge that the criminal legal system is designed to oppress people who look like them, fail them, or fall short of meeting their needs. The problem of addressing violent crimes while also disrupting the historic oppression and violence perpetuated on BIPOC folks in our country and community.

Many victims of crime, including many NVRDC clients, have experienced first-hand the injustices, violence, and racism perpetuated by our criminal legal system as a result of over policing in their neighborhoods, harassment by law enforcement as a result of experiencing homelessness or engaging in sex work, or while being arrested or incarcerated. Some are just fearful because of experiences family, friends, and neighbors have had with police or what, generationally, BIPOC have be taught what it means to interact with police based on the historical experiences of their elder family members. As such, accessing any sort of formal systems for justice or support for many District residents who have experienced crime is not an option. Lack of access to vital resources funded by the government can be detrimental to a survivor's healing, wellbeing, and even livelihood.

For victims of crime in the District, to access many forms of support, such as Crime Victims Compensation, there are either actual or perceived requirements for interacting with formal systems. BIPOC victims of crime in the District are forced to engage with law enforcement in order to receive many services—a choice that may, because of their identities, put them at risk of harm by the system purporting to protect them. Even in circumstances where police interaction is not a requirement, there is often confusion in the community where victims of crime think they must report to or interact with the police in order to access services which ultimately lowers the number of folks accessing these spaces and services.

Our organization works with a local restorative justice practitioner to provide additional options for justice and accountability for our clients who are sexual assault survivors.

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There is a desire and need in our community for addressing harm that is different from what our current formal systems provide. Additionally, there is a strong need for police to understand the reasons Black and Brown communities fear police and do not want to interact with police, even when their safety is at risk as the result of a commission of a crime. NVRDC recommends trauma training for MPD employees but feels this type of training will fall short of meeting the needs of District residents whose communities have experienced abuse and violence as a result of policing. We urge the District to work with community service providers and members of the community to understand and learn from the experiences of District residents—no amount of internal improvements will matter if the underlying reasons leading to abuse by police are addressed.

We hope this bill is just the beginning of major changes in how the District 1) holds accountable those involved in the detection, investigation, and prosecution of crime, 2) works to dismantle the system of racist oppression ingrained in our policing and criminal legal system; 3) responds to the needs of crime victims beyond offering the current criminal and civil court options; 4) addresses the underlying causes of crime; and 5) responds to the maltreatment of crime victims by law enforcement.

NVRDC proposes the following regarding Bill 23-0882:

Subtitle B – Improving Access to Body-Worn Cameras:
This portion of the bill must contain provisions ensuring the preservation of privacy of the victim in both in the storage and release of body-worn camera footage under Federal and District law. Regarding prohibiting the Mayor from releasing body-worn camera footage absent the consent of the "individual against whom the serious use of force was used" or a deceased victim's next of kin, measures must be implemented to ensure that such consent is both informed and reasonably time-limited. The requirement that the Mayor notify the decedent's next of kin of the impending release under Subtitle B should be expanded to include those individuals whom the serious use of force was used, not just a deceased individual's next of kin. Additionally, any such notice of release should be reasonable and timely and should also include to whom and in what manner the footage will be released. Finally, in any procedure under this Subtitle in which there is a disagreement amongst the persons who must consent to the release that necessitates the Mayor seeking a resolution in DC Superior Court, NVRDC strongly suggests a procedure be adopted to allow for notice to and an opportunity to be heard by the persons who must consent to the release *prior* to the court making a determination on the release of the body-worn camera footage.

Subtitle C – Office of Police Complaints

In addition to the recommendations made regarding this Subtitle in DCCADV's testimony, we recommend those recommendations be applied to victims of any crime type. NVRDC also recommends greater transparency in the Office of Police Complaints (OPC) investigation process and accountability mechanisms for when

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those who file complaints are treated without fairness or respect for their dignity or privacy. Additionally, NVRDC recommends that all employees in the OPC receive annual training on working with those who have experienced trauma, violence, and crime in a trauma-informed way to ensure that complainants are treated with fairness and with respect for their dignity and privacy and that complainants do not feel forced, coerced, or pressured in participating in OPC investigations.

NVRDC also recommends that the number of seats on the Police Complaints Board be expanded to include a designated member of the victim services community.

Subtitle D – Use of Force Review Board Membership Expansion

As with the Police Complaints Board, NVRDC recommends that the number of civilian seats be expanded to also include a seat designated specifically for a member of the victim services community.

Subtitle F – Limitations on Consent Searches

NVRDC echoes the recommendations and observations made in DCCADV's testimony and echoes that, while MPD must provide interpretation services, our clients needing interpreter services report that MPD is inconsistent in following and often in violation of this requirement. NVRDC has worked with clients who have experienced searches that were neither executed pursuant to a warrant nor conducted pursuant to an applicable exception to the warrant requirement. These clients experienced a crime and were not informed that their consent was required by the investigating officers, nor was their consent obtained. In addition to such searches being unlawful, they only serve to further distrust and fear of police by crime victims whose participation in the investigation may be crucial to the victim's or public's safety.

The consent obtained by the victim should be informed, specific, and time limited. Any victim who is in need of interpreter services should be provided access to such services prior to any discussion of consent with the victim. The member(s) of MPD seeking consent of the victim should not be used as the interpreter in this situation and, instead, should be done by an interpreter. NVRDC recommends that minimum standards be set for interpreters used by MPD in both consent search situations and whenever working with victims with language access needs. NVRDC recommends that in order to determine such standards be done in consultation with the DC Office of Human Rights Language Access Program and the non-profit Ayuda.

Subjects of such consent searches should be provided with a rights card, similar to the Sexual Assault Victim's Rights Card provided for under DC Code § 23-1907(13) that provides the subject of the search with general information such as the subject's right to withhold consent to such a search. The card should comply with requirements set out by the DC Language Access Act and should, in addition to English, be available,

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at the very least, in the following languages: Spanish, Chinese, Vietnamese, Korean, French, and Amharic.

Subtitle G – Mandatory Continuing Education Expansion; Reconstituting the Police Officer Standards and Training Board

NVRDC is appreciative of the opportunities we have been provided to train members of MPD on responding to victims of crime; however, these trainings have usually been limited to groups within MPD. NVRDC recommends that MPD officers receive continuing education on working with victims of crime, to include specific training on trauma-informed interviewing and common manifestations of trauma in crime victims.

NVRDC recommends that the number of community representatives on the Police Officers Standards and Training Board (POST) be increased from five to seven members, with those two additional members being from the victim services community, and with one of those members having a background in services for survivors of intrafamily offenses, to include domestic violence, sexual assault, or stalking.

Subtitle K – Amending Minimum Standards for Police Officers

In addition to the requirements proposed in the Bill and the recommendations made by DCCADV, NVRDC also suggests that any applicant for appointment as a sworn member of MPD be ineligible for appointment if they currently or previously had a court order (such as a Civil Protection Order) issued against them in any jurisdiction as a result of the commission of an intrafamily offense.

Subtitle M – Officer Discipline Reforms

NVRDC recommends that any acts or occurrence of a sexual nature be added as acts or occurrences allegedly constituting cause under new paragraph (1A).

Additionally, NVRDC recommends processes be implemented to allow for complainants to learn the outcome of the complaint and what corrective action has been taken. For victims of crime who also experienced misconduct by police, not knowing whether they will have to interact with the member of MPD, concerns over similar conduct being perpetrated on future victims, and not knowing what actually happened as a result of their complaint only adds to the mistrust a victim or the community feels in the police.

Subtitle R – Metro Transit Police Department Oversight and Accountability

NVRDC recommends that any recommendations made for the Police Complaints Board under Subtitle C also be implemented for the Police Complaints Board under Subtitle R. NVRDC further recommends that "sexual harassment" be added under subsection (f)(10)—although such abuse or misuse may be implicitly covered under

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this section, specifically listing that behavior alongside the abuses and misuses listed in (f)(10)(A)-(F) demonstrate the seriousness with which the Council takes such behavior by Metro Transit Police.

Additional Recommendations:

NVRDC supports the recommendations outlined in DCCADV's testimony. Additionally, NVRDC recommends that such provisions be applied to victims of all crime types where applicable. Additionally, NVRDC recommends the following:

- As stated above, victims of crime, especially those who have intersecting marginalized identities or who have experienced abuse committed by police, face an impossible choice—interact with a system that has already harmed you and/or your community in order to receive services or go without such services. The Crime Victims Compensation Program is a prime example of this dilemma—victims of crime who do not obtain a Civil Protection Order or receive a medical-forensic exam must report to police in order to access Crime Victims Compensation (CVC). NVRDC recommends consideration for removing this requirement altogether[3] or adding additional options to the law governing accessing CVC.
- NVRDC also recommends that this Bill include a provision amending the CVC requirements that would allow for complaints to OPC that allege serious use of force, criminal offenses, or sexual harassment by a member of MPD to create eligibility for CVC without an accompanying police report.
- NVRDC recommends that the District fund and allow for alternatives to our criminal legal system that hold those who commit crime accountable, such as restorative justice programs and that such programs are informed, run, or led by those who have experienced crime.

Thank you for your time and commitment to making the District a place that is safe for everyone. I am happy to take any questions you may have.

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reach out. rise up.

[3] NVRDC understands there may be limitations imposed by Federal law that would not allow, currently, for such an elimination, but encourages the Council to continue to consider this issue and alternatives to police reports to access CVC.

Dear Judiciary Committee Members,

I am writing to provide my input regarding the three police reform bills currently under consideration before the Judiciary Committee. While I support police reform, the reforms in these bills do not go far enough. I encourage the Council to adopt several additional reforms, as we move towards defunding the Metropolitan Police Department entirely.

Initially, I support all of the comments submitted by Black Lives Matter DC, Black Swan Academy, Stop Police Terror Project DC, ACLU-DC, DC Justice Lab, the Working Families Party DC, and all of the members of the Defund MPD Coalition. In addition, I encourage the Judiciary Committee to make the following revisions to the Comprehensive Policing and Justice Reform Amendment Act of 2020:

1) The MPD plays numerous roles in DC, but we do not know how much time and resources are devoted to each. For instance, the MPD does everything from traffic management to street patrolling to responding to mental health crises to tagging along to 911 medical and fire calls, but we do not know how much of each they do. The bill should require the DC Auditor to catalogue and track the time spent on the many different functions the MPD plays, including those incident to other functions, and issue a report before this upcoming budget cycle. That will facilitate public conversations around appropriate police functions and budgets. However, the audit should be completed timely so it does not delay action this budget cycle.

2) The people who perform basic public services in DC shouldn't carry guns. We need to disarm the police in basic interactions, so that police are less able to inflict deadly violence on DC residents. This should be a first step toward shifting all public safety work to non-police public servants.

3) Police reform shouldn't just make it easier to complain about police misconduct: it should reduce interactions with the police. Well-off white people in DC live essentially free from police interactions, because police just aren't needed in most circumstances. When emergency response is needed, we should replace police with well-trained, non-violent professionals, like social workers, psychologists, violence interrupters, and traffic directors. And when an emergency response is not needed, such as when police frequently harass homeless residents, sex workers, or Black people, police should not be involved at all.

4) DC should hold employees accountable for their misconduct. It is good that this bill removes officer discipline from bargainable subjects for the police union, but we need to move discipline entirely outside of the MPD and create a strong, independent Police Complaints Board.

DC residents deserve to live free from police violence, brutality, and racism. I urge you to greatly strengthen these bills by adopting the above revisions, as well as those proposed by the above-listed organizations. These reforms will not solve the problem entirely, but they are a good step forward as we move towards defunding.

rebecca rossi

Written Testimony on Behalf of Community Oversight of Surveillance – D.C. Coalition Partners

D.C. Council Committee on the Judiciary and Public Safety

Public Hearing on B23-0723, The Rioting Modernization Amendment Act of 2020, B23-0881, The Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020 and B23-0882, The Comprehensive Policing and Justice Reform Amendment Act of 2020

Thursday, October 15, 2020

Dear Chairman Allen and Members of the Committee on the Judiciary:

Thank you for holding this important hearing on much-needed police reform legislation and protestors' rights. Our coalition, the Community Oversight of Surveillance-D.C. (COS-DC), is a local coalition of groups based in Washington, D.C., that is working to secure enactment of legislation here in the District to provide transparency and accountability for government use of surveillance technologies.[1] We are a diverse and growing coalition of local and national stakeholders that include civil rights organizations, technology policy organizations, government oversight organizations, local advocates, and beyond.

Our coalition applauds the efforts that the Committee is undertaking to address police reform in the District. The brutal police killings of George Floyd, Breonna Taylor, and others this past spring—which follow a long history of police brutality toward Black people—has spurred a long overdue reckoning over racial justice in our country, as well as our approach to policing. We are glad that the Committee, and in turn the Council, are responding swiftly and seriously to calls for widespread reform, first with the emergency legislation passed in July[2] and now with a more permanent set of bills.

However, our COS-DC coalition urges that this reform effort also consider and set rules for police use of surveillance technologies. While it is important to directly address police conduct and accountability, we must realize that increasingly common technical tools contribute to much of the disproportionate policing in the United States, while also enabling police to monitor and potentially stifle dissent. Over the past two decades, police departments and other government agencies across the country have been acquiring, deploying, and gaining access to surveillance equipment, in secret, without any notice to the public or authorization from local legislatures. These technologies include everything from traditional CCTV cameras to large networks of private security and doorbell

[1] Community Oversight of Surveillance DC, https://takectrldc.org/ (last visited Oct. 16, 2020).
[2] D.C. Act 23-336, the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, https://code.dccouncil.us/dc/council/acts/23-336.html.

cameras, facial recognition systems, license plate readers, gunshot locators with audio surveillance, smart street light bulbs with video surveillance capabilities, drones, and much more.[3]

Many of these powerful surveillance technologies are extremely privacy invasive, as they provide the government an unprecedented ability to monitor local residents over time, and accumulate vast amounts of personal data (especially when combined). Accordingly, it is critical that residents and local elected officials are able to provide input into whether, and how, any surveillance technology is used in their jurisdiction. For example, numerous studies have established that technologies like facial recognition are biased against women and people of color,[4] and we now have clear examples of cases in which facial recognition mismatches led to the wrongful arrests of Black men.[5] Surveillance technologies are also often disproportionately used on communities of color,[6] leading to higher arrest rates in those communities and potentially feeding this cycle of police brutality and racialized policing.[7]

Beyond the serious issues of privacy-invasiveness and discriminatory policing, First Amendment rights are also at stake. This summer, as Black Lives Matter protestors pushed for racial justice both here in the District and across the country, reports emerged showing that protesters were subject to mass surveillance by police, who used a wide array of these technologies.[8] Such surveillance can have a chilling effect on speech, and modern surveillance technology has dramatically increased the scope and scale of the already-concerning surveillance of protests—especially protests by and for communities of color. New forms of biometric surveillance can track thousands of protesters from each

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[3] COMMUNITY CONTROL OVER POLICE SURVEILLANCE: TECHNOLOGY 101, ACLU (2020), https://www.aclu.org/report/community-control-over-police-surveillance-technology-101.

[4] Patrick Grother, Mei Ngan, Kayee Hanaoka, FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS, NISTIR 8280, NAT'L INST. OF STANDARDS AND TECHNOLOGY (Dec. 2019), *available at* https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf.

[5] Kashmir Hill, *Wrongfully Accused by an Algorithm*, NY Times (Jun. 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html; Kris Holt, *Facial recognition linked to a second wrongful arrest by Detroit police*, Engadget (July 10, 2020), https://www.engadget.com/facialrecognition-false-match-wrongful-arrest-224053761.html.

[6] See e.g., Brian Barret, *The Baltimore PD's Race Bias Extends to High-Tech Spying, Too*, Wired (Aug. 16, 2016), https://www.wired.com/2016/08/baltimore-pds-race-bias-extends-high-tech-spying/; Adam Goldman and Matt Apuzzo, *NYPD Defends Tactics over Mosque Spying; Records Reveal New Details on Muslim Surveillance*, Huffington Post (Feb. 25, 2012), http://www.huffingtonpost.com/2012/02/24/nypd-defends-tactics-over_n_1298997.html;
Dave Mass & Jeremy Gillula, *What You Can Learn From Oakland's Raw ALPR Data*, EFF (Jan. 21, 2015), https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data.

[7] *See* Rashida Richardson, Jason Schultz & and Kate Crawford, DIRTY DATA, BAD PREDICTIONS: HOW CIVIL RIGHTS VIOLATIONS IMPACT POLICE DATA, PREDICTIVE POLICING SYSTEMS, AND JUSTICE (Feb. 13, 2019). 94 N.Y.U. L. REV. ONLINE 192 (2019), *available at* SSRN: https://ssrn.com/abstract=3333423 (discussion of predictive policing technology's threats to rights resulting from the software perpetuating existing and historic racialized policing).

[8] Rebecca Heilweil, *Members of Congress Want to Know More About Law Enforcement's Surveillance of Protestors,* Vox (Jun. 10, 2020), https://www.vox.com/recode/2020/5/29/21274828/drone-minneapolis-protests-predator-surveillance-police.

surveillance camera—and the Metropolitan Police Department (MPD) has hundreds of CCTV cameras across the District.[9] Unfortunately, due to the lack of laws in place regulating most of these technologies, we may never know the full extent of which technologies have been used to watch Black Lives Matters protesters in the District.

These threats are not hypothetical, and are not only perpetrated by the federal government. We know that the MPD uses facial recognition technology, cell-site simulators, automatic license plate readers, and gunshot locators, among a wide range of other surveillance tools.[10] But we lack complete information about the surveillance technology they possess, and the policies that govern their use. Absent such information we cannot tell if the rights of District residents are protected.

Amidst historic calls for racial justice, and a barrage of threats to those making such calls, it's time to bring oversight and accountability to police use of surveillance technologies in the District, and the Committee should strive to do so in its reform efforts. At the very least, democratic processes must be put in place surrounding the acquisition and use of surveillance tech. The legislation our coalition seeks would do just that—require transparency into what police technologies are in use, and require opportunities for both community and Council input, before they may be deployed.

Over the past few years, local communities across the country have begun to enact these "Community Control Over Police Surveillance" (CCOPS) bills to provide much needed transparency and accountability for local government surveillance programs.[11] The purpose of CCOPS is to ensure that residents and lawmakers are empowered to decide whether and how surveillance technology is acquired and used by local law enforcement agencies. To date, sixteen jurisdictions in California, Massachusetts, Michigan, New York, Ohio, Tennessee, and Washington State have adopted local laws based on the CCOPS model, and dozens of other jurisdictions are considering similar proposals.[12] Even the New York Police Department, one of the most historically secretive police departments in the nation, is now governed by a similar ordinance, enacted this summer.[13]

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[9] Deirde Paine. "DC to Spend $5 Million for Additional 140 Security Cameras Around City." The DC Post, Nov. 27, 2019, https://thedcpost.com/washington-dc-5-million-new-security-cameras/.

[10] *See e.g.*, Letter from Chief of Police Cathy L. Lanier to Councilmember Charles Allen, (March 2, 2020), https://dccouncil.us/wp-content/uploads/2020/03/JPS-Performance-Oversight-Responses-2020-MPD.pdf (confirming the Metropolitan Police Department's use of facial recognition technology, automatic license plate readers and cell site simulators in response to Committee and questions); *see also*, Lauren Sarkesian and Maria Angel, *Debate on Police Surveillance Technologies in D.C. Is Long Overdue* (Sept. 10, 2020), https://www.newamerica.org/oti/blog/debate-police-surveillance-technologies-dc-long-overdue/.

[11] COMMUNITY CONTROL OVER POLICE SURVEILLANCE, ACLU (last visited Oct. 16, 2020), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance; Mailyn Fidler, *Fourteen Places Have Passed Local Surveillance Laws. Here's How They're Doing*, Lawfare Blog, Sept. 3, 2020, https://www.lawfareblog.com/fourteen-places-have-passed-local-surveillance-laws-heres-how-theyre-doing.

[12] *Id*.

[13] New York City Code § 14-188, https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-124303; Alan Feur, *Council Forces N.Y.P.D. to Disclose Use of Drones and Other Spy Tech*, NY Times (Jun. 18, 2020), https://www.nytimes.com/2020/06/18/nyregion/nypd-police-surveillance-technology-vote.html.

Now, it's time for the District of Columbia to follow suit. As our nation's capital, Washington, D.C. has long been one of the central places for protest in the United States. District residents need safeguards from inappropriate government surveillance as we exercise our First Amendment rights, as well as protection from everyday discriminatory uses of surveillance technology. This requires transparency and accountability surrounding the technology the MPD already possesses, thorough scrutiny when MPD seeks to obtain new technologies, and ongoing community oversight of the use of all surveillance technologies.

At its core, the legislation we urge the Council to take up would require the D.C. government to:

- Use a transparent public process when any D.C. government agency seeks to acquire and use any surveillance technology.
- Weigh costs and benefits to the District regarding technology the Council is considering, including impact on individual civil rights and civil liberties.
- Establish written rules for use of surveillance technologies to be approved by the Council.
- Create a surveillance advisory group, which would include members with expertise in privacy and technology, that would advise D.C. government agencies and the Council on the civil rights and civil liberties risks related to specific surveillance technologies, and provide impact reports ahead of debates on new technologies.
- Conduct regular audits and evaluations of the use and impact of surveillance technologies, including the impact on rights and liberties.

This legislation would therefore ensure that decisions surrounding police technologies are made with thorough consideration and crucial buy-in from both the D.C. community and the Council. Significantly, it would also provide clear processes and rules that safeguard residents' rights and provide transparency. This process, and the transparency it would bring to our policing, would in turn help to build trust between the community and its police—a goal we know the Committee shares, and that we all seek to achieve now more than ever. It would also ensure that sound financial decisions are made about how we invest in our community's public safety.

To begin the process of considering the legislation we recommend, we as a coalition ask that the Council hold a public roundtable on the state of surveillance in the District this fall, in order to learn from impacted D.C. residents as well as privacy and technology experts. Further, we ask that the Committee consider surveillance-related legislation as soon as possible as part of its comprehensive police reform efforts, and our coalition stands ready to help in these matters.

Thank you for your consideration.

Respectfully,

ACLU-DC
Brennan Center for Justice
Center for Democracy & Technology
Jews United for Justice
New America's Open Technology Institute
The Project On Government Oversight

Date: Friday, October 23, 2020

Name: Kris Garrity
Mailing Address: 901 H ST NE #430 Washington, DC 20002

To: Councilmember Charles Allen
Chairperson of the Committee on the Judiciary & Public Safety
1350 Pennsylvania Ave NW
Washington, DC 20004

Re: Bill 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020

Greetings Committee Chairman Allen and Councilmembers of the District of Columbia.
My name is Kris Garrity. I live in Ward 6. Thank you for providing District residents with an opportunity to participate in our democracy and for bringing the conversation of public safety to the forefront of our community. After reviewing Bill 23-0882 - Comprehensive Policing and Justice Reform Amendment Act of 2020, here are my recommendations, in line with DC Justice Lab, Black Swan Academy, and Stop the Police Terror Project DC + Showing Up for Racial Justice DC:

1. End jump-outs
    a. Disband existing paramilitary units and reassign those officers.
    b. Require officers to work in full uniform and marked police cars, unless they are conducting a justified and targeted undercover operation.
    c. Prohibit officers from demanding to see a person's waistband without probable cause.
    d. Disallow the following common pre-textual bases for reasonable articulable suspicion or probable cause:
        i. Presence in a high-crime neighborhood;
        ii. Apparent nervousness around police officers;
        iii. So-called furtive gestures or movements or running;
        iv. A generic bulge in a person's clothing; and
        v. Time of day.
    e. Suppress all evidence seized as a result of "jump outs" and other discriminatory stop and frisk tactics.
2. Eliminate consent searches
3. Limit search warrants
    a. Require strong evidence, due diligence, and transparency.
    b. Disallow search warrants for drug activity or based on drug activity alone.

    c. Ban no-knock warrants and limit quick-knock warrants.
    d. Prohibit handcuffing, gun-pointing, and searching individuals, unless immediately necessary to prevent a physical injury.
    e. Compensate victims.
4. Disarm special police
    a. Disarm special police officers.
    b. Increase the quantity and quality of training required.
    c. Pass the Special Police Officer Oversight Amendment Act.
    d. Disallow pursuit beyond property boundaries.
5. A more mature *Miranda* for kids
    a. The District of Columbia should make any statement made to law enforcement officers by any person under eighteen years of age inadmissible in any court of the District of Columbia for any purpose, including impeachment, unless:
        i. The child is advised of their rights by law enforcement;
        ii. The child is given an opportunity to confer with an attorney; and
        iii. The child knowingly, intelligently, and voluntarily waives their rights in the presence of counsel.
6. Police-free schools
    a. Remove all forms of police from D.C. schools including DC police officers, special police officers and security officers that are contracted &/or managed through the Metropolitan Police Department.
    b. Invest in resources that will create a safer, healthier, more equitable school environment.
        i. Commit $6 million for expansion of school-based mental health programs and $4.4 million to expand the use of community-based violence interrupters in schools and the broader community.
        ii. Reject the mayor's proposed $18.5 million increase to the police budget in the fiscal year 2021 city budget.
7. A total, complete ban on deadly force by MPD.
8. A ban on the use of "chemical irritants" and "projectiles" in all cases not just vaguely defined "First Amendment Assemblies."
9. Prohibitions on editing and cutting of body worn camera footage, including not allowing the MPD to redact the faces of officers (who are public employees) at the scene.

In line with the aforementioned analysis and recommendations of the DC Justice Lab, Black Swan Academy, and Stop the Police Terror Project DC + Showing Up for Racial Justice DC. I call for the District to prioritize community-focused public safety measures over continuing to fund MPD.

Thank you for your time.

Good Morning Councilmembers and staff

Thanks for giving me the opportunity to testify before you this morning regarding the police reform bill.

I want to express my reservation about the bill, to the extent that it does not include the perspective, ideas, and suggestions from MPD. I live in a ward 7 a predominately African American Ward. A ward with the lowest annual medium incomes and I suspect a ward with one of the highest crime rates, particularly in ANC7F. ANC7F is an area inundated with deeply affordable housing; as well few resources to effectively address the needs of the poor. An area where a halfway house for returning citizens is being proposed in "downtown Minnesota Avenue". A halfway House which was rejected in your Ward councilmember Allen; and fell through in Ward5.

I live on a block where my next-door neighbor barricaded himself in his home after MPD came to his home. The young man shot an officer before being taken into custody. At the end of the block my 87-year-old neighbor who lives alone in her home; barely missed being shot when an errant bullet came through her window barely missing her as she was walking to her living room. I live in a block where a young man who lived across the street was shot and killed on Minnesota Avenue. A young woman was killed at Minnesota and Ames leaving behind a five-year-old child. Two months ago, a young man was shot and killed at Minnesota Ave. and Ames St. at 4:00PM, broad daylight. Shots being fired and drug overdoses are routine. I do not want to forget my neighbor new to the neighborhood was attacked, robbed, and savagely beaten walking from Minnesota Ave metro to his home. This occurred approximately 5:30 PM.

The police work tirelessly to deal with crime in our neighborhood, with a focus on Community Policing. In our neighborhood which covers Ames, Blaine, Clay 36th and 35th Street; we have started a program called porch patrol, Where officer meet with a few different neighbors one to two times per month. They get to interact with residents for a few minutes getting to know the resident personally; discussing and sharing information on a more personal level. Residents get to know and feel comfortable with MPD. We have had Summer and Fall initiative in our neighborhood. Captain Kennedy used his personal funds and partnered with our neighborhood organization to provide Thanksgiving baskets to residents. A couple of summers ago many officers, including Captain Weaver joined our line dancing class. I could go on and on about this kind of community policing.

In addition, MPD holds monthly PSA meeting in every PSA. Our Commander Habeebullah holds a monthly Commanders meeting. Officer who routinely patrol the area never fail to chat for a minute when they see you outside.

I remember, while watching the movie Silence of the Lambs the character, Hannibal Lector was talking about the first murder committed by a serial killer. Hannibal Lector said we covet what we see. That which we see everyday on a regular basis. I think that is a similar situation with MPD. We critique and criticize that which we see every day. We do not see our legislators on a regular basis. In fact, Councilmember Allen since you have chaired Public Safety, I believe I have seen you one time at a Council hearing held in Deanwood. I know of at least one meeting that you or a staff member were invited to a where, neither you nor your staff was available. I have seen Chief Newsham many times at community meetings, community walks, crime scenes etc. I see Commander Habeebullah and her staff regularly in the community.

Finally, my suggestions before you discuss any kind of reform, I suggest you begin Suring up Agencies/programs already in place.

First, for 911 or 311 non-emergency police calls. 911 staff need to know where/how to appropriately route calls. Also take into consideration the thousand of calls MPD receives daily. How will these calls be correctly routed? In our haste, let us not throw the baby out with the bath water.

I would suggest that you have an after hours for each of the Agencies which needs to respond to after hour emergencies. All that is needed is that staff person needs to respond to a call received via 911 or 311. Sometimes the call can be handled by phone, the report is then written and routed to the appropriate unit the next workday. When an assessment determines that the worker needs to make a home visit then that is what they do. Sometimes the situation might require that the worker be accompanied by an MPD officer; however, the assessment is made by the worker and case is routed to appropriate agency/unit not MPD for follow up.

Finally, legislation needs to be introduced by the Council to address the safety needs of the community when our safety and well-being is in jeopardy. The legislation does not have to entail an arrest, citations can be given with referrals to appropriate Agencies.

While I know this City is determined to build luxury apartments/condos in every nook and cranny. I think that SE Community Hospital can be designated for in patient drug treatment or short- term mental treatment. The DC jail could be used for returning citizens needing to be placed in a halfway house. Although realistically speaking since the property where the jail is located is considered prime property; I expect to see expensive housing built on this land very soon. Typical for DC leadership.

Thank you for the opportunity to testify

Betty Diggs

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Executive Office of Mayor Muriel Bowser

Public Hearing on

B23-723, the "Rioting Modernization Amendment Act of 2020"

B23-771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"

B23-882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

Testimony of

Dr. Roger A. Mitchell, Jr.
Interim Deputy Mayor for Public Safety and Justice

Before the
Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chairperson
Council of the District of Columbia

October 15, 2020
3:00 PM

Good afternoon Chairperson Allen and members of the Committee on the Judiciary and Public Safety. I am Dr. Roger A. Mitchell, Jr., Interim Deputy Mayor for Public Safety and Justice, and I will be providing testimony on Bill 23-882, the "Comprehensive Policing and Justice Reform Amendment Act," and Bill 23-723, the "Rioting Modernization Amendment Act." Joining me is Metropolitan Police Department Chief Peter Newsham to present additional testimony on the bills.

"Let us test and examine our ways."
– Lamentations 3:40

We all understand the importance of ensuring our police department and criminal justice system reflect our values, protect the sanctity of life, and recognize the dignity of every individual. We all have seen the numerous traumatizing videos of Black men and women being murdered, assaulted, and grossly disrespected by police officers. We see the anguish and hear the pain in far too many of our Black and Latinx communities, both in our city and across the nation. While we firmly believe that the role of a police department is to protect and serve, far too many of our family, friends, and neighbors who are persons of color don't see the police that way. Many of our residents have personal, lived experiences with police officers where they felt they were treated unfairly, unjustly, or unconstitutionally. Our duty is to constantly review our laws, policies, and practices to ensure they meet the evolving values of our city. This is an opportune time for a careful, thoughtful, and collaborative review.

In my role as the District's Chief Medical Examiner, I constantly see the impact of violence on our communities. Like a number of other large cities, the District is seeing a significant increase in gun-related violence. And as we tragically well know, this violence leaves a residual traumatic impact on survivors, their families, friends, neighbors, classmates, and their community.

Just in the past seven days, eight people died as a result of gun violence in our city. This is unacceptable. Each one of those murdered men and women had people who loved them and are mourning their loss. It requires all of us – elected officials, agency leaders, schools, faith leaders, nonprofit and community-based organizations, health providers, housing providers, private sector employers, and law enforcement – to develop, institute, and sustain a coordinated, multiyear strategy to reduce and stop cyclical, retaliatory violence and to begin healing our residents who have been suffering from years of untreated trauma. In the coming weeks, I will be speaking more on these critical issues.

This hearing is an important byproduct of the demonstrations happening here and in many cities across the country. It is an opportunity to improve police practice where necessary, to highlight good police practices, and to build deeper relationships between law enforcement and the communities they serve. We must use this opportunity to examine what it actually means to do community policing. Our goal must be to look at our own systems to ensure our residents are living in communities that are safe, raising their children with opportunities, and serve as foundations for those families to grow and thrive. We must examine all of our service delivery systems to ensure each is operating with transparency, compassion, and effectively carrying out its mission. We must continue to examine our court systems, our government services, and our healthcare delivery to residents to ensure each is responsive to the changing needs of our city.

I want to be clear: We have a good police force. The men and women of the Metropolitan Police Department risk their lives daily in service of the community.

The Metropolitan Police Department's demographics more closely match those of its residents than any other large city in the country. Since her first year in office, Mayor Bowser has continuously expanded the size of the police cadet program, which hires DC public school graduates, pays for their education at the University of the District of Columbia to earn academic credits, and puts them on track to entering the Police Academy. Cadets embody the goals of community policing – including understanding the needs, customs, and cultures of our neighborhoods – which makes them critical assets to the future of the Metropolitan Police Department. Having our residents serve as MPD officers is an important step in reforming police practices from within.

But we all know that we are not going to arrest our way out of the current increase in gun violence. And for the past five years, Mayor Bowser has focused on a variety of non-law enforcement efforts to treat the needs of our most vulnerable residents and communities. In the interest of time, I will mention just a few of those efforts.

Since 2015, Mayor Bowser led a coordinated effort to reduce violent crime in specific areas in the District through strategic prevention and coordinated enforcement, referred to as "Safer Stronger DC." These investments were done across multiple agencies, focusing on violence prevention, workforce development, neighborhood investments, and educational programming. The initiative incorporated an advisory board, comprised of government agencies, community organizations, academics, and community members. A second initiative that connects the work being done across agencies is the Violence Fatality Review Committee. This committee reviews all homicides and suicides to identify patterns, conduct a retrospective review of socioeconomic determinant risk factors, and recommend systemic changes. The third initiative is the Hospital-based Violence Intervention Program (HVIP), which is run out of the Office of Victim Services and Justice Grants. This program, which currently operates in five DC-area hospitals, engages victims and their families while they are in the hospital recovering from an intentional injury and seeks to create a support system that leads to long-term change.

Mayor Bowser has supported a public health approach to violence prevention and has tasked her agencies with working with partners inside and outside of government to develop solutions. We have expanded programming at the Office of Neighborhood Safety and Engagement through its Pathways Program. This program has provided intensive mentoring, cognitive therapy, and job training for residents who are justice involved. In addition, we provide administrative support to the Comprehensive Homicide Elimination Strategy Task Force which is working on a citywide approach to violence prevention.

Finally, we look forward to working with the Committee on record sealing reform and making sure it is passed by Council this year. Mayor Bowser's "Second Chance Amendment Act" (Bill 23-16) envisions a radical restructuring of the District's outdated criminal record sealing laws. It will simplify the process and greatly expand its reach. Enactment of record sealing reform will immediately impact tens of thousands of individuals, giving them a second chance at finding employment, housing, and educational opportunities.

Bill 23-882, the "Comprehensive Policing and Justice Reform Amendment Act"

The Executive is generally supportive of this bill and its provisions. We support the provision prohibiting the use of neck restraints as it reflects longstanding MPD policy on which all officers are trained. We support including members of the public on MPD's Use of Force Review Board – their insight will be a valuable asset to this review. We are supportive of the inclusion of racism and white supremacy on the continuing education requirements for MPD officers, to give officers insight to their own potential biases. Finally, we support the enfranchisement of residents serving sentences for felonies. And I want to highlight the work being done by the Department of Corrections to ensure residents in their custody who were convicted of felonies are aware of their right to vote and are able to do so.

However, we believe that there are several provisions in the bill that require additional consideration.

First, we recommend flexibility on the timeline for MPD to release body-worn camera (BWC) footage. Five days may not be enough time to allow for other required actions – such as notifying a family, arranging their viewing of the footage, and obtaining their consent to publicly release the footage – in a manner that is trauma-informed and centers on the family and their needs. Conversely, the five days may also be too long to ensure that the public gets timely access to the details of the shooting. While the Executive recognizes the Council's intent to increase transparency in deaths or serious encounters resulting from an interaction with a police officer, we believe the family of the decedent or the citizen themselves needs to be centered in this process. We are committed to working with the Council and trauma-informed specialists on a process that is focused on families' needs and minimizes additional trauma to a grieving family. The Executive is committed to ensuring a timely release of BWC footage as recently demonstrated. We strongly recommend working with the Committee to develop a specific and intentional timeline for public release of such critical information while supporting the families of those involved.

Second, the Executive recommends allowing police officers to view their BWC footage as they write an incident report. We support the consensus view incorporated into the BWC law in 2016 that prohibited officers from viewing their BWC only in cases of a fatal shooting. We are unaware of any evidence-based practices or peer-reviewed research that supports the prohibition of officers from reviewing their BWC footage before they write their report on any incident, whether it is an officer-involved shooting, a sexual assault, a robbery, or a traffic collision.

Third, we believe Subtitle C of the bill should be amended to maintain MPD as a non-voting member of the Police Complaints Board. MPD is a valuable resource to the board and is able to answer board members' questions on the agency's policies, training, or procedures. It would be useful to have an MPD official whose job it is to investigate these complaints to be present on the board. We are unaware of the rationale used in the emergency version of this legislation in removing MPD from the board.

I want to reiterate the Executive's commitment to working closely with you on this bill so it can be a model for the entire country.

Bill 23-723, the "Rioting Modernization Amendment Act"

This bill would have a significant impact on preventing destructive rioting that has affected several of our commercial and retail businesses. The bill, as written, would severely constrain the ability of police officers to respond in situations where individuals are intentionally damaging property, whether by shattering windows, setting fires, or looting.

I am concerned that it would require an officer to prove that a rioter had knowledge that at least nine other people were acting to commit the offense of rioting. The police officer must know that a person committed or attempted to commit an assault, theft, or property damage – and that the person knew nine other people were doing the same thing. If the officer cannot make this finding, then no arrest can be made. In his testimony, Chief Newsham will speak more on this unworkable standard.

I will be blunt in the end result of enactment of this bill: I am worried that bad actors from outside of Washington DC will come to our city for the sole purpose of violence and destruction. It may have the unintended result of where a rioting crowd is setting fires, smashing windows, or committing assaults, responding officers would be inclined to stand aside and watch the violence happen, rather than making immediate arrests

To be absolutely clear, the Executive strongly supports the public's constitutional right to demonstrate. We have hundreds of such events every year in the District and the overwhelming majority of them are peaceful. However, in those few instances where a small group of individuals intend to cause destruction, our police officers must be able to hold those individuals accountable for their harmful actions. As we have unfortunately seen both here in the District and elsewhere, federal law enforcement and military units can be deployed in ways that violate our city's protocols and without any accountability to our residents. That is the last thing we should ever want to see happen.

* * *

Chairperson Allen, I appreciate the opportunity to testify. You will be hearing from several other District agencies today and I want to reiterate the Executive's commitment to working with the Council on these bills.

Thank you.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Metropolitan Police Department

Comprehensive Policing and Justice Reform Amendment Act of 2020 (B23-0882)

and

Rioting Modernization Amendment Act of 2020 (B23-0723)

Testimony of
Peter Newsham
Chief of Police

Before the
Committee on the Judiciary & Public Safety
Councilmember Charles Allen, Chair
Council of the District of Columbia

October 15, 2020
Washington, DC 20004

It is the mission of the Metropolitan Police Department to safeguard the District of Columbia and protect its residents and visitors with the highest regard for the sanctity of human life. We will strive at all times to accomplish our mission with a focus on service, integrity, and fairness by upholding our city's motto, Justitia Omnibus -- Justice for All.

Good afternoon, Chairperson Allen, members of the Committee, and everyone watching and listening remotely. I am here to provide public testimony on the *Comprehensive Policing and Justice Reform Amendment Act* and the *Rioting Modernization Act*. I will address the Policing and Justice Reform legislation now, and the Rioting legislation later this afternoon.

* * *

Our country is facing a number of challenges right now including grappling with structural racism that pervades many aspects of our society – housing, education, healthcare, access to financial resources, and access to opportunity are all impacted. This past May, the murder of George Floyd very publicly highlighted the effects of racism and the need for police reform in our country. Fortunately, the District of Columbia has a law enforcement agency that is committed to reform. The Metropolitan Police Department is known for listening to and learning from our community, and MPD has a proven history of being willing to take proactive efforts to confront bias and eliminate injurious practices.

As you know, nineteen years ago MPD entered into a Memorandum of Agreement on Use of Force with the Department of Justice. When those reforms were adopted, MPD became a national model for use of force policies and practices. In fact, a number of those policies MPD implemented years ago are included in the Policing and Justice Reform legislation under discussion today.

The Department continued major reform efforts thanks to the leadership of and legislation enacted by the Council in 2004, when MPD revised its practices for First Amendment assemblies, and became a national leader in supporting peaceful demonstrations.

A follow-up evaluation of MPD's use of force policies and practices was conducted in 2015 by the DC Auditor. The DC Auditor contracted with the original Independent Monitor, and he confirmed that MPD continues to be a national leader in use of force practices and "remains committed to limiting and managing use of force – and to fair, unbiased and constitutional policing."

In recent years through improved hiring practices, forward-thinking policy, innovative training, accountability, and transparency, the Department has continued on a steady path of progress and reform. In 2016, MPD updated our Use of Force Policy and revised our mission statement to explicitly recognize the sanctity of all human life. The Department then trained all officers on the

new decision-making framework on use of force that emphasizes de-escalation, proportionality, and reasonableness.

In the past four years, MPD has worked to address concerns about bias and other issues in policing by implementing comprehensive screening for new recruits to ensure that our new hires reflect our DC values. MPD has doubled down on its commitment to a diverse workforce through targeted recruitment, and more than tripling in size our cadet program that hires DC high school graduates who matriculate into police officers.

Prior to the murder of George Floyd, MPD's forward-thinking policies prohibited the use of chokeholds and established an officer's duty to intervene. MPD officers are required by policy to intervene if they observe fellow officers using excessive force and to report if an officer is engaging in misconduct. MPD is also one of a few departments nationwide to actively train on the duties to intervene and report.

In 2018, MPD launched innovative training in partnership with the University of the District of Columbia and the National Museum of African American History and Culture (NMAAHC). This training helps MPD members focus on historical reasons for the challenging relationship between police and African American communities and motivates our officers to work to mend that relationship. The initial training featured a guided tour of the museum, a lecture on Black history and culture, and a facilitated discussion on race and policing.

Because of the overwhelmingly positive feedback from the community and the members to the initial curriculum, we are continuing this discussion in 2020 with the professors returning for more facilitated discussions on Black history and culture and its current relationship to policing. Phase Two focuses on procedural justice and how the earlier lessons are relevant to improving police-community relations today, particularly in terms of how we can appropriately engage individuals of all backgrounds who may have a negative perception of the police. Using documentary footage and current popular images, video, and music as a framing device, as well as voices from the community, professors are continuing the discussion to promote understanding of the history of law enforcement and relationships with Black, immigrant, LGBTQ+, and other underserved communities. Although we have worked to continue this through virtual learning, we hope to be able to continue in-person group discussions when the public health emergency ends.

In January of this year, based on several months of work with the DC Office of the Attorney General (OAG), MPD issued new policy governing interactions with juveniles. We recognize that the nature and circumstances of contacts with police can have a lasting impression on a young person. The policy enhancements are a reminder to our members to always treat individuals – regardless of their age – safely, respectfully, and with the best possible service. Through research and collaboration with OAG, MPD identified practices best suited for the District and implemented a number of new guidelines in our policy, including limiting

handcuffing or arrests of juveniles on scene whenever possible and encouraging officers to apply for a custody order (a juvenile arrest warrant) when there are no immediate public safety concerns.

In addition to strong policy and training, MPD emphasizes accountability and transparency to support an open and trusting relationship with the community we serve. More than 3,200 body-worn cameras (BWCs) are deployed to full-duty officers and sergeants in public contact positions, and they are required to be activated for every call for service. Officer conduct and uses of force are subject to external review by the independent Office of Police Complaints or the U.S. Attorney's Office, each of which has direct access to all BWC videos, as does the DC OAG.

Transparency is critical to community trust. That is why MPD makes all policies and a growing number of data sets – from police stops and arrests to crimes and hate crimes – available directly to the public on our website, MPDC.DC.gov. We also encourage members of the community to learn more about our operations from an officer perspective, through ride-alongs and our Community Engagement Academy.

Regarding police stops, earlier this week, a significant effort was launched to create community dialogue and support independent and robust research around police stops. Once MPD published the first four weeks of data from its expanded stop data collection in September 2019, we began planning the next steps for comprehensive and independent analysis of the data as well as community discussion on the role and impact of stops in our neighborhoods. The end result of our initiative is that this week and next, Georgetown Law, Howard University, and The Lab @ DC are co-hosting a two-week event on "*Reimagining the Role of Police Stops in Public Safety: A Workshop Series on Reducing Harm through Research, Policy, and Practice."*

By bringing together impacted community members, advocates, researchers, and police practitioners, we can begin to understand more completely the costs and benefits of police stops and develop a research agenda and policy recommendations. The workshop series is designed to balance considerations of timeliness of analyses with ensuring that any research on this question is inclusive and credible, reflective of community concerns, scientifically rigorous, and conducted with transparency and objectivity.

This research agenda is just the latest effort of many through which MPD has tried to confront the issue of racism in policing head on.

I highlight this work to demonstrate MPD's well established and strong commitment to reform and progress. I have no doubt that there are areas where the Department can and will continue to improve in our service to the community. The Policing and Justice Reform Act will further this

in areas such as improved communication about consent searches and the expanded Use of Force Review Board.

While the Department has implemented all relevant areas of the emergency legislation, the one area where I remain most concerned is the new prohibition on officers being able to view body-worn camera (BWC) footage before writing routine reports. Before the passage of the emergency legislation, officers could review their BWC video before writing reports for any incident except a police-involved shooting. The legislation now prohibits this. This policy that was initially developed, like the rest of the BWC policy, through a comprehensive and inclusive process involving key stakeholders and community members before being enacted by the Council.

The original policy also has the support of the national and independent Police Executive Research Forum, which conducted extensive research supported by the US Department of Justice to develop best practice policies around body-worn cameras. Their rationale for allowing officers to review BWC videos included:

- "Reviewing footage will help officers remember the incident more clearly, which leads to more accurate documentation of events. The goal is to the find the truth, which is facilitated by letting officers have all possible evidence of the event.
- "Real-time recording of the event is considered best evidence. It often provides a more accurate record than an officer's recollection, which can be affected by stress and other factors. Research into eyewitness testimony demonstrates that stressful situations with many distractions are difficult even for trained observers to recall correctly."
- "If a jury or administrative review body sees that the report says one thing and the video indicates another, this can create inconsistencies in the evidence that might damage a case or unfairly undermine the officer's credibility."

The new prohibition in the Act is inconsistent with the best practices as developed by the Police Executive Research forum. I urge the Council to modify this provision to be in line with national best practices.

* * *

To close my testimony on the Policing and Justice Reform Act, I would like to reiterate my strong commitment and that of the Department to working with our communities and the Council on continually improving our police service to the District.

Thank you for the opportunity to address the Council. I will be happy to address any questions that you may have.

Rioting Modernization Amendment Act of 2020

The District of Columbia hosts hundreds of First Amendment demonstrations and assemblies each year. The vast majority of these are facilitated safely and peacefully for all those involved by the Metropolitan Police Department. MPD is a recognized leader in ensuring that individuals of all backgrounds and opinions are able to safely assemble and exercise their First Amendment rights in the nation's capital. Before I discuss the specifics of the Rioting Modernization Amendment Act, I would like to share with the Council and the public a video providing details on the small number of riots that have taken place amidst the almost daily peaceful demonstrations in DC since the tragic death of George Floyd in Minneapolis. It is essential for this discussion that everyone understand the difference between the peaceful demonstrations and violent and destructive riots.

* * *

I know my time is limited so I will be very direct about the likely consequences of the proposed legislation. It would leave MPD officers with almost no legal tools to address violent and destructive rioting in the District.

The changes to the rioting legislation will make it impossible for the offense to be charged at the time of the riot. In order to make an arrest, an officer would need to have probable cause to believe that a specific person:

- Knowingly committed or attempted to commit an offense that causes or would cause bodily injury, property damage, theft, or sexual contact, **and**
- Was "Reckless as to the fact nine or more other people" are each committing or attempting to commit one of the same offenses, generally in the same area and at the same time.

The first provision means that rioting would become a secondary charge; officers could only charge it if they already had probable cause to make an arrest for one of the other offenses. The tactics that rioters use, which I will describe in a moment, make it ***very unlikely*** that officers will be able to make such an arrest on scene or will be able to identify the suspect through subsequent investigation. The second provision means officers would ***never*** be able to charge it on scene.

It is important to distinguish between people who peacefully demonstrate and those that participate in violent and destructive riots. The rioters that we have seen over the past several months and years are intent on committing destruction and violence and have developed tactics to evade identification and arrest. Beyond just covering their face, they dress similarly – usually in all black – to avoid identification through their clothing. They often change or exchange outer clothing or hats to further frustrate identification. They also exchange bags so that the person who committed damage to or destruction of property or an assault won't be found carrying the tools used to the commit the crime. When officers attempt to arrest individuals involved in the

riots, others involved in the action will intervene or throw objects at the arresting officers creating a greater likelihood of officers having to use force and exacerbating the situation. The result is a more dangerous situation for the rioters and the police. Additionally, under the proposed legislation, the people who knowingly facilitate the crimes won't face legal consequences.

If the Council proceeds with this legislation, rioters will be able to act with impunity. Police won't be able to detain violent and destructive rioters. It is important to note that dispersing a group that is intent on rioting only spreads the destructive behavior to other parts of the city. More businesses will be impacted by the destruction and looting, likely leading to higher insurance costs and possibly lost businesses and wages in the city.

Lastly, the Council must remember that this law is content neutral. In law enforcement circles, it is widely believed that there will be civil unrest after the November election regardless of who wins. It is also believed that there is a strong chance of unrest when Washington, DC hosts the inauguration in January. Regardless of who wins the election, now is not the time to restrict the police department's ability to effectively deal with illegal rioting.

Therefore, I urge the Council to take no rash action on this legislation at this time. Next year, the Council can take more time to deliberate on less drastic changes to the rioting law that both respects civil liberties and protects the District from people intent on committing violence and destruction on our streets while hiding under the umbrella of our nation's fundamental First Amendment rights.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
POLICE COMPLAINTS BOARD
OFFICE OF POLICE COMPLAINTS

PUBLIC HEARING
B23-0723, THE "RIOTING MODERNIZATION AMENDMENT ACT OF 2020"
B23-0771, THE "INTERNATIONALLY BANNED CHEMICAL WEAPON PROHIBITION AMENDMENT ACT OF 2020"
AND
B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

BEFORE THE

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
CHARLES ALLEN, CHAIR

Testimony of Michael G. Tobin, Executive Director
Office of Police Complaints

October 15, 2020

TESTIMONY OF

MICHAEL G. TOBIN,
EXECUTIVE DIRECTOR
OFFICE OF POLICE COMPLAINTS

October 15, 2020

Good afternoon Chairman Allen and members of the Committee on the Judiciary and Public Safety. I am Michael G. Tobin, the executive director of the Office of Police Complaints (OPC).

The mission of OPC is to improve community trust in the District's police departments through effective civilian oversight. Effective civilian oversight is a common denominator among cities that embrace forward-thinking community policing concepts. In the District of Columbia, the role of community participation in police oversight is provided by OPC and its community-based member board, the Police Complaints Board (PCB). The OPC staff and PCB work to improve community trust by holding police officers accountable for misconduct with an effective community complaint program and by providing a reliable system of police policy review.

OPC has four core functions: (1) Investigate community complaints against the Metropolitan Police Department (MPD) and the DC Housing Authority Police Department (DCHAPD), (2) Conduct mediations, when appropriate, within those investigations, (3) Conduct outreach throughout the community, and (4) Provide the Mayor, the Council, MPD, DCHAPD, and the community with policy recommendations that will better the police practices within our community and build better trust in the District's police forces.

I appreciate the opportunity to provide testimony regarding: (1) Bill 23-0723, the "Rioting Modernization Amendment Act of 2020", (2) Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", and (3) Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020" as this corresponds with our statutory authority to advise and recommend on police practices and policies.

I am generally in favor of the three bills this hearing is addressing. The stated purpose of B23-0723, the "Rioting Modernization Amendment Act of 2020", is to amend the Act relating to crime and criminal procedure in the District of Columbia to provide definitions for certain terms related to the offense of rioting, to clarify the conduct that constitutes rioting, to revise the penalties for convictions, and to establish a right to a jury trial for prosecutions. The stated purpose of B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020", is to amend the First Amendment Rights and Police Standards Act of 2003 to prohibit the use of chemical irritants at First Amendment assemblies. The stated purpose of B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020", is to provide for comprehensive policing and justice reform for District residents and visitors.

I would like to begin by discussing B23-0723, the "Rioting Modernization Amendment Act of 2020".

Rioting Modernization Act

- Provides needed clarity by reducing the ability to declare a First Amendment assembly a riot without having specific indicators of crowd behavior. It provides better guidance to MPD, USAO, and demonstrators to determine what constitutes lawful conduct within the First Amendment versus what is criminal conduct.

Secondly, in regards to B23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020".

- Adoption of the international standard is a logical extension of appropriate restrictions. The irony is that the federal government is a signatory to the International Act but fails to follow it domestically.

Lastly, addressing selected provisions of Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020".

Subtitle A. Neck Restraints

- Over the past several months the UFRB has had a number of neck restraint cases, illustrating the continuing need to clarify the neck restraint provisions. The majority of cases reviewed by the UFRB have been found not justified and not within policy, however, clarifying statutory language concerning neck restraints versus trachea hold and carotid hold eliminates any potential confusion and aligns the statute with current MPD policy.

Subtitle C OPC Reforms

- By expanding OPC jurisdiction to investigate misconduct beyond what is specifically alleged by a complainant is a measure that has been advocated by many parts of the community. It is a significant improvement that will go a long way toward improving community trust.

Subtitle D Use of Force Review Board (UFRB)

- If civilian appointees to the UFRB receive adequate training it will improve community understanding of how and when serious force is utilized by MPD. In cases that garner public attention, it will be very beneficial for the community to know that they have a voice in determining whether the police use of force was justified. In addition, having access to all of the available evidence in a serious use of force incident will increase transparency and trust in the review process.

Subtitle F Consent Searches

- This is a much-needed provision that we have advocated for several years to establish. This provision is essentially a declaration that as a matter of policy, consent searches should not be used as a technique of routine policing in our community but rather as an exceptional circumstance.

Subtitle G Police Officers Standards and Training Board (POST)

- This Board has a very important function that has not been performed for at least 10 years – for the past 6 years I have advocated for its reconstitution to no avail. Hiring the right people and training them appropriately is the core of developing police officers that conduct themselves professionally, and the POST board is intended to provide the necessary oversight to do so.

In furtherance of OPC's policy recommendation function, in the past three weeks, OPC has published four policy recommendation reports.

First, on September 28, 2020, the National Police Foundation (NPF) released, and OPC published, its independent review of MPD's Narcotics and Specialized Investigations Division (NSID). This review was conducted as a result of "D.C. Law 23-16. Fiscal Year 2020 Budget Support Act of 2019". Through data collection, research, interviews and other review methods regarding stops and searches, NPF found that there was a total of 2,871 reported stops involving NSID-assigned personnel during August 1, 2019 to January 31, 2020 and a reported total of 3,680 persons who were stopped during those interactions. Out of the 3,680 persons stopped, 1,699 persons (46.2%), were reported searched or had a protective pat down conducted with probable cause as the most common justification for the search.

In this report, the NPF highlighted and recommended that MPD has very specific definitions of what constitutes a "stop" and what constitutes a "field contact." Only MPD's definition of a "stop" fits into the Neighborhood Engagement Achieves Results Act of 2015's (NEAR Act) definition of a "stop." Therefore, the NPF noted that MPD, in accordance with GO 304.10 and the NEAR Act, is not required to collect data regarding "field contacts." In line with the effective practices of other jurisdiction, the NPF recommends that the District review MPD's

"stop" and "field contact" definitions in accordance with the intent of the NEAR Act to allow data collection of MPD's "field contacts" as well as "stop" data.

Secondly, on October 5, 2020 the Police Complaints Board released the "Policy Report #21-1: Stop and Frisk Data Review" report recommending that MPD increase transparency with the community by following their own suggestion to undertake a comprehensive analysis of the MPD "Stop Data Report February 2020" which, among other things, showed that from July 22, 2019 through December 31, 2019, 72% of MPD's stops were of black people exhibiting the possibility of racial bias in District policing.

Further, on October 13, 2020, the PCB published its "Report on Use of Force by the Washington, D.C. Metropolitan Police Department 2019." In 2019, MPD's reported use of force incidents increased less than 1% in 2019. However, MPD's reported use of force incidents have increased 84% since 2015. The number of officers who reported using force in 2019 decreased by 8%; however, more than one-third of all MPD officers reported using force in 2019. It is important to note that our use of force reporting is having an impact. In our first report, we made eight recommendations to MPD highlighting where MPD could implement more effective practices within their use of force guidance and use of force collection. In our second report, OPC made an additional four recommendations including one update to the original eight recommendations.

In our 2019 report, we highlighted that as of May 2020, MPD has implemented five of our recommendations, partially implemented three, and has not implemented four. OPC recommended

that MPD create an electronic use of force form with mandatory fields and a mandatory supervisor review to eliminate hand-written and incomplete forms and MPD has fully implemented this recommendation as of January 2020. This new electronic, mandatory field form will drastically improve MPD's use of force data collection, which in turn, will have exponential impact on the analysis that MPD and OPC can conduct with the consistent, quality-checked, and validated data entered by the officer who exercised force on a member of the public. Two recommendations MPD has not implemented, nor agrees with, is our recommendation that MPD collect use of force data immediately after the force is used, and that MPD include fields such as the number of shots fired and where the shots fired made impact.

Lastly, on October 14, 2020 the Police Complaints Board released "Policy Report #21-2: Discipline" that highlighted MPD's disciplinary process shortcomings regarding sustained OPC complaints. The PCB recommended modifications to MPD's disciplinary process for sustained complaints bringing OPC and the PCB into the decision-making process to secure higher community trust in the system.

In conclusion, OPC has a very important role in ensuring the District's police forces serve the community with the most effective practices and in a way that continues to build trust. I thank the Committee for its time, and we will be happy to answer any questions you may have.

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDCIARY

COUNCIL OF THE DISTRICT OF COLUMBIA

PUBLIC HEARING

B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"

Testimony of Niquelle M. Allen, Esq.
Director of Open Government
Board of Ethics and Government Accountability

Thursday, October 15, 2020
10:00am
Virtual Hearing via Zoom

Good afternoon, Chairman Allen and Members of the Committee on the Judiciary and Public Safety. I am Niquelle Allen, the District of Columbia Director of Open Government. The Office of Open Government, an office within the Board of Ethics and Government Accountability, facilitates District of Columbia Government's compliance with the Freedom of Information Act (FOIA) and advocates for a fair and efficient FOIA process. Thank you for this opportunity to testify regarding Bill 23-0882, The "Comprehensive Policing and Justice Reform Amendment Act of 2020." My testimony today concerns "Subtitle B: Improving Access to Body-Worn Camera Video Recordings."

INTRODUCTION

I would like to begin by commending the D.C. Council for taking significant action to increase transparency in policing in the District of Columbia in light of the mass demonstrations that have occurred since the murder of George Floyd on May 25, 2020, and many other victims of police misconduct in the United States. Body-Worn Camera (BWC) recordings of the police along civilian video recordings have proven indispensable in the call for justice for all persons impacted by police misconduct. It also informs the public about policing and police actions. The release and preservation of BWC footage is intended to deter officer misconduct and eliminate ambiguity in excessive force cases. This Bill makes great strides in increasing government transparency through the BWC program by requiring the Mayor, with consent of the subject of the video and/or their next of kin, to publicly release BWC footage and names of officers involved in five days when there is use of excessive force or a death.

However, while the Bill takes important steps to increase transparency, it does not address the problems that the Office of Open Government is aware of concerning the general release of BWC footage. Significant barriers to transparency exist when members of the public and the media request BWC footage through the FOIA process. These barriers are over-redaction of the video footage, timely production of the video footage, and the cost associated with processing FOIA requests. I am presenting this testimony today to offer suggestions regarding how this Bill could be enhanced to address these issues.

BODY WORN CAMERAS AND D.C. FOIA

The effectiveness of the District's use of BWCs must be viewed through the lens of the FOIA. The videos taken with BWCs are public records that are created and maintained by the Metropolitan Police Department (MPD) and the public may request access to those records under FOIA. While citizens have access to BWC footage under FOIA, its release and availability are often limited due to FOIA exceptions. The limited release of BWC footage calls into question the utility of BWCs in providing the public with a timely, relevant, and clear view of the MPD officers' actions. There is also a financial barrier to obtaining this information because the cost of producing BWC footage may be passed on to FOIA requesters.

Personal Privacy Redactions under D.C. FOIA Law

MPD's current BWC policies consider privacy protections of law enforcement personnel and the public; access protocols; the retention of non-evidentiary video versus video that may be used in the litigation of criminal and civil matters; cost of video storage and the collection of metadata; and the monetary and human capital costs inherent to the review and editing of video pursuant to public access laws.[1] MPD may reasonably and legally rely upon several exemptions that prevent the full release of unredacted BWC footage to the public.[2] Namely, the investigatory records exemption and the personal privacy exemptions may cause much of the footage to require redaction.[3] In response to FOIA requests, we have received complaints that MPD has released BWC videos that have been redacted beyond recognition — that is, videos with all faces, all voices, all street names, badge numbers, every car tag in sight, and the like redacted. While the redactions based on the law enforcement FOIA exemptions may be valid, if the BWC camera footage that is released is unrecognizable it has no value. When BWC footage is released to the public in extremely redacted form, the public does not get the full story and it appears as if the government has something to hide.

Personal Privacy

It many of these instances, MPD relies on the personal privacy exemption when it redacts information concerning individual law enforcement officers. I do not interpret this exemption to extend to police officers operating in their official capacity. There should be no expectation of personal privacy for individual officers acting on behalf of the District of Columbia and in uniform. Further, there should be no redactions when in the public space. It is reasonable to have an expectation of privacy in spaces closed to the public, medical facilities, and the like. If the incident recorded occurs in the public space, then the signs and other indicators of locations should not be redacted. I encourage the Committee to consider amending the law or regulations concerning BWC to address this issue. Further, while maintaining the public's privacy and protecting witness identities are reasonable justifications for redacting videos, releasing these excessively redacted videos is not in the public's interest.

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[1] Police Executive Research Forum (PERF), *Implementing a Body-Worn Camera Program Recommendations and Lessons Learned* (http://ric-zai-inc.com/Publications/cops-p296-pub.pdf).

[2] D.C. Official Code § 2-532 affords to any person the "*…right to inspect…and to copy any public record of a public body*" except as expressly provided in the enumerated exemptions under D.C. Official Code § 2-534.

[3] D.C. Official Code § 2-534(a)(3)(A-F) exempts investigatory records compiled for law enforcement purposes if release would interfere with enforcement proceedings; Council investigations; Office of Police Complaint investigations; deprive a person of due process; constitute and unwarranted invasion of personal privacy; disclose a confidential source; disclose investigative techniques; endanger law enforcement personnel. D.C. Official Code § 2-534(a)(2) exempts from disclosure information of such a personal nature that release would constitute an unwarranted invasion of personal privacy.

Balancing the Public's Interest and Personal Privacy

With respect to the release of BWC footage when there is a significant public interest in the content, when it does not involve excessive force or death, the Committee should consider articulating a litmus test for the MPD to follow when determining whether releasing the video is in the public's interest and outweighs personal privacy considerations. Such considerations could include the public response to the incident, the location (public vs. private property), and the degree of harm resulting from withholding the video. Even without a change to the law or regulations, MPD should enact and release clear policies that inform the public – in plain language – of when it will release BWC footage and under what conditions. MPD's articulation of clear, well-reasoned policies about the release of BWC footage in response to FOIA requests will bolster the long-term success of the BWC program.

Timing and Cost of Production

The Committee should consider including a provision in this Bill that requires MPD to waive any cost for producing BWC video footage or limit (impose a cap) the cost MPD may charge a requester to receive the footage. Notably, in California, on May 28, 2020, the state supreme court ruled that California's government agencies cannot pass the cost of redacting police body-camera footage and other digital public records onto the members of the public who requested them under the California Public Records Act. [4] The court held that:

> "Just as agencies cannot recover the costs of searching through a filing cabinet for paper records, they cannot recover comparable costs for electronic records. Nor, for similar reasons, does 'extraction' cover the cost of redacting exempt data from otherwise producible electronic records."

This case is instructive and I believe the District should take similar action. In the interest of transparency, MPD should not be permitted to pass the cost of video production and redaction to requesters. These costs are prohibitive for many requesters and serve as a significant barrier to transparency.

If these costs are not waived, they should be significantly reduced and MPD should release to the public, in the form of policy or regulation, redaction guidance that explains the cost of the act of redaction in actual work hours (cost per hour). Promulgating regulations or policies respecting cost per hour for production and guidelines for redacting would serve the public interest by clarifying the video production process and ensuring that any cost incurred is reasonable.

[4] https://www.rcfp.org/wp-content/uploads/2019/05/2020-05-28-NLG-v.-City-of-Hayward-Opinion.pdf

To reduce cost and control the time it takes to produce the video, I also encourage MPD to consider internal resources to process BWC video footage and prepare it for production. Having government personnel perform video redactions could reduce costs to the public to receive BWC footage. MPD should have an attorney and technical personnel available to process these FOIA requests internally. Using internal resources could result in a cost savings and decrease the amount of time it takes to turn over footage.

CONCLUSION

Giving the media and the public full, transparent, and timely information ensures that the public has full access to the government and ensures that the government's actions may be examined and scrutinized when necessary. In the area of policing, where citizens and officers may find themselves in life or death situations, the recordings get us closer to the truth of whether or not the police have infringed upon the rights and liberties of citizens or have acted properly. Transparency through the use of BWCs and timely release of useable footage is paramount to maintaining an informed citizenry and a just, transparent government.

Thank you, Chairman Allen, for the opportunity to testify. I am happy to answer any questions from the Committee.

D.C. Criminal Code Reform Commission

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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety

From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)

Date: October 15, 2020

Re: Testimony for the October 15, 2020 Hearing on B23-0723, the "Rioting Modernization Amendment Act of 2020" and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020."

Introduction.

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on B23-0723, the "Rioting Modernization Amendment Act of 2020" (hereafter "rioting bill"), and B23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020," (hereafter "policing and justice reform bill"). My name is Richard Schmechel. I am the Executive Director of the Criminal Code Reform Commission (CCRC) and am testifying on its behalf.

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's primary mission is to issue comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing comprehensive recommendations to reform the District's "substantive" criminal statutes—i.e. laws that define crimes and punishments.

The CCRC expects to issue its final recommendations on or by March 30, 2021. These recommendations will address at least four matters in the policing and justice reform bill and rioting bill, including: (1) codification of a new restriction on law enforcement use of force; (2) repeal of the current failure to arrest statute (D.C. Code § 5-115.03); (3) changes to the jury demandability statute (D.C. Code § 16-705(b)(1)); and (4) changes to the rioting statute (D.C. Code § 22-1322). My testimony is limited to these four subjects.

Absent final recommendations approved by the CCRC's statutorily-designated Advisory Group, the agency cannot take a position regarding the specific bill language now before the Committee. However, the CCRC has completed research and drafted statutory language on the four abovementioned matters and is near finalization of its recommendations. Based on its current drafts on these four topics, the CCRC draft recommendations are almost entirely consistent with, and broadly supportive of, the police and justice reform bill and rioting bill language.

I. Codification of a new restriction on law enforcement use of deadly force.

To start, I'd like to raise two points regarding Subtitle N of the policing and justice reform bill, regarding the use of deadly force by a law enforcement officer.

First, this provision would begin to fill a substantial gap in the current D.C. Code. The District currently is in a minority of jurisdictions nationally for not legislatively codifying the requirements self-defense, defense of others, and other general defenses. Such defenses exist in the District only to the extent they have been recognized by federally-appointed judges in individual cases over the last two centuries. For decades, the Model Penal Code, dozens of jurisdictions, and a broad array of experts have recognized that all general defenses, including as to use of deadly force, should be codified by the legislative branch because they involve weighty policy choices and fixing the language by statute provides a more consistent basis for administering the law.

Second, the language in subsections (a), (b) and (c)(1) of Subtitle N appears consistent with codified language in other jurisdictions and current District case law, while subsection (c)(2) would change District law to some degree. There are some ambiguities in subsections (a), (b) and (c)(1) that could be interpreted in a manner that would change District law, however. These ambiguities include: the meaning of "intended" in the proposed definition of "deadly force;" whether "totality of the circumstances" in subsection (b)(2) includes facts unknown to the law enforcement officer but available to the factfinder;[1] the overall characterization of the provision as a limitation on self-defense or defense of others; and the burden of proof for raising this apparent defense. However, on their face, subsections (a), (b), and (c)(1) are consistent with current District case law and national norms. Subsection (c)(2), in contrast, has little precedent in other jurisdictions' statutes. However, evidentiary provisions regarding police conduct is a fast-changing legislative area and subsection (c)(2) is quite limited in its effect. The subsection does not preclude consideration of any evidence nor make any evidence dispositive. It is merely a non-exclusive list to guide factfinder inquiry.

The policing and justice reform bill language differs somewhat from the current CCRC draft recommendations by providing less specificity regarding requirements of the defense and not addressing some possible scenarios. The CCRC draft recommendations go into more detail by, for example:

- Clarifying the meaning of "reasonable" and "necessary" by requiring the use of deadly force to be "necessary in its timing, nature, and degree;"
- Specifying that attempts to use deadly force are treated the same as actual uses of deadly force;[2]

[1] While "totality of circumstances" is ambiguous on its face as to whether the analysis reaches circumstances that the law enforcement officer has no subjective awareness of, the provision in subsection (c)(2)(A)(i) referring to "possessed or appeared to possess a deadly weapon" suggests that the "totality of circumstances" is meant to include facts *not* known to the law enforcement officer at the time of the incident (e.g., the complainant actually "possessed" a deadly weapon even though they did not appear to do so).

[2] The bill addresses this issue through its inclusion in the definition of "deadly force" of "force that is … intended to cause serious bodily injury or death." However, "intended" is not defined and it is unclear if the term is meant to differ from the requirements for attempt liability in the District.

- Specifying that deadly force may be justified to prevent a sexual act (involving penetration) or confinement (kidnapping), when other requirements of the defense are met; and
- Specifying, in addition to other considerations, that a factfinder must consider whether all reasonable efforts were made to prevent a loss of a life, including abandoning efforts to apprehend the complainant.

The CCRC draft recommendations also more comprehensively address the use of force (not just deadly force) in self-defense or defense of others, and they do so not only for law enforcement officers but for all persons. The CCRC draft recommendations specify other exceptions to claims of self-defense and defense of others, and they do all this by using definitions standardized across many revised statutes rather than being limited to the law enforcement use of deadly force.

Yet, while the CCRC draft recommendations go into greater detail and provide a much broader framework for self-defense and defense of others, the differences between the bill language and the CCRC draft recommendations are minor and the bill is almost entirely consistent with the draft recommendations and current law.

II. Repeal of the current failure to arrest statute (D.C. Code § 5–115.03).

The next matter I'd like to raise briefly is Subtitle J of the of the policing and justice reform bill, which repeals of D.C. Code § 5-115.03, a statute that criminalizes failure to make an arrest for an offense committed in a law enforcement officer's presence.

A fundamental tenet of any criminal justice system must be that the criminal justice system is a last resort when other efforts to ensure public safety fail. This statute enshrines the opposite, making an officer criminally liable for not making an arrest even when doing so does not advance justice. Moreover, as the statute refers to both federal and District law, it effectively binds District law enforcement officers to follow federal crime policy on drug and other offenses even when such the District has a different policy. The statute is routinely ignored in current practice and continuing to include the law in the D.C. Code undermines the legitimacy of all criminal laws.

When an officer's failure to arrest an individual is because of the officer's collusion in a protection scheme or because of some other illicit motive, other criminal statutes and doctrines of accomplice and conspiracy liability adequately sufficiently criminalize and punish such conduct.

Consistent with the bill, the CCRC draft recommendations also recommend repeal of this statute.[3]

III. Changes to the jury demandability statute (D.C. Code § 16-705(b)(1)).

Next, I'd like to raise three points regarding Subtitle I of the policing and justice reform bill, which gives the option of a jury trial (rather than a single-judge bench trial) to persons accused of committing a simple assault against a law enforcement officer.

[3] *See* CCRC First Draft of Report #29 – Failure to Arrest (attached).

The first point is that this amendment appears to fulfill the intent of the 2016 Neighborhood Engagement Achieves Results (NEAR) Act to let jurors decide charges of assaults on police officers. The NEAR Act in relevant part made the misdemeanor charge of assault against a police officer (APO) and charges of resisting arrest subject to six months maximum incarceration instead of 180 days. Why this slight increase? Since 1993 the District's jury demandability statute has provided that a 180-day offense *is not* jury demandable whereas a six-month offense *is* jury demandable. The NEAR Act legislation made APO and resisting arrest charges jury demandable, in recognition that most states do so and that the change, in part, could make prosecutors consider diversion options and take judges out of the position of having to make an adverse credibility determinations that could impact an officer's career.[4]

However, the NEAR Act didn't change the District's general "simple assault" statute (D.C. Code § 22-404(a)(1)), even though the simple assault statute is a 180-day, not jury demandable offense that can be brought against any person accused of assaulting anyone (including a law enforcement officer). Consequently, the NEAR Act left open the possibility that, based on the same conduct, instead of bringing a six-month jury-demandable APO charge, a prosecutor instead could bring a simple assault charge with a 180-day penalty and avoid the person accused of assaulting a law enforcement officer asking for a jury trial.

Available evidence suggests that, because the NEAR Act failed to amend jury demandability for simple assault charges against a police officer, the legislation failed to make a practical difference in how these cases were handled. Prosecutorial charging practices merely shifted to bring simple assault charges instead of APO charges. While court data on simple assault charging and convictions does not track whether the complainant in the case was a law enforcement officer, a drop in APO charges after passage of the NEAR Act coincides with a similar size increase in the number of simple assault charges.[5]

The second point I'd like to raise in connection with this expansion of jury demandability is to note that the District is a national outlier in its restrictions on the right to a jury trial. Most states make every single crime carrying an imprisonment penalty jury demandable.

Thirty-five states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[6] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo* on appeal, effectively guaranteeing a jury trial right in every case.[7] Another three states have developed systems that stop short of a full jury

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[4] Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.

[5] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 10-11 (attached).

[6] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming).

[7] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Arkansas, North Carolina, and Virginia).

trial right, but are more expansive than the constitutional minimum.[8] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[9]

The third point is that while expansion of jury demandability may or may not result in some administrative efficiency costs,[10] it may have significant effects on the public's perception of the legitimacy of the justice system. This point has been articulated eloquently in a 2018 concurring opinion by Senior Judge Washington of the D.C. Court of Appeals who noted that the Council could reconsider its past decision to "value judicial economy above the right to a jury trial."

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state.[11]

Public participation in deciding the facts of alleged assaults on a law enforcement officer may improve public trust and confidence even if the results were to be no different than those made by judges in non-jury bench trials.

The current CCRC draft recommendation on jury demandability provides that all forms of assault and threats where the complainant is a law enforcement officer should be jury demandable, consistent with Subtitle I in the policing and justice reform bill. However, the current CCRC draft recommendations on jury demandability go further, recommending (at present—these issues are still under review) the District revert to the standard it held from 1926[12] to 1993[13] that defendants have a right to demand a jury in any case in which they are subject to imprisonment for more than 90 days. In addition, certain other offenses with a 90-day or lower imprisonment penalty would also be jury demandable under the CCRC draft recommendation.[14]

IV. Changes to the rioting statute (D.C. Code § 22-1322).

Lastly, I'd like to raise several points regarding the rioting bill, which revises the elements and penalty of D.C. Code § 22-1322, the District's rioting statute.

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[8] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City).

[9] See CCRC First Draft of Report #51 – Jury Demandable Offenses at 7 (attached) (listing: Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island).

[10] The criminal justice system is a dynamic system with multiple actors exercising discretion who can adjust to time and staffing constraints in various ways. For example, rather than increase court jury trials, the system may adjust to an expansion of jury demandability by changing charging practices (as happened previously when the NEAR Act made APO jury demandable but left simple assault non-jury demandable) or plea bargaining practices.

[11] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018).

[12] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[13] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[14] *See* CCRC First Draft of Report #51 – Jury Demandable Offenses (attached).

First, what is distinctive about rioting as compared to the hundreds of other crimes in the D.C. Code is that an actor is engaging in wrongdoing in a group context. Other aspects of the crime being equal, group action may be harder to oppose or control, may lower inhibitions so as to effectively embolden others to join in, or may lead to a more severe overall harm resulting from cumulative actions. Consequently, wrongdoing committed in a group context arguably[15] merits having a separate offense of rioting and punishing such conduct somewhat more severely than the same conduct committed outside the group context.

However, it is critical to not lose sight of the fact that regardless whether there is a rioting statute or not, with whatever punishment it may provide, the D.C. Code contains hundreds of other criminal offenses that punish each particular form of wrongdoing in a far more specific and proportionate manner. Crimes as various as theft, destruction of property, robbery, assault, and sexual abuse vary sharply in their requirements and seriousness and a person who commits these acts should first and foremost be charged according their particular form of wrongdoing even if, in addition, there is some slight liability under a rioting statute.

For example, a person who breaks a store window during a riot could alternatively, or in addition to a rioting charge, be charged under the District's destruction of property offense which provides liability for anyone who "maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own."[16] If the window damage was $1,000 or more, that person is subject to a 10 year imprisonment penalty under current District law (the same as felony rioting), and if the damage is less than $1,000 then the maximum imprisonment is 180 days (the same as misdemeanor rioting).[17] Similarly, a person who enters a store with intent to steal an item of any value during a riot ("looting") could alternatively, or in addition to a rioting charge, be charged under the District's second degree burglary statute and be subject to a 15 year imprisonment.[18] Vandalizing property with spray paint could alternatively, or in addition to a rioting charge, be charged under the District's graffiti offense and be subject to a 180-day penalty.[19] Merely threatening to commit property damage of any sort or bodily injury of any sort could alternatively, or in addition to a rioting charge, be charged under the District's threats offense and be subject to a 20 year penalty.[20]

Even when a person's conduct falls short of these traditional crimes, the District's disorderly conduct statute[21] authorizes arrest, conviction, and up to a 90 day penalty for the very same general types of behavior involved in "riotous" activity:

> "(a) In any place open to the general public, and in the communal areas of multi-unit housing, it is unlawful for a person to:

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[15] Even this fundamental justification for a rioting statute is open to debate, as it may be thought that an individual is less culpable and deserves a lower punishment for committing a crime in a group context as compared to engaging in such context on their own.
[16] D.C. Code § 22–303.
[17] *Id.*
[18] D.C. Code § 22–801.
[19] D.C. Code § 22–3312.04.
[20] D.C. Code § 22–1810.
[21] D.C. Code § 22–1321.

(1) Intentionally or recklessly act in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken;

(2) Incite or provoke violence where there is a likelihood that such violence will ensue; or

(3) Direct abusive or offensive language or gestures at another person (other than a law enforcement officer while acting in his or her official capacity) in a manner likely to provoke immediate physical retaliation or violence by that person or another person."

Moreover, both the current D.C. Code rioting statute and the reform bill's rioting statute implicitly assume that another crime provides the primary liability and punishment for illegal rioting by punishing any person who engages in rioting the same, with a flat and relatively low 180-day penalty regardless whether the individual committed an assault, an aggravated assault, a petty theft, or arson of a building. That penalty is obviously disproportionate—too low or too high—if rioting is the most severe, primary charge. However, the current 180-day penalty makes sense for a secondary offense that effectively provides a small, but significant, increase in liability for committing the act as part of group conduct.

Second, just as the D.C. Code's many crimes already provide more appropriate descriptions of the elements that must be proven and the punishment for the crime that a person commits during a riot, the D.C. Code also provides liability for any person who "incites" any type of criminal conduct. The District's current "aiding and abetting" statute in D.C. Code § 22-1805 provides that, "for any criminal offense all persons advising, *inciting*, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories." This aiding and abetting statute effectively makes a person who incites damage to property during a riot liable to the same criminal penalty as the person who actually commits the damage to property. Moreover, if a person incites multiple people to engage in damage to property during a riot, that person's liability is likewise multiplied. The District's conspiracy liability statute, D.C. Code § 22-1805a also provides overlapping liability for a person who agrees to joint participation in what constitutes a crime.

Pointing out that the current D.C. Code already addresses "incitement" of any crime is important because the current rioting statute takes a sharply different approach to incitement by penalizing incitement of rioting that results in excess of $5,000 property damage or someone experiencing serious bodily injury by 10 years imprisonment. That 10-year penalty is 20 times the 180-day penalty for incitement that results in lesser harm[22]—and 20 times the 180-day penalty for the rioter who actually commits the serious bodily injury or property damage! I'll address the likely reason for this anomalous 10-year penalty for incitement next. But, the point here is that even without a separate incitement provision a person who incites another to commit a crime faces equal liability for that crime, be it serious or minor. The flat, high penalty reserved for inciting rioting that causes serious bodily injury or more than $5,000 of damage, consequently, appears to

[22] Notably, the District's current disorderly conduct offense, D.C. Code § 22–1321, provides a maximum 90-day penalty for a person to: "Incite or provoke violence where there is a likelihood that such violence will ensue" regardless of consequences."

be superfluous[23] and the penalty disproportionate to the harm that the actor causes as compared to the penalties provided elsewhere in the current D.C. Code.[24]

Also, regarding incitement, it bears repeating that the District's current disorderly conduct statute,[25] quoted above, also specifically refers to a person who "incites" others to misconduct. The statute authorizes arrest, conviction, and provides up to a 90 day penalty for a person to "incite or provoke violence where there is a likelihood that such violence will ensue." [26]

Third, the District's current rioting statute is vague and, as a consequence, raises particular concerns to how it may infringe on free speech and assembly rights under the First Amendment. The statute's broad language requires proof only of a mere "threat" of "tumultuous and violent conduct" and a "grave danger" of harm by a group as small as five people. Moreover, as discussed further below, the statute specifically criminalizes any speech that amounts to "incitement" of rioting but does not define the term or specify how such incitement differs from the type of encouragement that is generally criminalized as aiding and abetting elsewhere in the D.C. Code. The absence of any concrete, objectively measurable results that must be proven for a rioting charge opens up the possibility of bias influencing when the statute is applied. For example, a certain group erroneously may be deemed to be "riotous" based on the content of their speech or conduct covered by the First Amendment. Or, peaceful protestors who stand near others committing violence may be deemed, by their presence, to be encouraging, facilitating, or inciting

[23] The terms "incite" and "urge" as used in the District rioting statute are not defined in the statute itself or in case law. There also is no District law on whether or to what extent "incite" and "urge" as used in the rioting statute differ from the scope of the existing aiding and abetting statute in D.C. Code § 22–1805. Congressional legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[24] It should be noted that if the rioting statute were to be the sole charge for conduct (rather than being in addition to liability for a separate D.C. Code offense), there would be a consistent logic to setting a 10-year maximum imprisonment penalty for incitement for rioting that causes serious bodily injury or over $5,000 in property damage. This is because the current aggravated assault statute, D.C. Code § 22-404.01, provides a 10-year maximum imprisonment penalty for causing serious bodily injury to another, the current destruction of property statute, D.C. Code § 22-303, provides a 10-year maximum imprisonment penalty for destroying $1,000 or more of property, and the current aiding and abetting statute, D.C. Code § 22-1805a, treats a person who "incites" liable to the same penalty as the person who actually commits the act in question.

However, first, as noted previously, the remainder of the current rioting statute implicitly assumes the opposite—that rioting is an add-on charge and a person may still be liable for the more specific crime the person commits. Second, the rioting statute presumably covers other (worse) harms than serious bodily injury (e.g., causing death) which merit more severe punishment than what is authorized for serious bodily injury. Finally, there is strong reason to doubt that the current D.C. Code's equal punishment of $1,000 of property destruction and serious bodily injury. The CCRC has conducted public opinion surveys that consistently found District residents rate the loss of $5,000 of property to be about the equivalent in seriousness to a more minor "significant bodily injury" that requires treatment but not hospitalization as in a "serious bodily injury." *See, e.g.*, survey questions 5.02 and 4.24 in CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses (https://ccrc.dc.gov/node/1436766).

[25] D.C. Code § 22–1321.

[26] *Id*.

violent conduct. This conflict between the First Amendment and the rioting statute was explicitly recognized and endorsed by at least one member of Congress who helped pass the current statute.[27]

While the connection between incitement of rioting and free speech has not always been recognized, recently the Acting United States Attorney who has authority over District rioting charges has explicitly recognized this connection and said that his office has charged specific offenses instead of rioting.[28] However such charging practices may have or be changing, this position appears to differ sharply with the policy and practice of the Metropolitan Police Department (MPD). The Acting United States Attorney stated with regard to a number of recent arrests that MPD "arrested as a collective" persons for rioting when the arresting documents did not demonstrate "any articulable facts linking criminal conduct to each individual arrested."[29] The prosecutor went on to emphasize that, "we cannot charge crimes on the basis of mere presence or guilt by association."[30]

The fourth point I'd like to raise about the District's current rioting statute is its history with respect to race. The earliest predecessor of the District's rioting statute that the CCRC has been able to identify is an 1827 Ordinance of the Corporation of Washington entitled "Idle, Disorderly or Tumultuous Assemblages of Negroes Prohibited."[31] As a display at the National Museum of African American History and Culture states, through most of the 19th century, Black Codes in the District and virtually all Southern states prohibited African Americans to gather in groups of more than five. The language of the District's *current* rioting statute was passed by Congress in 1967 as racial tensions were at a peak, under the guidance of then Chairman of the

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[27] In support of the current law, Rep. Joel Broyhill, argued, "Those who incite others to violence should be punished whether or not their freedom of speech is involved." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 9.

[28] Keith L. Alexander and Meryl Kornfield, *Among more than 400 arrested during protests in the District, most cases involve curfew violations and burglary*, WASHINGTON POST (June 16, 2020) (https://www.washingtonpost.com/local/public-safety/among-more-than-400-arrested-during-protests-in-the-district-most-cases-involve-curfew-violations-and-burglary/2020/06/14/ef7e2e82-ac93-11ea-94d2-d7bc43b26bf9_story.html) ("'I did not authorize any of those individuals to be charged with rioting. I think that's a very gray area, a very dangerous area that bleeds into protesting, and what is First Amendment [protected] and what is not,' [Acting United States Attorney] Sherwin said in a June 5 statement to The Washington Post. 'But what we did charge and will continue to charge is any and all acts of violence, physical aggression and property damage — such conduct will never be condoned or accepted in the District.'").

[29] Peter Hermann and Spencer S. Hsu, Prosecutor accuses D.C. police of making rioting arrests with insufficient evidence, WASHINGTON POST (September 1, 2020) (https://www.washingtonpost.com/local/public-safety/prosecutor-accuses-dc-police-of-making-rioting-arrests-with-insufficient-evidence/2020/09/01/96310954-ec61-11ea-99a1-71343d03bc29_story.html) (quoting from and linking to September 1, 2020 Letter of Acting United States Attorney to Michael R. Sherwin to Mayor Muriel Bowser at: https://www.washingtonpost.com/context/letter-from-acting-u-s-attorney-michael-sherwin-to-d-c-mayor-muriel-bowser/41cbbcc9-54fd-4e82-a8ac-3e465ea170de/?itid=lk_inline_manual_7).

[30] *Id.*

[31] Ordinances of the Corporation of Washington, May 31, 1827, Section 3 ("All idle, disorderly or tumultuous assemblages of negroes, so as to disturb the peace or repose of the citizens are hereby prohibited, and any free negro or mulatto, found offending against the provisions of this section may, on conviction thereof before a justice of the peace be recognized with one or more sureties, in the penal sum of twenty dollars, conditioned for his or her peaceable and orderly behavior, for any period of time, not exceeding six months from the date of such recognizance.").

House Committee on the District of Columbia John McMillan.[32] The anomalous penalty for inciting rioting that results in a serious bodily injury or over $5,000[33] in property damage very well may have been based on an assumption by some Congressmen about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated by "professional agitators."[34] While the rioting statute was prosecuted most frequently during the 1968 riots at the assassination of Dr. King,[35] dozens of arrests under the statute have occurred this past summer.[36] From 2010-2019, as described below, most of those charged with rioting were white.

As noted above, the absence of any concrete, objectively measurable results that must be proven to sustain a rioting charge opens up the possibility that erroneous decisions will be made about what conduct constitutes a threat of violent conduct and what speech constitutes incitement of rioting. Similarly, the ambiguous language of the current rioting statute, untethered to more specifically defined criminal conduct, opens up the possibility that erroneous decisions will be made based on bias about appearance.

Fifth and finally, while the crime of rioting has been used frequently charged in recent years, very few convictions have resulted. A CCRC analysis of Superior Court data[37] for adult charging and sentencing 2010-2019 (ten years, including inauguration rioting arrests but not 2020 arrests) shows that misdemeanor rioting (D.C. Code § 22–1322(b)) was charged a total of 199 times during that period and felony rioting (D.C. Code § 22–1322(d)) 219 times during that period. In contrast, there were just 13 total convictions during that ten year span for misdemeanor rioting and just 1 felony rioting convictions. All 14 convictions were obtained by pleas. Approximately 84% of those charged (both misdemeanor and felony charges) were white, 92% of those convicted for misdemeanor rioting were white, and the sole felony conviction also appears to have been

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[32] McMillan, a signatory of the Southern Manifesto and opponent of District home rule, in 1967 sent a truckload of watermelons in response to receiving a budget from the District's newly appointed black Mayor-Commissioner Walter Washington. Harry S. Jaffe and Tom Sherwood, Dream City: Race, Power, and the Decline of Washington D.C., 1994, p.62.

[33] The statute's dollar threshold has not changed since 1967. Accounting for inflation, the 1967 threshold would be equivalent to $38,909.88 in 2020 dollars. *See* https://www.in2013dollars.com/us/inflation/.

[34] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[35] In April 1968 alone, District police arrested 7,600 people on rioting charges. See Rachel Chason and Rebecca Tan, *For black residents who saw D.C. burn decades ago, Floyd protests feel like hope*, WASHINGTON POST (June 16, 2020), available at https://www.washingtonpost.com/local/dc-politics/dc-protests-1968-george-floyd/2020/06/15/bc5475e6-ab28-11ea-9063-e69bd6520940_story.html.

[36] Eliza Berkon, *U.S. Attorney For D.C. Refutes Bowser's Claims That The Office Lacks 'Willingness' To Prosecute Protesters*, DCIST (September 1, 2020), available at https://dcist.com/story/20/09/01/dc-us-attorney-michael-sherwin-refutes-bowser-claim-office-prosecute-protesters/.

[37] CCRC Advisory Group Memo #38: Statistics on District Adult Criminal Charges and Convictions, available at https://ccrc.dc.gov/node/1490156.

white. Most of those who pled guilty to misdemeanor rioting served no time in jail but did receive suspended sentences. The sole person convicted of felony rioting appears to have been sentenced to serve 4 months in jail, the remainder of their 36 month sentence suspended. All but one (13 of 14) conviction had a conspiracy charge in the case. The person sentenced for felony rioting appears to have been sentenced in the case for another crime as well. The CCRC analysis is based on first-in-time court entries as to sentencing and may not reflect subsequent changes due to appeals or otherwise. For further details on the methodology and limitations of the CCRC analysis, see CCRC Advisory Group Memo #38: Statistics on District Adult Criminal Charges and Convictions.[38]

The rioting bill language before the Committee differs from the current CCRC draft recommendation language in minor respects. The current CCRC draft recommendations on rioting, for example:

- Require the actor engage in an offense reckless that at least seven others are engaging in specified criminal conduct in the perceptible area;
- Do not include sexual contact as a predicate offense;
- Clarify, through a different definition of a location "open to the public" that the statute applies in locations that require proof of age or identity to enter and may require a security screening; and
- Use a variety of standardized mental state and other terminology.[39]

However, the differences between the bill language and the current CCRC draft recommendations are minor, and the bill is almost entirely consistent with the draft recommendations.

Closing.

I have attached to my testimony, below, the CCRC's latest draft recommendations and accompanying commentary concerning law enforcement use of force, failure to arrest, jury demandability, and rioting. These documents describe in greater detail the CCRC's latest statutory language and how such language would change current District law. However, please bear in mind that the CCRC draft recommendations have been developed as a comprehensive whole with general provisions that are not included here, and the draft recommendations remain subject to further change prior to their release in March 2021.

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[38] *Id.*

[39] The CCRC's standardized mental state and other terminology clarifies the meaning of "reckless," clarifies that there must be proof of *both* the fact that others are committing criminal offenses nearby *and* that the defendant is aware of a substantial risk that such offenses are being committed, and clearly specifies predicate offenses as those that have as an element what is defined as a "bodily injury."
Notably, as the current D.C. Code contains offenses that are not defined in terms of "bodily injury," the Committee's rioting statute may benefit from clarification as to whether offenses such as simple assault (D.C. Code § 22–404(a)(1)) are intended to be included as predicate offenses for rioting liability. The current text may be construed as either requiring a fact-specific analysis of a given case to determine whether there is an offense involving bodily injury, or requiring a categorical analysis of whether the legal elements of the offense explicitly require "bodily injury."

Thank you for your consideration. For questions about this testimony or the CCRC's work more generally, please contact our office or visit the agency website at www.ccrc.dc.gov.

Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

Current as of September 28, 2020:
RCC § 22E-403. Defense of Self or Another Person.

(a) *Defense*. It is a defense that, in fact, the actor reasonably believes the conduct constituting the offense is necessary, in its timing, nature, and degree, to protect the actor or another person from a physical contact, bodily injury, sexual act, sexual contact, confinement, or death.

(b) *Exceptions*. This defense is not available when:

(1) In fact, the actor uses or attempts to use deadly force, unless the actor:

(A) Reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from serious bodily injury, a sexual act, confinement, or death; or

(B) Both:

(i) Is inside their own individual dwelling unit; and

(ii) Reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement;

(2) The actor recklessly brings about the situation requiring the defense, unless, in fact:

(A) The actor is a law enforcement officer acting within the reasonable scope of that role;

(B) The actor's conduct that brought about the situation is speech only; or

(C) The actor withdraws or makes reasonable efforts to withdraw from the location; or

(3) The actor is reckless as to the fact that they are protecting themselves or another from lawful conduct.

(c) *Use of deadly force by a law enforcement officer.* When, in fact, the actor is a law enforcement officer who uses or attempts to use deadly force, a factfinder shall include consideration of all of the following when determining whether the actor reasonably believed the conduct was necessary, in its timing, nature and degree:

(1) The law enforcement officer's training and experience;

(2) Whether the complainant:

(A) Appeared to possess, either on their person or in a location where it is readily available, a dangerous weapon; and

(B) Was afforded an opportunity to comply with an order to surrender any suspected dangerous weapons;

(3) Whether the law enforcement officer engaged in de-escalation measures, including taking cover, waiting for back-up, trying to calm the complainant, or using non-deadly force;

(4) Whether the law enforcement officer increased the risk of a confrontation resulting in deadly force being used; and

(5) Whether the law enforcement officer made all reasonable efforts to prevent a loss of a life, including abandoning efforts to apprehend the complainant.

(d) *Definitions*. The terms "intentionally" and "reckless" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "bodily injury," "complainant," "dangerous weapon," "deadly force," "law

enforcement officer," "serious bodily injury," "sexual act," "sexual contact," and "speech" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the defense of self or another person defense for the Revised Criminal Code (RCC). The defense applies where a person acts under a reasonable belief that they are protecting themselves or another person from a specified physical harm. The RCC defense of self or another person defense is the first codification of such a defense in the District.*

Subsection (a) establishes the requirements for the defense. The term "in fact" indicates that no culpable mental state need be proven for the defense requirements in subsection (a).

Subsection (a) specifies that the person must reasonably believe that the conduct constituting the offense is necessary to prevent a specified physical harm to the actor or to another person from occurring or continuing.[40] The harm at issue may be a physical contact, bodily injury, sexual act, sexual contact, confinement, or death and must be specific and identifiable. The harm could be caused by a criminal act or an accident.[41] The terms "bodily injury," "sexual act," and "sexual contact" are defined in RCC § 22E-701 and include a wide array of conduct.[42] The phrase "physical contact" should be construed to have the same meaning as in RCC § 22E-1205. The word "confinement" is undefined and is intended to broadly include confining a person in a closed space, limiting a person's movements by applying physical restraints to the body, and taking a person to another location against their will. The actor's belief that the harm will occur may be mistaken,[43] but it must be objectively reasonable. Reasonableness is an objective standard that takes into account relevant characteristics of the actor.[44] A person acting in the heat of passion caused by an assault may actually and reasonably believe something that seems unreasonable to a calm mind and does not necessarily lose a claim of defense or another person by using greater

[40] An additional motive, such as animus or hatred toward the complainant, does not defeat an otherwise valid claim of self-defense or defense of another person. *Parker v. United States*, 155 A.3d 835 (D.C. 2017).

[41] Consider, for example, a baseball coach who observes Player A is about to take a practice swing that will accidentally hit Player B. The coach may be justified in assaulting Player A, roughly pushing them out of the way, to protect Player B from being injured.

[42] The fact that a person may defend against even the most minor bodily injury or sexual contact is offset by the requirement that the conduct must be necessary in its timing, nature, and degree. For example, an actor may be justified in using a great amount physical force to protect against a beating about the head or a prolonged groping of the breast and be unjustified in using the same degree of force to protect against a mere grazing of the arm or buttocks.

[43] *Sloan v. United States*, 527 A.2d 1277 (D.C. 1987); *Jackson v. United States*, 645 A.2d 1099 (D.C. 1994).

[44] *See* Commentary to RCC § 22E-401, Lesser Harm; Model Penal Code § 3.02 cmt. at 241-42 (1985) (concerning the necessity defense) ("…these questions are asked not in terms of what the actor's perceptions actually were, but in terms of an objective view of the situation as it actually existed…The standard for ultimate judgement invites consideration of the 'care that a reasonable person would observe in the actor's situation.' There is an inevitable ambiguity in 'situation.' If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all of its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.") (Citations omitted).

force than would seem necessary to a calm mind.[45] The actor must believe that the conduct is necessary in its timing, nature, and degree.[46] Conduct is not necessary if the harm can be avoided by a reasonable "legal alternative available to the defendants that does not involve violation of the law."[47] Retreat may be a reasonable way to avoid a harm, however an actor has no affirmative duty to retreat before using force when the requirements of the defense are otherwise satisfied.[48]

Subsection (b) establishes three exceptions to the defense of self or another person defense.

Paragraph (b)(1) limits the availability of the defense when the actor uses or attempts to use deadly force. The term "deadly force" is defined in RCC § 22E-701 and means any physical force that is likely to cause serious bodily injury or death or death. A person may use deadly force even if the person does not intend to cause a serious injury[49] and even if death or serious injury does not occur.[50] The word "attempt" in paragraph (b)(1) should be construed to have the same meaning as in Criminal Attempt under RCC § 22E-301. That is, a person attempts to use deadly force if they engage in conduct that is reasonably adapted to causing serious bodily injury or death.[51] Subparagraph (b)(1)(A) applies to any actor in any location and permits deadly force only to protect against serious bodily injury, a sexual act, confinement or death. Subparagraph (b)(1)(B) applies only when the actor is inside their own individual dwelling unit[52] and permits deadly force to protect against the lesser harms of bodily injury and sexual contact, provided that other requirements of the defense are met.

Paragraph (b)(2) precludes application of the defense if the defendant is reckless in bringing about the situation that necessitates the defense. "Reckless" is defined in in RCC § 22E-

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[45] *Fersner v. United States*, 482 A.2d 387, 392 (D.C. 1984) ("[W]hen it comes to determining whether—and to what degree—force is reasonably necessary to defend a third person under attack, the focus ultimately must be on the intervenor's, not the victim's, reasonable perceptions of the situation."). *See also Lee v. United States*, 61 A.3d 655, 660 (D.C. 2013); *Jones v. United States*, 555 A.2d 1024, 1027–28 (D.C. 1989); *Graves v. United States*, 554 A.2d 1145, 1147–49 (D.C. 1989).

[46] The reasonableness of the belief that the conduct is necessary is fact-sensitive and depends in part on the type of harm that is being threatened, the degree of harm that is being threatened, and, in the case of defense of a third person, that third person's ability to protect themselves. The actor's awareness of the complainant's reputation for violence is also a relevant consideration. *See, e.g., Hart v. United States*, 863 A.2d 866, 870 (D.C. 2004)

[47] *See* Commentary to RCC § 22E-401, Lesser Harm; *Griffin v. United States*, 447 A.2d 776, 778 (D.C. 1982) (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980) ("Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail.")).

[48] *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979) (explaining there is no affirmative duty to retreat because "when faced with a real or apparent threat of serious bodily harm or death itself, the average person lacks the ability to reason in a restrained manner how best to save himself and whether it is safe to retreat" but that a jury may consider whether a defendant "could have avoided further encounter by stepping back or walking away" in deciding whether the defendant was actually or apparently in danger).

[49] For example, a factfinder may find that an actor who repeatedly stabs a person in the abdomen with a long knife used deadly force that was objectively likely to kill the person, even though the actor subjectively intended to only inflict a superficial wound. Expert testimony may be required to assist the factfinder in understanding whether particular conduct is likely to cause death or serious bodily injury.

[50] For example, a factfinder may find that a bullet wound was likely to cause a serious bodily injury if not for immediate intervention by a medical professional. Expert testimony may be required to assist the factfinder in understanding whether a particular injury is likely to cause death or serious bodily injury.

[51] A person does not attempt to use deadly force by merely desiring to seriously injure the other person. For example, a person who intends to kill someone by pinching their arm does not attempt to use deadly force.

[52] The word "inside" should be construed to mean inside the boundaries of the structure and to include a sunroom or balcony that is exposed to outdoor elements. The term "dwelling" is defined in RCC § 22E-701 and does not require proof of ownership or long-term residency. The words "individual" and "unit" make clear that the communal areas of multi-unit housing buildings are not included.

206 and here requires that the person consciously disregard a substantial risk that they would cause the danger to occur and that the person's disregard of the risk is clearly blameworthy. This exception generally excludes initial aggressors from the defense.[53] However, if after a confrontation begins, the actor becomes subject to an unforeseeable amount of force, the actor may nevertheless respond in self-defense.[54]

Subparagraphs (b)(2)(A) – (b)(2)(c) identify three circumstances in which a person may claim self-defense or defense of another person even though they were the initial aggressor.

Under subparagraph (b)(2)(A), a law enforcement officer may claim self-defense or defense of another person even if the officer provoked the danger that necessitated the defensive conduct.[55] The term "law enforcement officer" is defined in RCC § 22E-701. Subparagraph (b)(2)(A) requires that the officer be acting within the reasonable scope of their professional role.[56] Law enforcement officers acting in their professional roles who are required to engage in conduct that they are practically certain will cause another person to use force are not barred from raising the defense under subsection (b)(2).

Under subparagraph (b)(2)(B), the defense is still available to an initial aggressor who is engaging in speech[57] only.[58] The term "speech" is defined in RCC § 22E-701 and means oral or written language, symbols, or gestures. While political speech enjoys the greatest protection under the First Amendment, the exercise of other forms of speech does not alone constitute a provocation that bars the speaker from subsequently defending themselves or others if they are attacked and otherwise meet the requirements of the defense.

Under subparagraph (b)(2)(C), the defense is still available to an initial aggressor who withdraws[59] or makes reasonable efforts to withdraw from the location.[60] Efforts to withdraw include communicating a desire to withdraw.

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[53] Consider, for example, an actor who learns of a protest in a neighboring town and wants to confront the protestors and cause a violent scene. The actor arms himself with a concealed firearm and begins assaulting protestors, hoping that one will fight back and give him a reason to use deadly force to in self-defense. Paragraph (b)(2) precludes the defense unless one of the criteria in subparagraphs (b)(2)(A), (b)(2)(B), or (b)(2)(C) is satisfied.

[54] Under these circumstances, it cannot be said that the person consciously disregarded a substantial risk that they would provoke the danger. *See Andrews v. United States,* 125 A.3d 316, 323 n.22 (D.C. 2015) (defense available when complainant "unjustifiably escalate[d] the ... level of violence[.]"); *see also Lee v. United States*, 61 A.3d 655, 658 n.2 (D.C. 2013).

[55] For example, if an officer is assaulted while placing someone under arrest, the officer may be justified in using the degree of force necessary to protect the officer from further assault. *See also* RCC § 22E-402, Execution of Public Duty.

[56] For example, the officer might lose the justification defense if they are engaged in a personal dispute while off-duty or if they are engaging in conduct while on duty that is outside the reasonable scope of their job duties.

[57] Consider, for example, an actor who appears at a political demonstration fighting for racial justice wearing a t-shirt with racist slurs written on it, fully intending and expecting that it will provoke a physical attack. If a demonstrator attacks the actor, the actor still has a right to use the degree of force necessary to protect herself from further assault.

[58] The phrase "speech only" does not include menacing under RCC § 22E-1203, criminal threats under RCC § 22E-1204, or the tort of assault, defined as "putting another in apprehension of an immediate and harmful or offensive conduct." *See Madden v. D.C. Transit System, Inc.*, 307 A.2d 756, 767 (D.C. 1973); *Person v. Children's Hosp. Nat Medical Center*, 562 A.2d 648, 650 (D.C. 1989).

[59] If the defendant disengages, he is able to defend himself against any subsequent attack. *See Rorie v. United States*, 882 A.2d 763, 775 (D.C. 2005).

[60] Consider, for example, a Bar Patron A who challenges Bar Patron B to meet outside for a fight. When a large crowd gathers, A has second thoughts and tries to run away. B prevents A from fleeing and begins severely beating A. A may be now be justified in committing assault against B in self-defense.

Paragraph (b)(3) precludes application of the defense if the actor is reckless as to the fact that they are protecting against conduct that is lawful.[61] The term "reckless" is defined in RCC § 22E-206 and here requires that the person consciously disregard a substantial risk that the physical harm at issue is lawful and that the actor's conduct is blameworthy under the circumstances. The exception does not require proof that the actor knows the specific law at issue but does require conscious disregard of a substantial risk that the physical harm is lawful in some manner.[62]

Subsection (c) requires a factfinder to include consideration of certain specific facts when determining whether an actor who is a law enforcement officer and uses deadly force reasonably believed the conduct was necessary, in its timing, nature and degree. The terms "law enforcement officer" and "deadly force" are defined in RCC § 22E-701. The term "in fact" indicates that the actor is strictly liable with respect to whether they are a law enforcement officer and with respect to whether the force used is deadly force.[63] The list is not exhaustive and the factfinder may consider other factors.

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised defense of self or another person defense clearly changes current District law in three main ways.*

First, the revised statute does not categorically require that the harm to be avoided be immediate. The current D.C. Code does not codify a self-defense or defense of others defense. However, District case law[64] and the District's current pattern jury instruction require immediacy.[65] In contrast, the RCC statute requires the conduct be necessary in its timing, nature, and degree, but does not specify that harm to be avoided must be imminent. In unusual circumstances, conduct may be necessary to avoid non-immediate but otherwise inevitable harm.[66] This change improves the proportionality of the revised statutes.

Second, the revised defense provides that the use of deadly force is justified if the actor is inside their own dwelling and reasonably believes the conduct is necessary in its timing, nature, and degree, to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement. The D.C. Code does not codify a defense of self or another person defense. The DCCA has not squarely decided to accept or reject the "castle doctrine" that one who through no fault of his own is attacked in one's own home is under no duty to retreat.[67] The District of

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[61] For example, an actor is not justified in committing an assault against a corrections officer to protect themselves against being confined inside D.C. Jail.

[62] Consider, for example, an actor who physically attacks a bouncer, in defense of a person the bouncer is removing at a bar. It is inconsequential that the actor does not know the specific law that authorizes a bouncer to act. If the actor recklessly disregards the fact that bouncer's conduct is lawful, the defense of another person defense does not apply.

[63] RCC § 22E-207.

[64] *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912) ("[I]t is necessary before one may kill another in self-defense, that he shall actually have believed in his own mind at the very moment he strikes the blow, that then either his life is in danger, or that he is in danger of great bodily harm."); *Dawkins v. United States*, 189 A.3d 223, 233, 235 (D.C. 2019).

[65] Crim. Jury Inst. for DC Instruction § 9.500 (2019).

[66] As the Model Penal Code commentary to Necessity explains, "[I]t is a mistake to erect imminence as an absolute requirement, since there may be situations in which an otherwise illegal act is necessary to avoid an evil that may occur in the future. If, for example, A and B have driven in A's car to a remote mountain location for a month's stay and B learns that A plans to kill him near the end of the stay, B would be justified in escaping with A's car although the threatened harm will not occur for three weeks." *See* Model Penal Code § 3.02 cmt. at 17 (1985).

[67] *Cooper v. United States*, 512 A.2d 1002, 1005 (D.C. 1986); *see also Smith v. United States*, 686 A.2d 537, 545 (D.C. 1996) ("We need not decide definitively whether the castle rule should apply.").

Columbia Court of Appeals (DCCA) has adopted a "middle ground" approach to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat is some evidence of whether a defendant was actually or apparently in danger.[68] However, the court has held that the doctrine does not apply when the attacker is a co-occupant of the same home.[69] In contrast, the revised defense includes a broader right to self-defense inside one's dwelling,[70] as defined in RCC § 22E-701, permitting the use of deadly force to protect against more than serious bodily injury or death, irrespective of the complainant's co-occupancy. Deadly force may be used to protect the actor or another person from bodily injury, a sexual act, a sexual contact, or confinement when the actor is in their dwelling and the other requirements of the defense (reasonable belief that the conduct is necessary in its timing, nature, and degree) are met.[71] The revised defense specifically recognizes that protection against even lower-level bodily harms that occur in the home (versus another location) involve special consideration and a blanket ban on the use of deadly force for such lesser harms is unwarranted. This change improves the clarity and proportionality of the revised statutes.

Third, the revised statute provides that a law enforcement officer may be justified in using deadly force to protect a person from a sexual act or confinement. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 forbids a law enforcement officer from using deadly force unless it is immediately necessary to protect a person from serious bodily injury or death.[72] In contrast, although there are few circumstances in which it would reasonably appear necessary in timing, nature, and degree to use deadly force to protect against a lesser harm, the revised statute permits the defense should such circumstances arise.[73] This change improves the proportionality of the revised statutes.

Beyond these three changes to current District law, five other aspects of the revised statute may constitute substantive changes to District law.

First, the revised defense applies to all offenses. The D.C. Code does not codify a self-defense or defense of others defense. The DCCA has recognized that self-defense is a defense to various offenses, including assault, possession of a prohibited weapon and threats.[74] However, the scope of offenses to which the current self-defense and defense of others defense applies is largely undefined. To resolve this ambiguity, the RCC clarifies that defense of self or another person may justify any offense. Limiting the defense to crimes involving the use of physical force, as is

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[68] *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

[69] *Cooper v. United States*, 512 A.2d 1002, 1005–06 (D.C. 1986). The court reasoned that co-occupants are usually related and have some obligation to attempt to defuse the situation. The court stated that even unrelated roommates have a heightened obligation to treat each other with a degree of tolerance and respect.

[70] Unlike some jurisdictions, the revised defense does not offer any broader protection inside one's place of business.

[71] Instances where deadly force is reasonably necessary in timing, nature, and degree to protect against a bodily injury or sexual contact are expected to be extremely rare, as other means of protection such as withdrawal or more moderate use of force may avoid the harm.

[72] Act 23-336.

[73] Consider, for example, an assailant who has confined a large number of people in an internment camp, where they are being raped and tortured but not sustaining serious bodily injuries. If all other reasonable legal alternatives have been exhausted, an officer may be justified in using a less-lethal weapon that is likely (though not certain) to kill the assailant.

[74] *McBride v. United States,* 441 A.2d 644 (D.C. 1982)*; Potter v. United States,* 534 A.2d 943 (D.C. 1987); *Reid v. United States*, 581 A.2d 359 (D.C. 1990); *Douglas v. United States*, 859 A.2d 641 (D.C. 2004); *Hernandez v. United States*, 853 A.2d 202 (D.C. 2004).

common in many jurisdictions,[75] may lead to counterintuitive and undesirable outcomes.[76] This change improves the consistency and proportionality of the revised statutes.

Second, the revised statute provides that an actor may be justified in using deadly force to protect against a sexual act or confinement. The current D.C. Code does not codify a self-defense or defense of others defense. District case law provides that a person may use deadly force to protect against "serious bodily harm,"[77] but has not defined the term "harm" in this context,[78] as distinguishable from "serious bodily injury" found elsewhere in the D.C. Code and case law.[79] Resolving this ambiguity, the revised statute permits the defense should such circumstances arise, provided that the conduct reasonably appears necessary in timing, nature, and degree. This change clarifies and may improve the proportionality of the revised statutes.

Third, the revised statute defines clear parameters for when the defense is available to a someone who provokes an attack. District case law has held that self-defense is not available to someone who "deliberately places himself in a position where he has reason to believe his presence would provoke trouble."[80] The District of Columbia Court of Appeals (DCCA) has adopted a "middle ground" approach to analyzing whether a person has a duty to retreat, holding that while there is no affirmative duty to retreat, a failure to retreat is some evidence of whether a defendant was actually or apparently in danger.[81] The ambiguity of this rule has resulted in courts requiring a duty to retreat in some cases and not others, with sometimes inconsistent and counterintuitive outcomes.[82] Resolving this ambiguity, the revised statute applies the RCC's standardized definition of "reckless"[83] and clarifies that any person (other than a law enforcement officer or a

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[75] *See* Model Penal Code §§ 3.04 and 3.05.

[76] Consider, for example, an actor who picks up a large tree branch to protect themselves from an assault in a public park. Under the Model Penal Code's formulation, the actor would have a defense to assault for hitting the attacker with the tree branch but would have no defense to disorderly conduct for instead swinging the branch around wildly to create an appearance of danger.

[77] *Sacrini v. United States*, 38 App. D.C. 371, 378 (D.C. Cir. 1912); *Gillis v. U. S.*, 400 A.2d 311, 313 (D.C. 1979).

[78] *But see Brown v. United States*, 139 A.3d 870, 872 (D.C. 2016) (defining "serious bodily harm" to have the same meaning as "serious bodily injury" with respect to the meaning of "deadly force"); *Stewart v. United States*, 370 A.2d 1374, 1376 (D.C. 1977) (recognizing in *dicta* that other jurisdictions include sexual attacks as a bodily harm that is a possible predicate for a duress defense but then describing only serious bodily injury and death as predicates in the District).

[79] "Serious bodily injury" in other contexts has been construed to mean injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or loss or impairment of a bodily member or function. *Brown v. United States*, 139 A.3d 870, 876 (D.C. 2016) (regarding the meaning of "serious bodily injury" in defense of property); *Jackson v. United States*, 970 A.2d 277, 279 (D.C. 2009) (citing *Jackson v. United States,* 940 A.2d 981, 986 (D.C. 2008); *Bolanos v. United States,* 938 A.2d 672, 677 (D.C. 2007); *Payne v. United States,* 932 A.2d 1095, 1099 (D.C. 2007); *Swinton v. United States,* 902 A.2d 772, 776–77 (D.C. 2006)); *see also* RCC § 22E-701.

[80] *Rowe v. United States*, 370 F.2d 240, 241 (D.C. Cir. 1966); *Harris v. United States*, 364 F.2d 701 (D.C. Cir. 1966) ("One cannot provoke fight and then rely on claim of self-defense when such provocation results in counterattack unless he has previously withdrawn from fray and communicated such withdrawal."); *Nowlin v. United States*, 382 A.2d 9, 14 n.7 (D.C. 1978); *Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995).

[81] *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

[82] *Compare Laney v. United States*, 294 F. 412, 414 (D.C. Cir. 1923) (finding that self-defense was unavailable to a man who ran away from a mob of 100 men yelling "Catch the nigger," and "Kill the nigger," because he reached a place of "comparative safety" and could have gone home) *with Marshall v. United States*, 45 App. D.C. 373 (1916) (finding no duty to retreat during a fight over a craps game and stating, "The right of a defendant when in imminent danger to take life does not depend upon whether there was an opportunity to escape.").

[83] RCC § 22E-701.

person engaging in mere speech[84]) who consciously disregards a substantial risk that they will provoke the danger necessitating the defense loses the right to self-defense, unless they retreat or make reasonable efforts to retreat.[85] This change improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised defense does not apply when the person is reckless as to the fact that they are protecting against conduct that is lawful.[86] The current D.C. Code does not codify a self-defense or defense of others defense. District case law has held that a person has no right to defend against an apparently lawful arrest or other apparently lawful restraint by a police officer,[87] but has not yet addressed other lawful conduct.[88] Resolving this ambiguity, the revised statute clarifies that a person cannot assert the offense if they are defending against a physical contact, bodily injury, sexual act, sexual contact, confinement, or death that is lawful and they are reckless as the fact that it is lawful. This change clarifies the revised statute.

Fifth, the revised statute amends the list of factors that a factfinder should consider when determining whether a law enforcement officer reasonably believed that deadly force was necessary, in its timing, nature and degree. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 states that a factfinder should consider the totality of the circumstances and provides a non-exhaustive list of factors.[89] One of these factors is: "Whether the subject of the use of deadly force [] [p]ossessed or appeared to possess a deadly weapon."[90] The scope and meaning of "possession" of a deadly weapon, whether an officer's training and experience is relevant, and other factors in this statute are unclear and there is no case law to date. To resolve these ambiguities, the revised statute clarifies the provision regarding possession of a weapon[91] and expands the list to include the officer's training and experience[92] and whether the law enforcement officer made all reasonable efforts to prevent a loss of a life. This clarifies the revised statute.

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[84] *See* Crim. Jury Inst. for DC Instruction § 9.504 (2019).

[85] *See Harris v. United States*, 364 F.2d 701, 702 (D.C. Cir. 1966); *Parker v. United States*, 158 F.2d 185, 186 (D.C. Cir. 1946); *Rowe v. United States*, 164 U.S. 546 (1896); *Bedney v. United States*, 471 A.2d 1022, 1023–24 (D.C. 1984).

[86] For example, an actor is not justified in committing an assault against a corrections officer to protect themselves against being confined inside D.C. Jail.

[87] *Speed v. United States*, 562 A.2d 124, 128 (D.C. 1989).

[88] E.g., a parent who is disciplining a child.

[89] Act 23-336.

[90] *Id*.

[91] Current law requires the factfinder to consider whether the complainant "Possessed or appeared to possess a deadly weapon," whereas the revised statute focuses on whether it appeared to the law enforcement officer that the person possessed a weapon or had one readily available. It is of little consequence that a person constructively possessed a weapon in a far-off location.

[92] *See* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, & Imperfect Self-Def.*, 2018 U. Ill. L. Rev. 629, 665 (2018) ("Unlike civilians, police officers undergo extensive training, including training on threat perception, and are more attuned than the average citizen to behaviors indicative of threat. Therefore, it makes sense to assess the reasonableness of an officer's beliefs and actions from the perspective of a reasonable officer in the defendant officer's shoes.") (Citations omitted.).

Relation to National Legal Trends. *Statutory codification of self-defense and defense of others is broadly supported by national legal trends, however, there is variance with respect to the rights of initial aggressors*[93] *and the duty to retreat.*

All 29 reform jurisdictions[94] codify a defense for using force to defend a person.[95] A growing majority of states impose no duty to "retreat to the wall" before using deadly force outside of one's home or business. [96] A few states include the Model Penal Code's surrender-possession and comply-with-demand limits on deadly force.[97]

[93] *See* § 10.4(e) The aggressor's right to self-defense, 2 Subst. Crim. L. § 10.4(e) (3d ed.) (explaining An initial aggressor (or mutual combatant) to use self-defense in two situations: when a nondeadly aggressor is met with deadly force or when the initial aggressor withdraws (or tries to withdraw)).

[94] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[95] Ala.Code § 13A-3-23; Alaska Stat. Ann. § 11.81.330; Ariz. Rev. Stat. Ann. § 13-405; Ark. Code Ann. §§ 5-2-605, 5-2-607; Colo. Rev. Stat. Ann. § 18-1-704; Conn. Gen. Stat. Ann. § 53a-19; Del. Code Ann. tit. 11, § 464; Haw. Rev. Stat. Ann. § 703-304; 720 Ill. Comp. Stat. Ann. 5/7-1; Ind. Code Ann. § 35-41-3-2; Kan. Stat. Ann. § 21-5222; Ky. Rev. Stat. Ann. § 503.050; Me. Rev. Stat. tit. 17-A § 108; Minn. Stat. Ann. § 609.065; Mo. Ann. Stat. § 563.031; Mont. Code Ann. § 45-3-102; Mont. Code Ann. § 45-3-105; N.H. Rev. Stat. Ann. § 627:4; N.J. Stat. Ann. § 2C:3-4; N.Y. Penal Law § 35.15; N.D. Cent. Code Ann. § 12.1-05-03; Ohio Rev. Code Ann. § 2901.05; Or. Rev. Stat. Ann. § 161.209; 18 Pa. Stat. and Cons. Stat. Ann. § 505; S.D. Codified Laws § 22-16-35; Tenn. Code Ann. § 39-11-611; Tex. Penal Code Ann. § 9.31; Utah Code Ann. § 76-2-407; Wash. Rev. Code Ann. § 9A.16.020; Wis. Stat. Ann. § 939.48.

[96] *See* § 10.4(f) Necessity for retreat, 2 Subst. Crim. L. § 10.4(f) (3d ed.) (explaining the National Rifle Association has recently advocated for states to pass "Stand Your Ground" laws, but the ABA Task Force has found that "[s]tand-your-ground laws hinder law enforcement, are applied inconsistently, and disproportionately affect minorities," and also "that states with some form of stand-your-ground laws have seen increasing homicide rates.").

[97] *Id*. (citing Conn. Gen. Stat. Ann. § 53a-19; Del. Code Ann. tit. 11, § 464; Haw. Rev. Stat. § 703-304; Me. Rev. Stat. Ann. tit. 17-A, § 108; Neb. Rev. Stat. § 28-1409; N.J. Stat. Ann. § 2C:3-4); Model Penal Code § 3.04.

Current as of February 19, 2020
Failure to Arrest, D.C. Code § 5-115.03

The Commission recommends the repeal of D.C. Code § 5-115.03 which criminalizes neglect to make an arrest for an offense committed in a law enforcement officer's presence.

COMMENTARY

Explanatory Note and Relation to Current District Law.
Current D.C. Code § 5-115.03 provides:

> If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding $500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section.[98]

The D.C. Court of Appeals (DCCA) does not appear to have published any opinions in which a criminal defendant was charged with violating this statute. However, the DCCA has referred to this statute when finding that members of the Metropolitan Police Departments are "always on duty."[99] Additionally, the U.S. District Court for the District of Columbia has referred to this statute when finding that the District does not have a policy or practice of allowing officers to break the law and shielding the government from liability under 42 U.S.C. § 1983.[100]

There is no legislative history available as to the original intent of the statute because it is among the oldest in the D.C. Code. The crime began as part of wartime (Civil War) 1861 legislation that originally created a unified "Metropolitan Police district of the District of Columbia" out of the "corporations of Washington and Georgetown, and the county of Washington." [101]

The scope of D.C. Code § 5-115.03 is ambiguous because it does not specify culpable mental states as to applicable criminal laws or the relevant conduct of persons. In other words, it

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[98] D.C. Code § 5-115.03.
[99] *See* D.C. Code § 22–405; *Mattis v. United States*, 995 A.2d 223, 225–26 (D.C. 2010)(finding off-duty police officers are protected by the District's assault on a police officer statute); *Lande v. Menage Ltd. Pshp.*, 702 A.2d 1259 (D.C. 1997)(finding private business not liable for the unlawful actions of the off-duty police officers they employed as security guards).
[100] *Gregory v. District of Columbia*, 957 F. Supp. 299 (D.D.C. 1997)
[101] *See Compilation of the Laws in Force in the District of Columbia, April 1, 1868,* U.S. Government Printing Office (1868) at 400, (available online at https://books.google.com/books?id=87kWAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false) (citing Congress' August 6, 1861 Act to create a Metropolitan Police district of the District of Columbia, and to establish a police therefor, and providing in section 21 of the law: "It shall be a misdemeanor punishable by imprisonment in the county jail or penitentiary not exceeding two years, or by a fine not exceeding five hundred dollars for any person without justifiable or excusable cause to use personal violence upon any elector in said district, or upon any member of the police force thereof when in the discharge of his duty, or for any such member to neglect making any arrest for an offence against the law of the United States, committed in his presence, or for any person not a member of the police force to falsely represent himself as being such member, with a fraudulent design.").

is unclear from the statute whether police officers may be criminally liable for neglecting to arrest persons if he or she is unaware of the laws being broken or that person's conduct.[102]

However, even if limited to situations where an officer knows a person is breaking a criminal law in their presence, the statutory language makes no exception for the many circumstances in which safety concerns or District policy would require an officer to decline to arrest. In some situations, requiring an officer to make an arrest may compromise the officer's safety,[103] the arrestee's safety,[104] or the safety of a third party.[105] In some situations, Metropolitan Police Department (MPD) orders specifically direct officers to engage with people in a manner that may not result in an arrest for wrongdoing.[106] In still other situations, District law[107] conflicts with federal law[108] and requiring an arrest undermines the District's authority to make and enforce its own criminal laws.[109]

In rare circumstances,[110] requiring law enforcement officers to make arrests for criminal actions they know to be committed in their presence may be consistent with District policy. The CCRC will evaluate such situations in the context of its review of future offenses. However, the CCRC recommends the repeal of the broad failure to make arrest requirement in D.C. Code § 5-115.03. This change improves the consistency and proportionality of the revised offenses.

Relation to National Legal Trends.

No other state has a similar criminal provision concerning a failure to make an arrest. Nevada and Oklahoma criminalize willfully refusing to arrest a person after being "lawfully commanded" to do so.[111] New Jersey punishes a public servant's refraining from performing a duty when it is done "with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit."[112] Twenty-five states explicitly allow law enforcement officers to issue a citation instead of arrest for some or all offenses, by statute or in the rules of criminal

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[102] For example, it is unclear if an officer would be liable for failure to arrest when he or she observes a group of people playing outside without knowing that the game they are playing is shindy or that there is a law against playing shindy, D.C. Code § 22-1308.

[103] E.g., the officer is undercover, the officer is outnumbered, the officer is unarmed or physically outmatched,

[104] E.g., a person in need of immediate medical care for an injury, illness, or psychiatric condition. *See* D.C. Code § 21-521.

[105] E.g., a hostage.

[106] *See., e.g.,* Metropolitan Police Department, General Order 201.26(V)(D)(2)(f), April 6, 2011; Metropolitan Police Department, General Order 303.01(I)(B)(2)-(3), April 30, 1992; Metropolitan Police Department, Special Order 96-10, July 10, 1996; Metropolitan Police Department, General Order 502.04, April 24, 2018;

[107] D.C. Code § 48-1201 (providing a civil penalty for possession of marijuana, one ounce or less).

[108] 21 U.S. Code § 844 (criminalizing possession of a controlled substance, including marijuana).

[109] Notably, the District recently adopted a policy of non-custodial arrests for public consumption of marijuana. *See* Martin Weil and Clarence Williams, *D.C. arrests for marijuana use to result in citation, not custody, officials say*, Washington Post, September 21, 2018, *available at* https://wapo.st/2OJBEZo?tid=ss_mail&utm_term=.9078c3261301.

[110] *See, e.g.,* D.C. Code § 16-1031 (requiring police officers to make an arrest in domestic violence, but without a criminal penalty for failure to comply). Another situation where a mandatory arrest policy may be considered is when a law enforcement officer is present during a criminal act by another officer. For example, Officer A witnesses Officer B steal narcotics from the evidence control branch and, although A did not consciously desire B to steal and was not an accomplice or accessory after-the-fact, he fails to arrest B to protect B's job. In such situations, the officer's failure to arrest may be conduct sufficiently harmful to be criminalized. This situation will be reviewed when the CCRC examines the District's obstruction of justice statutory provisions.

[111] Nev. Rev. Stat. Ann. § 199.270; Okla. Stat. Ann. tit. 21, § 537.

[112] N.J. Stat. Ann. § 2C:30-2.

procedure.[113] Eleven additional states appear to allow officers to issue a citation instead of arrest (that is, the code has a citation procedure and does not explicitly require an arrest).[114] Ten states enforce a presumption that officers will issue a citation instead of arrest for certain offenses.[115]

[113] Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[114] Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Montana, North Carolina, Oregon, Texas, and Wyoming. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[115] Alaska, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, Ohio, Pennsylvania, Rhode Island, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

Current as of February 19, 2020
D.C. Code § 16-705. Jury trial; trial by court.

(b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if:

(1) (A) The defendant is charged with an offense that is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 90 days (or for more than six months in the case of the offense of contempt of court);

(B) The defendant is charged with an attempt, conspiracy, or solicitation to commit an offense specified in subparagraph (b)(1)(A) of this section;

(C) The defendant is charged with an offense under Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in D.C. Code § 22E-701;

(D) The defendant is charged with a "registration offense" as defined in D.C. Code § 22-4001(8);

(E) The defendant is charged with an offense that, if the defendant were a non-citizen and were convicted of the offense, could result in the defendant's deportation from the United States under federal immigration law; or

(F) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 1 year; and

(2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

COMMENTARY

Explanatory Note. *This section establishes the jury or nonjury trial provision for the Revised Criminal Code (RCC) and other D.C. Code provisions. The revised statute replaces D.C. Code § 16-705(b)(1) (Jury trial; trial by court).* The revised portion of D.C. Code § 16-705(b)(1) concerns the extension of a statutory right to a jury trial in six circumstances.

Subparagraph (b)(1)(A) of the revised statute permits a criminal defendant to demand a jury trial when charged with an offense punishable by imprisonment for more than 90 days.

Subparagraph (b)(1)(B) of the revised statute permits a defendant to demand a jury trial when charged with an inchoate form of an offense—i.e. attempt, solicitation, or conspiracy—that would be punishable by imprisonment for more than 90 days.

Subparagraph (b)(1)(C) of the revised statute permits a jury demand for a charge under Chapter 12 of Title 22E, including robbery, assault, menacing, criminal threats, and offensive physical contact, if the person who is alleged to have been subjected to the criminal offense [116] is a law enforcement officer as defined in § 22E-701.

Subparagraph (b)(1)(D) of the revised statute provides a right to a jury trial to a charge for a "registration offense" as defined under the District's sex offender registration statutes.

Subparagraph (b)(1)(E) of the revised statute extends a right to a jury for any charge[117] which, as a matter of law, could result in deportation of the defendant under federal immigration law were the defendant convicted of the crime and proven to be a non-citizen. This provision does not require any proof or assertion that the defendant is, in fact, a non-citizen or that federal authorities, in fact, would deport the defendant if convicted. The question under subparagraph (b)(1)(E) is purely a question of law—whether the charged offense could result in deportation under federal immigration law if the defendant were a non-citizen.

Subparagraph (b)(1)(F) of the revised statute provides a jury trial right to a criminal defendant charged with two or more offenses with a combined possibility of imprisonment of more than one year or more than $4,000.[118]

Relation to Current District Law. Revised D.C. Code § 16-705(b)(1) changes current District law by extending the circumstances under which a defendant is entitled to a jury trial. However, the revised statute makes no change to the process for waiver of a jury trial right, the jury trial procedure itself, or the procedures for adjudication absent a jury trial. The revised statute maintains the current language regarding the right to a jury trial where guaranteed by the United States Constitution, the current fine structure for jury demandable offenses, and the current language regarding jury demandable contempt of court cases.

In general, current D.C. Code § 16-705 establishes the circumstances under which a criminal defendant is entitled to a jury trial,[119] the process for waiving a jury trial,[120] the procedure for adjudicating cases in which a defendant is not entitled to a jury trial or a jury trial is waived,[121] and the procedure for jury trials.[122] Under current D.C. Code § 16-705, a criminal defendant is entitled to a jury trial in six instances: (1) where a jury trial is guaranteed by the United States Constitution;[123] (2) where the defendant is charged with an offense punishable by a fine over

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[116] The term "complainant" is defined in RCC § 22E-701 as a "person who is alleged to have been subjected to the criminal offense," such that the phrasing here is identical to "complainant" in RCC § 22E-701.

[117] The application of federal immigration law to District statutes is complex and constantly evolving. Establishing a definitive list of the District's deportable misdemeanor offenses would be an immense and likely fruitless undertaking. Consequently, the revised statute codifies a clear, flexible standard that courts can evaluate as needed as federal law changes.

[118] *See* D.C. Code §§ 4-516 (Assessments for crime victims assistance and compensation); 16-711 (Restitution or reparation); 22-3571.01 (Fines for criminal offenses).

[119] D.C. Code §§ 16-705(a)-(b-1).

[120] D.C. Code § 16-705(a); D.C. Code § 16-705(b)(2); D.C. Code § 16-705(b-1).

[121] D.C. Code §§ 16-705(a)-(b-1).

[122] D.C. Code § 16-705(c).

[123] D.C. Code § 16-705(a). According to the United States Supreme Court, a criminal defendant is entitled to a jury trial under the United States Constitution when charged with a "serious" offense, but not when charged with a "petty" offense. *Duncan v. Louisiana*, 391 U.S. 145, 157-62 (1968). The Supreme Court has identified the maximum authorized penalty as the most relevant objective criteria by which to judge an offense's severity and has held then no offense may be deemed "petty" if it is punishable by more than six months imprisonment. *Baldwin v. New York*, 399

$1,000;[124] (3) where a defendant is charged with two or more offenses punishable by a cumulative fine of over $4,000;[125] (4) where a defendant faces imprisonment for more than 6 months for contempt of court;[126] (5) where a defendant is charged with an offense punishable by more than 180 days imprisonment;[127] and (6) where a defendant is charged with two or more offenses punishable by imprisonment for more than two years.[128] The current statute also clarifies that when a defendant is charged with two or more offenses, if one of the offenses is jury demandable, all offenses shall be tried by jury unless waived.[129]

The revised statute changes D.C. Code § 16-705(b)(1) to expand the right of a criminal defendant to demand a jury trial in several ways. First, in contrast to the current standard of more than 180 days,[130] subparagraph (b)(1)(A) of the revised statute sets the baseline right to a jury of one's peers for a non-contempt of court charge that carries a maximum imprisonment penalty of more than 90 days. Second, in contrast to current law which makes no distinction as to whether a charge is an attempt or other inchoate form of an offense that is jury demandable, subparagraph (b)(1)(B) of the revised statute treats inchoate forms of a jury-demandable offense as jury demandable, regardless whether their imprisonment penalty is 90 days or less. Third, the revised statute creates entirely new statutory rights to a jury for any charge which, under subparagraph (b)(1)(C) or subparagraph (b)(1)(D) is an offense in Chapter 12 [Chapter 12. Robbery, Assault, and Threats] of Title 22E in which the person who is alleged to have been subjected to the criminal offense is a "law enforcement officer" as defined in § 22E-701, or a charge for a "registration offense" as defined in § 22-4001(8). Fourth, the revised statute, in subparagraph (b)(1)(E), codifies a statutory right to a jury for a charge that, as a matter of law, could result in deportation were the defendant proven to be a non-citizen and convicted of the crime. This change appears to expand D.C. Court of Appeals (DCCA) case law that provides a right to a jury on constitutional grounds for a non-citizen defendant who is subject to possible deportation if convicted of the offense.[131] Finally, subparagraph (b)(1)(F) of the revised statute reduces from two years to one year the

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U.S. 66, 68-69 (1970). Offenses punishable by six months imprisonment or less are presumptively "petty," but that presumption may be overcome if a defendant shows that additional statutory penalties, viewed in conjunction with the maximum period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is "serious." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

[124] D.C. Code § 16-705(b)(1)(A).

[125] D.C. Code § 16-705(b)(1)(B).

[126] D.C. Code § 16-705(b)(1)(A).

[127] D.C. Code § 16-705(b)(1)(A).

[128] D.C. Code § 16-705(b)(1)(B).

[129] D.C. Code § 16-705(b-1).

[130] D.C. Code § 16-705(b)(1)(A).

[131] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury."). The *Bado* decision does not explicitly state that a defendant must prove that he or she is a non-citizen in order to avail themselves of the right to a jury for a deportable offense, although this appears to be implicit in the *Bado* decision's reliance on Supreme Court precedent in *Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989)* and repeated emphasis that the *Blanton* court relied on the consequences to a *particular* defendant. *See also Miller v. United States,* 209 A.3d 75, 79 (D.C. 2019)("Although the trial record did not reveal that Ms. Miller is not a citizen, the United States has not relied on that circumstance to argue that the error in this case was not obvious for purposes of the plain-error standard. We therefore do not address that issue. … Second, the United States's proposed reading of Bado appears to rest on the premise that a defendant has a constitutional right to a jury trial only if conviction would in a practical sense make the defendant's situation worse than it otherwise would be. Bado, however, repeatedly states that the relevant inquiry is whether the defendant "faces" or "is exposed" to the penalty at issue, or alternatively whether the penalty "could be" imposed, if the defendant is convicted. E.g., 186 A.3d at 1246, 1249-50, 1252, 1253, 1256, 1257, 1261.").

cumulative term of imprisonment that a defendant must be subject to under two or more charges in order to demand a jury. The one-year threshold is four times the otherwise applicable revised threshold of 90 days in subparagraph (b)(1)(A), just as the current threshold of two years is four times the otherwise applicable threshold of 180 days.[132]

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The rationale for limiting a right to a jury to offenses punishable by 180 days or less is rooted in a specific factual context that no longer exists in the District.

For most of the past century, the District has provided a more expansive jury trial right than it does today.[133] Between 1926 and 1993, criminal defendants were entitled to a jury trial in all cases punishable by a fine or penalty of $300 or more, or by imprisonment for more than 90 days.[134] In 1992, however, the D.C. Council passed the Criminal and Juvenile Justice Reform Amendment Act, increasing the penalty threshold for a jury trial more than threefold and doubling the imprisonment threshold.[135] Although this was a dramatic change to the substantive jury trial right, its impact on the actual number of jury trials in the District was minimal. As Fred B. Ugast, then Chief Judge of D.C. Superior Court subsequently explained, because the vast majority of charged misdemeanors at the time had maximum penalties of one year, the amendment did not result in a significant change in jury trial rates.[136] However, the year after the Criminal and Juvenile Justice Reform Amendment Act went into effect, the Council passed the Omnibus Criminal Justice Reform Amendment Act of 1994.[137] The legislation reduced the penalties of more than forty misdemeanor offenses to remove criminal defendants' rights to demand a jury trial.[138] Today, jury trial rates in misdemeanor cases remain well below 1%.[139]

Both the Criminal and Juvenile Justice Reform Amendment Act of 1992 and the Omnibus Criminal Justice Reform Amendment Act of 1994 were passed at a time when responding to violent crime was the Council's priority as part of a conscious effort to promote expediency in the criminal process. Although there was no claim that the legislation would result in cost savings, the stated aim of the legislation was to promote judicial efficiency:

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[132] D.C. Code § 16-705(b)(1)(A).

[133] *See* Act of June 17, 1870, 41st Cong., (1870) (16 Stat. 153) (providing right to trial by jury *de novo* on appeal from all actions in Police Court); Act of March 3, 1891, 51st Cong., (1891) (26 Stat. 848) (providing right to trial by jury in Police Court for all cases punishable by penalty $50 or more or imprisonment for thirty days or more); Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119) (providing right to trial by jury in Police Court for all cases punishable by penalty of $300 or more or by imprisonment for more than ninety days).

[134] Act of March 3, 1925, 68th Cong., (1925) (43 Stat. 1119).

[135] Criminal and Juvenile Justice Reform Amendment Act of 1992, D.C. Law 9-272.

[136] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" attached "Copy of letter dated September 20, 1993 from Chief Judge Fred B. Ugast of the Superior Court ("Last year, the Council passed an amendment to D.C. Code §16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases.").

[137] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[138] Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151.

[139] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor jury trials as a percentage of misdemeanor dispositions at: 0.13% in 2003, 0.15% in 2004, 0.16% in 2005, 0.10% in 2006, 0.27% in 2007, 0.18% in 2008, 0.11% in 2009, 0.10% in 2010, 0.13% in 2011, 0.23% in 2012, 0.21% in 2013, 0.09% in 2014, 0.20% in 2015, 0.07% in 2016, 0.08% in 2017, and 0.07% in 2018.

> Title V reduces the penalty of more than 40 crimes to 180 days, presumptively making them non-jury demandable. Both the Superior Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date.[140]

In 1993, the year the Criminal and Juvenile Justice Reform Amendment Act went into effect and the year the Omnibus Criminal Justice Reform Amendment Act was introduced, violent crime in the District had reached an all-time high. According to the FBI's Uniform Crime Reporting Program, rates of violent crime in the District peaked in 1993 at 2,922 per 100,000 people.[141] The D.C. Council was reaching for all available options to respond. As noted in the committee report for the Omnibus Criminal Justice Reform Amendment Act of 1994:

> Over the past few years, the Council has passed much legislation in an attempt to curtail the crime and violence in the District of Columbia. However, crime and violence continues to hold the District of Columbia within its grip. . . .
>
> . . . The Council in its continued fight, must look at all options to increase public safety, including redefining crimes, reviewing management, and reallocating resources.[142]

Yet, overall violent crime in the District has been in steady decline since 1993.[143] In 2018, violent crime in the District reached 996 per 100,000 people, a 66% decrease from 1993,[144] and the lowest since the 1967.[145] This decrease in violent crime rates in the District in recent decades undermines the primary rationale for prioritizing judicial expediency over due process.

In addition, the impact of expanding jury demandability on judicial resources is unclear. Assuming that both judicial and prosecutorial resources are relatively constant and inelastic in the near future, and that jury trials require greater resources than bench trials, the result of expanding jury demandability may be an increase in non-trial dispositions (plea, diversion, or dismissal) for lower level cases. This is because any judicial impact depends on prosecutorial charging decisions which are highly discretionary, dynamic, and likely to change with resource pressure.

Expansion of the jury trial right would almost certainly increase to some degree the number of misdemeanor jury trials held annually. However, the overall rate of jury trials has been variable but at historic lows in recent years. The rate of jury trials has steadily declined for decades across

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[140] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4.

[141] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[142] Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 2.

[143] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[144] Federal Bureau of Investigation, Crime Data Explorer, Crime Rates in the District of Columbia, 1985-2018, https://crime-data-explorer.fr.cloud.gov/explorer/state/district-of-columbia/crime.

[145] Federal Bureau of Investigation, UCR Data Tool, Violent Crime Rates in the District of Columbia, 1960-2014, https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm.

the United States, with jury trials making up only a small fraction of overall dispositions.[146] In the District, felony jury trial rates averaged 7% over the past 15 years,[147] with the vast majority of charges resulting in either dismissal (36%)[148] or a guilty plea (52%).[149] Similarly, the vast majority of misdemeanor cases in the District resolve through dismissal (42%),[150] a plea (30%),[151] or diversion (14%).[152] Misdemeanor bench trial rates have remained low, averaging 5% of all misdemeanor dispositions.[153] There is no reason to think that an expansion of the misdemeanor jury trial right would create a significant shift in these numbers beyond converting bench trials to jury trials.

Further undermining the judicial efficiency argument is the fact that the vast majority of states successfully provide full jury trial rights to their citizens. Thirty-five states currently provide the right to a jury trial in virtually all criminal prosecutions in the first instance.[154] Another three states require bench trials for some minor criminal offenses, but provide a jury trial right *de novo*

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[146] *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Emp. L. Stud. 459 (2004); Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002," Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755-782.

[147] Compiled from District of Columbia Courts Annual Reports, showing felony jury trials as a percentage of felony dispositions at: 5% in 2003, 5% in 2004, 4% in 2005, 5% in 2006, 7% in 2007, 8% in 2008, 8% in 2009, 10% in 2010, 9% in 2011, 9% in 2012, 10% in 2013, 10% in 2014, 9% in 2015, 6% in 2016, 5% in 2017, and 4% in 2018.

[148] Compiled from District of Columbia Courts Annual Reports, showing felony dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of felony dispositions at: 46% in 2003, 44% in 2004, 40% in 2005, 31% in 2006, 33% in 2007, 34% in 2008, 31% in 2009, 27% in 2010, 27% in 2011, 27% in 2012, 25% in 2013, 29% in 2014, 32% in 2015, 38% in 2016, 43% in 2017, and 41% in 2018.

[149] Compiled from District of Columbia Courts Annual Reports, showing felony guilty pleas as a percentage of felony dispositions at: 34% in 2003, 35% in 2004, 28% in 2005, 62% in 2006, 59% in 2007, 58% in 2008, 60% in 2009, 63% in 2010, 63% in 2011, 62% in 2012, 64% in 2013, 59% in 2014, 58% in 2015, 56% in 2016, 51% in 2017, and 54% in 2018.

[150] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor dismissals (including no papered, *nolle prosequi*, dismissed with plea, and dismissal plea agreements) as a percentage of misdemeanor dispositions at: 46% in 2003, 41% in 2004, 39% in 2005, 36% in 2006, 40% in 2007, 39% in 2008, 44% in 2009, 40% in 2010, 43% in 2011, 39% in 2012, 36% in 2013, 40% in 2014, 43% in 2015, 49% in 2016, 47% in 2017, and 51% in 2018.

[151] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor guilty pleas as a percentage of misdemeanor dispositions at: 21% in 2003, 23% in 2004, 26% in 2005, 41% in 2006, 36% in 2007, 34% in 2008, 31% in 2009, 36% in 2010, 32% in 2011, 29% in 2012, 31% in 2013, 30% in 2014, 28% in 2015, 27% in 2016, 28% in 2017, and 27% in 2018.

[152] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor diversion as a percentage of misdemeanor dispositions at: 8% in 2003, 9% in 2004, 5% in 2005, 10% in 2006, 11% in 2007, 14% in 2008, 15% in 2009, 14% in 2010, 17% in 2011, 23% in 2012, 25% in 2013, 21% in 2014, 20% in 2015, 18% in 2016, 18% in 2017, and 16% in 2018.

[153] Compiled from District of Columbia Courts Annual Reports, showing misdemeanor bench trials as a percentage of misdemeanor dispositions at: 3% in 2003, 4% in 2004, 4% in 2005, 5% in 2006, 5% in 2007, 5% in 2008, 6% in 2009, 8% in 2010, 6% in 2011, 7% in 2012, 6% in 2013, 7% in 2014, 7% in 2015, 5% in 2016, 5% in 2017, and 5% in 2018.

[154] The following thirty-five states ensure the right to a jury trial in the first instance for virtually all criminal offenses: Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details. Some states provide this right by judicial interpretation of state constitutional provisions while others have legislatively enacted it.

on appeal, effectively guaranteeing a jury trial right in every case.[155] Another three states have developed systems that stop short of a full jury trial right, but are more expansive than the constitutional minimum.[156] Only nine other jurisdictions have jury trial rights that, like the District's, set jury demandability at the constitutional minimum.[157]

Yet, even if the rationale of judicial efficiency or financial[158] cost still holds for the District today, for several reasons, it is not clear that these considerations should outweigh right to a jury of one's peers.

First, the right to a jury is a foundational right of the American legal system. It is one of the only rights enumerated in the original, unamended Constitution[159] and is given additional protection in the Sixth Amendment.[160] The constitutional language itself is unequivocal, ensuring the right to a jury trial for "all Crimes"[161] and in "all criminal prosecutions."[162] As many historians, legal scholars, and Supreme Court Justices have pointed out, the jury trial serves a score of critical democratic functions.[163] It ensures that community standards are represented in local courtrooms.[164]

Second, the Council itself, in considering legislation impacting the jury trial right in the District, has repeatedly discussed and considered numerous circumstances in which the jury serves a particularly important role in weighing the outcome of a case. This includes cases where civil liberties are at stake,[165] cases where subjectivity plays a large role in demarcating criminal

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[155] Arkansas, North Carolina, and Virginia. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[156] Hawaii (adopting a three-part test to determine an offense's severity), New Mexico (providing a jury trial right for all offenses punishable by more than ninety days), and New York (providing a full jury trial right throughout the state, but only for offenses punishable by six months in New York City). See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[157] Arizona, Connecticut, Delaware, Louisiana, Mississippi, Nevada, New Jersey, Pennsylvania, and Rhode Island. See Advisory Group Memo #31 – Supplementary Materials to the First Draft of Report #51 for further details.

[158] Considering that the 1994 reduction in jury-demandable offenses had no anticipated monetary impact, it is likewise unlikely that the reverse process, an expansion of jury-demandable offenses, would result in additional cost. Committee on the Judiciary Report on Bill 10-98, the "Omnibus Criminal Justice Reform Amendment Act of 1994" at 4 (indicating no monetary savings as a result of the amendment).

[159] U.S. Const. art. III, § 2, cl. 1 (The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury).

[160] U.S. Const. amend. VI, cl. 1 (In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed).

[161] U.S. Const. art. III, § 2, cl. 1.

[162] U.S. Const. amend. VI, cl. 1.

[163] *See*, *e.g.*, Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 Wisc. L. R. 133, 136-37 (1997); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[164] *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Apprendi v. New Jersey*, 530 U.S. 466, 4776 (2000).

[165] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, —that is, allowing for a jury trial—is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones will permit law enforcement against otherwise permitted activity—freedom of association, for instance—and thus the bill permits trial by jury.").

conduct,[166] and cases where law enforcement officers' credibility is at issue.[167] While these Council statements have been made in the context of specific offenses, these rationales apply much more broadly across misdemeanors.[168]

Third, rights-based arguments aside, the limitations on jury demandability produce two main problems in specific cases.

First, the existence of a divide between jury-demandable and non-jury demandable cases in which the former require greater prosecutorial and judicial resources than the latter distorts charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case. Prosecutors enjoy wide discretion in charging decisions and the overlap between the scope of conduct covered by particular offenses (to a lesser degree under the RCC than the current D.C. Code) gives prosecutors multiple options as to which crimes to charge in a given case. If a prosecutor wishes to avoid a jury trial for any reason—and to the extent that added time is required for a jury trial or a conviction is less likely,[169] a prosecutor may be incentivized to do so—he or she often can simply opt to charge a non-jury demandable offense. The extent to which prosecutors make their charging decisions based on whether the crime is jury demandable is difficult to measure because charging discretion may be based on so many different reasons and

[166] *See* Committee on the Judiciary Report on Bill 16-247, the "Omnibus Public Safety Act of 2006," at 7 ("Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt."); Committee on the Judiciary Report on Bill 18-151, the "Omnibus Public Safety and Justice Amendment Act of 2009," at 33 ("A key change recommended by the Committee has to do ensuring a defendant's right to a jury trial. The primary factor in the Committee's decision to ensure this right relates to the subjective nature of stalking. It seems highly appropriate that a jury of peers would be best equipped to judge whether the behavior is acceptable or outside the norm and indicative of escalating problems. As stated by PDS, '[s]talking is an offense for which the community, not a single judge, should sit in judgment. Community norms should inform decisions about whether behavior is criminal or excusable.'").

[167] *See* Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17 (emphasizing the importance of the jury in moderating prosecutorial charging decisions and the importance of removing the judge from having to make officer credibility findings as support for making assault on police officer offenses jury demandable).

[168] For example, for a charge of current D.C. Code § 22–1307, Crowding, obstructing, or incommoding (a 90 day offense) or other misdemeanor public order offenses the complainant of record and sole witness may be a law enforcement officer. Arguably, as with assault on a police officer, the same rationale of removing the judge from having to make officer credibility findings in a case would support making this offense jury demandable.

[169] Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("But while the Council's goal may have been efficiency, the effect on imprisonment rates was immediate and monumental. At the time, according to a report by the Court's executive officer, Superior Court judges were almost twice as likely as a jury to decide that someone was guilty—so reducing jury trials made the conviction rate skyrocket. For misdemeanors, the year prior to the MSA, only 46 percent of cases ended with a guilty verdict or a guilty plea. The year after, that number jumped to 64 percent. This wasn't exactly an unexpected consequence. Several councilmembers were sure to clarify that despite reducing criminal penalties, the MSA was tough on crime. Even though the maximum sentence for most of these crimes used to be one year, the actual sentence was already generally less than 180 days. Thus, explained Harold Brazil—then-Ward 6 councilmember and one of the Act's co-sponsors—the MSA would mean 'misdemeanants would actually do more time.' 'Crime in our society…[is] out of control,' Brazil argued at a Council hearing on April 12, 1994. 'Years and years of leniency and looking the other way and letting the criminal go has gotten us into this predicament.'").

there is no record as to the reason for choosing one charge over another.[170] However, there are two examples that indicate the impact of this practice.

One example of how restriction of jury demandability distorts charging is the use of attempt charges to avoid jury trials in threat cases. D.C. Code § 22-407 criminalizes threats to do bodily harm.[171] Because the authorized maximum penalty for threats to do bodily harm is six months, a criminal defendant charged with the offense is entitled to a jury trial.[172] The District's attempt statute, however, has a maximum authorized penalty of 180 days for non-crime of violence offenses, making an attempted threat to do bodily harm non-jury demandable.[173] Although it is legally possible to attempt a threat without actually completing a threat, the likelihood of this factual scenario both occurring and resulting in prosecution is exceedingly low.[174] Nonetheless, of the 6,556 charges brought under D.C. Code § 22-407 between 2009 and 2018, 56% were for attempted threats rather than completed threats.[175] As there is no practical difference in the authorized imprisonment penalty between the attempt and completed offense (the difference between 6 months and 180 days), such a high percentage of charges for attempted threats of bodily injury suggests charging decisions may be based on jury demandability rather than how the facts fit the law.

Another example of example of how restriction of jury demandability distorts charging is evidenced by the shift in the number of charges brought under D.C. Code § 22-405(b)—assault on a police officer (APO)—before and after the offense became jury demandable. In 2016, the D.C. Council passed the Neighborhood Engagement Achieves Results (NEAR) Act, which split the existing 180-day, non-jury demandable APO offense into a new APO offense and a resisting arrest offenses and increased the penalty for both to six months.[176] The apparent legislative purpose of this shift was to make sure that these offenses were decided by juries rather than judges.[177] But charging data suggests that this has not been the effect of the law. The number of charges for violations of D.C. Code § 22-405(b) remained relatively consistent within the range of 1,592 and

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[170] *But, see* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Reviewing more than 500 cases from 2019, City Paper found that over the course of one month, prosecutors dodged jury trials more than 24 times a week by taking a crime that is jury-demandable and charging it as another, counterintuitive crime that's not.").

[171] D.C. Code § 22-407 ("Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.").

[172] D.C. Code § 22-407; D.C. Code § 16-705.

[173] D.C. Code § 22-1803; D.C. Code § 16-705.

[174] *See Evans v. United States*, 779 A.2d 891, 894 (D.C. 2001) (holding that "if a threat fortuitously goes unheard, the person who utters it is guilty of an attempt, not the completed offense" but recognizing that "[a]s a practical matter, such unconsummated threats may be unprovable").

[175] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Also, of the 1,869 convictions under D.C. Code § 22-407 between 2009 and 2018, 72% were for attempted threats rather than completed threats. *Id.*

[176] Neighborhood Engagement Achieves Results Amendment Act of 2016 (effective June 30, 2016), D.C. Law 21-125.

[177] *See* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Ward 5 Councilmember Kenyan McDuffie, who wrote the NEAR Act, tells City Paper that the goal was the make the crime jury-demandable."); Committee on the Judiciary Report on Bill 360, the "Neighborhood Engagement Achieves Results Amendment Act of 2016," at 16-17.

1,712 for every two-year period between 2009 and 2016.[178] However, after the NEAR Act, for the period of 2017 to 2018, the combined number of charges for APO[179] and resisting arrest[180] dropped by about a thousand charges to a mere 529[181] This represents a more than 66% decrease in charging from the previous years. However, the number of charges brought for violations of D.C. Code § 22-404(a)—simple assault—saw a corresponding uptick with the passage of the NEAR Act. For two-year periods between 2009 and 2016 simple assault charges were in the range of 3,221 to 3,865, but rose about a thousand charges to 5,282 for the period of 2017 to 2018.[182] The elements of the simple assault offense are identical to the prior APO offense, except that the complainant's status as a law enforcement officer need not be proven. And the NEAR Act did not explicitly preclude prosecutors from using their discretion to charge what previously had been an APO case as a simple assault. As there is no practical difference in the authorized imprisonment penalty between the revised offenses (revised APO and resisting arrest) and simple assault (the difference between 6 months and 180 days), the shift in charges so simple assault suggests these charging decisions may be based on jury demandability rather than how the facts fit the law.

The second main problem caused by the limitation of the right to a jury is that the maximum term of imprisonment is sometimes an inaccurate proxy for the real seriousness of a criminal charge to a particular person. Some offenses carry severe consequences for those charged despite having relatively low terms of incarceration yet are not afforded a jury trial.

One example of how an imprisonment penalty misrepresents the seriousness of a criminal charge is D.C. Code § 22-3010.01—misdemeanor sexual abuse of a child or minor—a 180-day offense that currently is not entitled to a jury trial.[183] But the offense is a "registration offense" under D.C. Code § 22-4001(8)(A).[184] Because of this, a person convicted of misdemeanor sexual abuse of a child or minor is subject to mandatory sex offender reporting requirements for ten years following their conviction or release.[185] The collateral consequences of sex offender registration—including burdensome restrictions on residency, internet usage, and access to public housing have been extensively documented.[186] The long-term and public nature of reporting requirements, the increased exposure to criminal liability for failures to report, and the additional social and structural consequences that accompany sex offender registration indicate that the seriousness of

[178] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Specifically, the numbers were: 1,712 in 2009-2010, 1,592 in 2011-2012, 1,659 in 2013-2014, 1,697 in 2015-2016. *Id.*

[179] The 2017-2018 charges for the unrevised and revised APO, D.C. Code § 22-405, were 355, with 80 convictions (a 23% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[180] The 2017-2018 charges for D.C. Code § 22-405.01 were 174, with 25 convictions (a 14% conviction rate). CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[181] CCRC Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[182] The charges for D.C. Code § 22-404(a) were: 3,221 in 2009-2010, 3,506 in 2011-2012, 3,432 in 2013-2014, 3,865 in 2015-2016, and 5,282 in 2017-2018.

[183] D.C. Code § 22-3010.01. See also misdemeanor sexual abuse, D.C. Code § 22–3006, carrying a 180-day (non-jury demandable) maximum imprisonment penalty.

[184] D.C. Code § 22-4001(8)(A).

[185] D.C. Code § 22-4003.

[186] *See*, *e.g.*, Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531, 532-539 (2007); Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (September 2007).

a misdemeanor sexual abuse or other charge involving sex offender registration may warrant elevated due process rights as a matter of policy.[187]

A second example of how imprisonment penalties do not accurately represent the seriousness of a criminal charge is when that charge could result in deportation. In 2018, an *en banc* decision of the D.C. Court of Appeals in *Bado v. United States* first held that a criminal defendant is entitled to a jury trial under the United States Constitution if charged with an offense that could result in deportation.[188] Although this decision addressed the fundamental issue of severe consequences resulting from juryless convictions, it has also produced its own set of challenges. As Senior Judge Washington noted in his concurring opinion, the court's decision created an odd dichotomy in which non-citizens are now entitled to more due process in the District's Superior Court than citizens for the exact same offense.[189] While the *Bado* decision extends jury demandability to relevant crimes for non-citizens, these non-citizens are in the difficult position of having to reveal their immigration status in open court in order to claim a constitutional right.[190]

The partial restoration of a jury right may have significant benefits to public safety insofar as this change in District law helps to restore community support for the criminal justice system.[191] In his concurring opinion to the *Bado* decision, Judge Washington urged the D.C. Council to adopt a full jury trial right and stating:

> Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial.[192]

However, the revised statute does not address all rights-based and other problems with restriction of jury-demandability. As long as the right to a jury trial is restricted for some charges and the prosecution of those charges require fewer resources or are more likely to result in a conviction, there will continue to be incentives to base charging decisions on jury demandability rather than what charge best fits the facts of the case at hand. In addition, as noted above, the revised statute's codification of the *Bado* holding requires non-citizen defendants to disclose their citizenship status in court in order to avail themselves of jury demandability. Finally, there may

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[187] The DCCA has previously held that, as a matter of law, a right to a jury does not exist for a charge of misdemeanor child sexual abuse under current law. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008).

[188] *Bado v. United States*, 186 A.3d 1243, 1246-47 (D.C. 2018) (en banc) ("We hold that the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury.")

[189] *Bado v. United States*, 186 A.3d 1243, 1262 (D.C. 2018) (en banc) ("I write separately because I am concerned that our decision today, while faithful to the dictates of *Blanton*, creates a disparity between the jury trial rights of citizens and noncitizens that lay persons might not readily understand. That disparity is one that the legislature could, and in my opinion, should address. The failure to do so could undermine the public's trust and confidence in our courts to resolve criminal cases fairly.").

[190] This point previously has been raised the Public Defender Service for the District of Columbia, a CCRC Advisory Group Member. *See* CCRC Comments on First Draft of Report #41 Ordinal Ranking of Maximum Imprisonment Penalties, 2 (November 15, 2019).

[191] Tom R. Tyler et al., The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement, *Psychological Science in the Public Interest*, 16, 75-109. (Available at http://dx.doi.org/10.1177/1529100615617791.)

[192] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (en banc).

be significant judicial efficiency costs that arise from litigation over the right to a jury for specific charges and individual defendants—efficiency costs that would not exist if the District followed the majority of states in extending a right to a jury in every criminal case carrying an imprisonment penalty.

The revised statute is a compromise solution to restore jury demandability that mitigates the potential impact on judicial efficiency. The revised statute, however, should not be construed as a permanent judgment as to the appropriate balance between judicial efficiency and the right to a jury of one's peers. A future expansion of jury-demandability to all criminal offenses may be feasible and warranted in the near future.

Current as of February 19, 2020
RCC § 22E-4301. Rioting.

(a) *Offense*. An actor commits rioting when that actor:
  (1) Knowingly attempts or commits a District offense involving bodily injury, taking of property, or damage to property;
  (2) Reckless as to the fact 7 or more other people are each personally and simultaneously attempting or committing a District offense involving bodily injury, taking of property, or damage to property in the area perceptible to the actor.
(b) *No attempt liability*. The general attempt provision in RCC § 22E-301 does not apply to this section.
(c) *Penalties*. Rioting is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "bodily injury," and "property" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the rioting offense for the Revised Criminal Code (RCC). The offense proscribes knowingly participating in a group of eight or more people who are each personally engaging in a criminal harm involving injury, property loss, or property damage. The revised offense replaces D.C. Code § 22-1322 (Rioting or inciting to riot).*

Paragraph (a)(1) requires that the accused act "knowingly," a defined term,[193] which here means the person must be practically certain that he or she is personally attempting or committing a District crime involving bodily injury, taking of property, or damage to property.[194] A person who is engaging in conduct that is merely obnoxious, disruptive, or provocative is not liable for rioting.[195] "Bodily injury" is defined in RCC § 22E-701 and means physical pain, illness, or any impairment of physical condition. "Property" is defined in RCC § 22E-701 and means "anything of value." Conduct that threatens a non-criminal harm or a harm not involving bodily injury, taking of property, or damage to property[196] is not a predicate for rioting liability.

Paragraph (a)(2) requires proof that seven[197] or more persons are also engaged in riotous conduct at the same time, in the same place. The riotous conduct of other persons need not be the

[193] RCC § 22E-206.
[194] RCC offenses that involve bodily injury, loss of property, or damage to property include: Assault (RCC § 22E-1202), Robbery (RCC § 22E-1201), Murder (RCC § 22E-1101), Theft (RCC § 22E-2101), Arson (RCC § 22E-2501), Criminal Damage to Property (RCC § 22E-2503), and Criminal Graffiti (RCC § 22E-2504).
[195] The RCC does not outlaw "all 'offensive conduct' that disturbs 'any neighborhood or person.'" *See Cohen v. California*, 403 U.S. 15, 22 (1971); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508-09 (1969)("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression…[T]o justify prohibition of a particular expression of opinion, [the State] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").
[196] For example, the RCC criminal threats statute is not included in the scope of the revised rioting statute.
[197] The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense, RCC § 22E-4301 requires the defendant behave in a riotous manner with seven other

precise type of conduct the actor is engaged in, but must also be criminal harm involving bodily injury, taking of property, or damage to property.[198] The revised statute does not require that the eight people act in concert with one another[199] or organize together in advance.[200] However, the others' conduct must be in a location where the actor can see or hear their activities.[201] Paragraph (a)(2) also requires a culpable mental state of recklessness, a term defined in RCC § 22E-206, which here means the accused must disregard a substantial risk that seven or more persons are engaged in riotous conduct nearby. A person who is merely present in or near a riot is not criminally liable under the revised rioting statute,[202] nor is a person engaged in First Amendment activities or seeking to prevent criminal activities liable.[203]

Subsection (b) specifies that there is no attempt liability for the rioting offense as a whole. However, attempts to commit specified District crimes are part of the element specified in paragraph (a)(1).

Subsection (c) provides the penalty for this offense. [*See* Second Draft of Report #41.]

Subsection (d) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised rioting statute changes current District law in four main ways.*

First, the revised rioting statute has only one gradation that addresses attempted and completed criminal harms involving bodily injury, taking of property, or damage to property. The current rioting statute addresses a "public disturbance" that involves "tumultuous and violent conduct" and is divided into two sentencing gradations.[204] The lower grade consists of such conduct that merely "creates grave danger of damage or injury to property or persons" or incites persons to such risk-creating behavior.[205] Limited case law indicates that this lower grade does

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riotous people nearby. However, the revised failure to disperse offense, RCC § 22E-4302, does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot.

[198] For example, a person may engage in rioting by spray painting graffiti on a building while a dozen others are breaking windows and assaulting a security guard nearby.

[199] The revised code does not incorporate the common law requirement that persons act "with intent mutually to assist each other against any who shall oppose them." *Riot*, Black's Law Dictionary (2nd Ed.).

[200] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("It is not necessary for the members of the assemblage to have acted pursuant to an agreement or plan, either made in advance or made at the time, or for the members to concentrate their conduct on a single piece of property or one or more particular persons. The Defendant does not have to personally know or be acquainted with the other members of the assemblage. The other members of the assemblage need not be identified by name or their precise number established by the evidence.").

[201] Distances may vary widely, depending on facts including crowd density, noise, and height. *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

[202] S*ee United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("The mere accidental presence of the Defendant among persons engaged in such a public disturbance, however, without more, does not establish willful conduct or involvement.").

[203] For example, the following persons are not liable under the RCC rioting statute: a journalist who is present to observe and report on riotous activities; a demonstrator (or counter-demonstrator) who decides to peacefully remain at a particular location in protest; a community leader who acts as a "counterrioter" and attempts to calm the crowd; or a local resident using public ways to leave and return home through a group engaged in riotous activity.

[204] D.C. Code § 22-1322(a).

[205] D.C. Code §§ 22-1322(b) and (c).

not include "minor breaches of the peace," but instead reaches "frightening group behavior" and "will usually be accompanied by the use of actual force or violence against property or persons."[206] The higher grade consists of inciting such conduct that actually causes "serious bodily harm or there is property damage in excess of $5,000."[207] The current statute's higher gradation has a maximum penalty twenty-times that of the lower gradation.[208] In contrast, the revised statute consists of one penalty gradation based on the attempt or commission of actual criminal harms involving bodily injury, taking of property, or damage to property. Revising the statute to require the attempt or commission of actual harms by the actor more clearly distinguishes rioting liability from minor breaches of the peace by a group, and, unlike the current statute, does not base the degree of punishment on the extent of others' misconduct.[209] Or, in the case of police-monitored crowds, such conduct may violate the RCC failure to disperse offense.[210] This change improves the clarity, consistency, and proportionality of the revised statute.

Second, the revised statute requires eight people to form riot. The District's current rioting statute states that a riot is a "public disturbance involving an assemblage of 5 or more persons..."[211] Legislative history indicates that the threshold of five people was a subjective judgment based, in significant part, on administrative considerations that it is more convenient to prosecute five or more defendants together for the composite offense of rioting than to prosecute them separately for the underlying assault and property offenses.[212] In contrast, the revised statute raises the number of people that must be involved in riotous conduct to eight. This number excludes many common types of group misconduct from being categorized as a riot,[213] focusing the offense on large-scale events that may give rise to a mob mentality and overwhelm the ability of a few law enforcement officers to control the scene. This change improves the proportionality of the revised offense and reduces an unnecessary overlap between the composite offense of rioting and common occurrences of predicate offenses.

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[206] *United States v. Matthews*, 419 F.2d 1177, 1184-85 (1969) ("The conduct involved must be something more than mere loud noise-making or minor breaches of the peace. The offense requires a condition that has aroused or is apt to arouse public alarm or public apprehension where it is occurring. It involves frightening group behavior. Tumultuous and violent conduct will usually be accompanied by the use of actual force or violence against property or persons. At the very least it must be such conduct as has a clear and apparent tendency to cause force or violence to erupt and thus create a grave danger of damage or injury to property or persons.").

[207] D.C. Code § 22-1322(d).

[208] The maximum imprisonment penalty for violations of subsection (b) and (c) is 180 days, compared to a 10-year maximum for a violation of subsection (d).

[209] The felony gradation in subsection (c) of the current rioting statute does not specify any culpable mental state as to the amount of overall injury resulting from the riot. Strict liability for the results of the riot would mean that a person would be liable even if a factfinder found that the defendant could not and should not have been expected to know that the bad results could occur—the defendant is liable even for unforeseeable accidents that may arise from the unanticipated actions of others in the disorderly group.

[210] RCC § 22E-4302.

[211] D.C. Code § 22-1322(a).

[212] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967 (Fred M. Vinson, Jr., Assistant Attorney General, Criminal Division, Department of Justice: "There are statutes in the states going as high as ten people. There is one statute that may go as high as 20 people. The New York statute is four people. Several statutes are five people. It was our subjective judgment that five or more people might rise to the dignity of a riot. Certainly fewer people than that can cause great trouble. However, fewer people than that causing trouble are much easier to handle, prosecutively, with regard to substantive offenses."); *see also United States v. Bridgeman*, 523 F.2d 1099, 1113 (D.C. Cir. 1975) (finding that the District's rioting statute was a codification of common law rioting except for its requirement of 5 participants).

[213] Common examples include a three-versus-three, mutually-agreed upon street fight and a five-co-defendant robbery.

Third, the revised statute eliminates incitement as a distinct basis for rioting liability.[214] Subsection (c) of the current rioting statute separately criminalizes behavior that "incites or urges other persons to engage in a riot," and subsection (d) imposes heightened liability for conduct that "incited or urged others to engage in the riot" and serious bodily harm or property damage in excess of $5,000 resulted.[215] The terms "incite" and "urge" are not defined in the statute or in case law.[216] Legislative history suggests that Congress' targeting of incitement as a form of rioting may have been based on an assumption about the operation of race riots in the 1960s—subsequently deemed erroneous—that they were premeditated and orchestrated.[217] Regardless, legislative history suggests that both "incite" and "urge" were understood as terms "nearly synonymous with 'abet'" and refer to words or actions that "set in motion a riotous situation."[218] In contrast, under the revised statute, a person who "incites" or "encourages" rioting is only liable if his or her conduct suffices to meet requirements for liability as an accomplice[219] or is part of a criminal conspiracy.[220] The revised statute relies on general provisions regarding accomplice and conspiracy liability to more precisely establish the limits of what instances of "incitement" or "urging" are criminal, and to provide a proportionate penalty for acting as an accomplice or co-conspirator. This change improves the clarity, consistency, and proportionality of the revised offense.

Fourth, the revised offense bars any attempt liability. Under current law, rioting or inciting to riot is subject to the general attempt statute.[221] In contrast, under the revised offense, even if a person satisfies the required elements for attempt liability under RCC § 22E-301 as to rioting, that person has committed no offense under the revised code. Completed rioting is already an inchoate crime, closely related to predicate offenses involving bodily injury, taking of property, and damage to property, for which the RCC provides separate liability. This change improves the proportionality of the revised statute.

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[214] Speech that incites violence as punished as disorderly conduct. RCC § 22E-4001(a)(2)(B). Abusive speech that is likely to provoke violence is punished as disorderly conduct. RCC § 22E-4001(a)(2)(C).

[215] D.C. Code § 22-1322(c).

[216] *But see United States v. Jeffries*, 45 F.R.D. 110, 117 (D.D.C. 1968) ("In the District of Columbia riot statute speech is only regulated under (b) where it is so closely brigaded with illegal action as to be an inseparable part of it.") (citing *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts*, 383 U.S. 413, 426 (1966) (J. Douglas concurring)).

[217] In support of the Anti-Riot Act, Rep. Joel Broyhill testified that recent District riots were premeditated, proclaiming, "These outbreaks of lawlessness that have become a scourge throughout this nation are not spontaneous in their origin. They are conceived in the twisted minds of the hate-mongers, a trained cadre of professional agitators who operate in open defiance of law, order, and decency…They plot the destruction…with zeal and devotion to stealth and secrecy." *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Page 7. However, in 1968, President Johnson's "Kerner Commission" completed an in-depth study of riots in ten American cities. One of the commission's key findings was that "The urban disorders of the summer of 1967 were not caused by, nor were they the consequence of any organized plan or 'conspiracy.'" National Advisory Commission on Civil Disorders Report, February 29, 1968, at Page 4.

[218] *See* Hearing Before Subcommittee No. 4 of the Committee on the District of Columbia, on H.R. 12328, H.R. 12605, H.R. 12721, H.R. 12557, Oct. 4, 1967, at Pages 23-25.

[219] *See* RCC § 22E-210.

[220] *See* RCC § 22E-303.

[221] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both.").

Beyond these changes to current District law, one other aspect of the revised rioting statute may be viewed as a substantive change of law.

The revised statute does not require that rioting occur in a public location. The current rioting statute defines rioting as a "public disturbance," but does not explain whether the term "public" refers to the character of the location of the riot or to the persons whose tranquility is disturbed. There is no case law on point.[222] In contrast, the revised statute provides that where eight or more people are simultaneously engaging in conduct that causes injury or damage, that group conduct amounts to a riot, irrespective of where it occurs. Such disturbances, whether in a sports arena or Congress,[223] run a similar risk of escalating into mob-like action. This change clarifies the revised statute and eliminates an unnecessary gap in liability.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised statute clarifies that an unlawful taking of property may be a predicate for rioting liability. The current rioting statute[224] criminalizes "tumultuous or violent conduct or the threat thereof [that] creates grave danger of damage or injury to property or persons." District case law has established that this reference to "injury to property" includes "either actual physical damage to property or the taking of another's property without the consent of the owner."[225] The revised rioting statute specifically refers to conduct that not only involves unlawful "damage" to property but also unlawful "taking" of property. This change clarifies the revised statute.

Second, the revised rioting statute replaces the archaic term "assemblage" with a reference to other persons being in a location where the actor can perceive them at the time of the target conduct, and requires a culpable mental state of recklessness as to their activities. The current law defines a riot as an "assemblage of 5 or more persons,"[226] but does not define "assemblage." District case law, however, has held that an "assemblage" refers to a group of people in close physical proximity to the defendant such that the person could "could reasonably have been expected to see or to hear" their action.[227] The revised statute codifies and clarifies this requirement as to others nearby activities by using the standard culpable mental state definition of "reckless." The actor need not be practically certain as to the scope and nature of others' activities, but must be aware of a substantial risk as to the others' numbers and conduct. No special connection or common purpose is required of the other persons engaged in unlawful conduct. This change clarifies and improves the consistency of the revised statute.

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[222] *But see, e.g., Ramsey v. United States*, 73 A.3d 138, 147 (D.C. 2013) (reversing a conviction for disorderly conduct, with an element that location of the offense be open to the general public, where the defendant was alleged to have attempted to urinate in a secluded, dark alley, away from any businesses, residences, or people).

[223] *See, e.g.,* United States House of Representatives, *The Most Infamous Floor Brawl in the History of the U.S. House of Representatives: February 06, 1858*, History, Art, and Archives (available at https://history.house.gov/Historical-Highlights/1851-1900/The-most-infamous-floor-brawl-in-the-history-of-the-U-S--House-of-Representatives/).

[224] DC Code § 22-1322.

[225] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969).

[226] D.C. Code § 22-1322(a).

[227] *See United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("In determining whether there was an assemblage, you may take into account only what was taking place in the general vicinity where the Defendant is claimed to have engaged in the public disturbance. You may consider only the acts, shouts and noise of individuals engaged in tumultuous and violent conduct within the general awareness of the Defendant, that is, the activities which on the evidence you find he could reasonably have been expected to see or to hear at or about the time he engaged in the public disturbance if, in fact, you determine he did so engage.").

Third, the revised statute requires a culpable mental state of knowledge for an actor engaging in the riotous conduct. The current rioting statute specifies that a person must "willfully" engage in, incite, or urge a riot,[228] however, the current statute does not define "willfully." District case law states that "willfulness" is required of each of the other riot participants also.[229] The RCC clarifies this culpable mental state requirement as to riotous activities by using the standard definition of knowledge[230] as the culpable mental state for paragraph (a)(1). Applying a knowledge culpable mental state requirement to interpret statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[231] This change clarifies and improves the consistency of the revised statute.

Relation to National Legal Trends. *The revised rioting statute's above-mentioned substantive changes to current District law have mixed support in national legal trends.*

First, defining rioting as a form of group disorderly conduct is consistent with criminal codes in a minority of reform jurisdictions. Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[232] all but two have a rioting statute.[233] Six of these twenty-seven reform jurisdictions with a rioting statute explicitly define rioting as disorderly conduct in a group similar to the RCC.[234] Similarly, the MPC defines rioting as disorderly conduct in a group.[235] The remaining twenty-one rioting statutes do not reference "disorderly conduct",[236]

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[228] D.C. Code § 22-1322.

[229] *United States v. Matthews*, 419 F.2d 1177, 1185 (1969) ("[Willfully] means the Defendant and at least four members of the assemblage participated in the public disturbance on purpose, that is, that each knowingly and intentionally engaged in tumultuous and violent conduct consciously, voluntarily and not inadvertently or accidentally.").

[230] RCC § 22E-206.

[231] *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (a defendant generally must "know the facts that make his conduct fit the definition of the offense," even if he does not know that those facts give rise to a crime. (Internal citation omitted)).

[232] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[233] All reform jurisdictions except Washington and Wisconsin criminalize engaging in a public riot. Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Me. Rev. Stat. tit. 17-A, § 503; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.J. Stat. 2C:33-1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Ohio Rev. Code Ann. § 2917.03; Or. Rev. Stat. Ann. § 166.015; 18 Pa. Cons. Stat. Ann. § 5501; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104. Washington has a related offense called Criminal Mischief. Wash. Rev. Code Ann. § 9A.84.010.

[234] Delaware, Hawaii, Maine, New Jersey, Ohio, and Pennsylvania. Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; Me. Rev. Stat. tit. 17-A, § 503; N.J. Stat. § 2C:33-1; Ohio Rev. Code Ann. § 2917.03; 18 Pa. Cons. Stat. Ann. § 5501.

[235] Model Penal Code § 250.1. Riot; Failure to Disperse.

[236] Case law research was not performed to determine how many states have held that disorderly conduct is a lesser-included offense of rioting.

but instead refer to "tumultuous or violent conduct" or a "disturbance of public peace" or similar language without specifying how such conduct relates to disorderly conduct.[237]

Second, eliminating incitement as a distinct basis for rioting liability is broadly supported by criminal codes in reform jurisdictions. Only eleven reform jurisdictions distinctly criminalize incitement to riot at all.[238] Nine of those eleven states punish incitement as a misdemeanor or lower-level felony as compared to the 10-year penalty in the District.[239] Only the Dakotas have a maximum penalty for incitement that is as high as the District of Columbia's current law.[240] The MPC rioting statute does not include an incitement provision.[241]

Third, the revised rioting statute's single gradation structure is consistent with approximately half of the criminal codes in reformed jurisdictions and the MPC.[242] Fifteen reform jurisdictions have multiple gradations of rioting in a public place.[243] Most of these jurisdictions grade more severely either on the presence or use of a dangerous weapon during the rioting,[244] or on the infliction of physical injury or substantial property damage.[245]

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[237] Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Or. Rev. Stat. Ann. § 166.015; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104.

[238] Alabama, Arkansas, Colorado, Connecticut, Kansas, Kentucky, Montana, New York, North Dakota, South Dakota, and Tennessee. Ala. Code § 13A-11-4; Ark. Code § 5-71-203; Colo. Rev. Stat. Ann. § 18-9-102; Conn. Gen. Stat. Ann. § 53a-178; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. Ann. § 525.040; Mont. Code Ann. § 45-8-104; N.Y. Penal Law § 240.08; N.D. Cent. Code Ann. § 12.1-25-01; S.D. Codified Laws §§ 22-10-6, 22-10-6.1; Tenn. Code Ann. § 39-17-304.

[239] Alabama punishes incitement as a misdemeanor. Ala. Code § 13A-11-4. Arkansas punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Ark. Code § 5-71-203. Colorado punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Colo. Rev. Stat. Ann. § 18-9-102. Connecticut punishes incitement as a misdemeanor. Conn. Gen. Stat. Ann. § 53a-178. Kansas punishes incitement as a low-level felony. Kan. Stat. Ann. § 21-6201. Kentucky punishes incitement as a misdemeanor. Ky. Rev. Stat. Ann. § 525.040. Montana punishes incitement outside a correctional institution as a misdemeanor. Mont. Code Ann. § 45-8-104. New York punishes incitement as a misdemeanor. N.Y. Penal Law § 240.08. Tennessee punishes incitement as a misdemeanor. Tenn. Code Ann. § 39-17-304.

[240] The rioting statutes in the Dakotas each include an additional limitation. North Dakota punishes incitement as a Class B felony only if: (1) the person incites five or more people or (2) the riot involves 100 or more people. N.D. Cent. Code Ann. § 12.1-25-01. South Dakota punishes incitement as a Class 2 felony only if the person also engages in rioting himself. S.D. Codified Laws §§ 22-10-6, 22-10-6.1.

[241] Model Penal Code § 250.1. Riot; Failure to Disperse.

[242] *Id*.

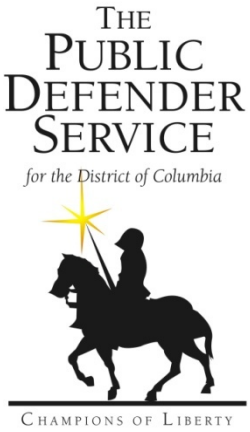
[243] Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Dakota, Tennessee, and Utah. Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b); Ind. Code Ann. § 35-45-1-2(Sec. 2); Ky. Rev. Stat. § 525.020; Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); N.Y. Penal Law § 240.06; N.D. Cent. Code Ann. § 12.1-25-01(4); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3). Some states recognize that a penal institution is not a public place or punish prison rioting as a distinct offense. *See* N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-301(3); Wash. Rev. Code Ann. § 9.94.010.

[244] Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

[245] Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

Finally, there is strong support in revised statutes for requiring at least recklessness as to the predicate conduct. A majority of the 27 reform jurisdictions that outlaw rioting require at least recklessness as to whether the actor's conduct causes public alarm.[246]

[246] Ala. Code § 13A-11-3 ("intentionally or recklessly"); Ariz. Rev. Stat. Ann. § 13-2903 ("recklessly"); Ark. Code Ann. § 5-71-201 ("knowingly"); Conn. Gen. Stat. Ann. § 53a-176 ("intentionally or recklessly"); Del. Code Ann. tit. 11 § 1302 ("with intent to…"); Haw. Rev. Stat. Ann. § 711-1103 ("with intent to…" or with a weapon); 720 Ill. Comp. Stat. Ann. 5/25-1 ("knowing or reckless"); Ind. Code Ann. § 35-45-1-2 ("recklessly, knowingly, or intentionally"); Ky. Rev. Stat. § 525.030 ("knowingly"); Me. Rev. Stat. tit. 17-A, § 503 ("with intent to…" or with a weapon); Minn. Stat. Ann. § 609.71 ("by an intentional act"); Mo. Ann. Stat. § 574.050 ("knowingly"); Mont. Code Ann. § 45-8-103 ("purposely and knowingly"); N.H. Rev. Stat. § 644:1 ("purposely or recklessly"); N.J. Stat. 2C:33-1("with purpose to…"); N.Y. Penal Law § 240.05 ("intentionally or recklessly"); Ohio Rev. Code Ann. § 2917.03 ("with purpose to…"); Or. Rev. Stat. Ann. § 166.015 ("intentionally or recklessly"); 18 Pa. Cons. Stat. Ann. § 5501 ("with intent to…" or with a weapon); Tenn. Code Ann. § 39-17-302 ("knowingly"); Tex. Penal Code Ann. § 42.02 ("knowingly"); Utah Code Ann. § 76-9-104 ("knowingly or recklessly"). Case law research was not performed to determined the culpable mental states where statutes were silent in Alaska, Colorado, Kansas, North Dakota, and South Dakota.



TESTIMONY OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

concerning

THE COMPREHENSIVE POLICING AND JUSTICE AMENDMENT ACT OF 2020

BILL 23-0882
Presented by

Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

October 15, 2020

Avis E. Buchanan, Director
Public Defender Service
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Thank you for the opportunity to testify on Bill 23-0882, the Comprehensive Policing and Justice Amendment Act of 2020. I am Katerina Semyonova, Special Council to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia. PDS strongly supports this bill and appreciates the work of this Committee in enacting its emergency and temporary versions. PDS makes a number of recommendations for amending the language of the bill including: expanding the ban on neck restraints, making Metropolitan Police Department (MPD), Department of Corrections (DOC), and Department of Youth Rehabilitation Services (DYRS) employees mandatory reporters of abuse by staff, expanding access to body worn camera, allowing the Office of Police Complaints (OPC) to receive anonymous complaints, requiring OPC to make recommendations for action on sustained complaints, improving transparency of OPC findings, clarifying the qualifications of the attorney member to be appointed to the Use of Force Review Board, ensuring the right to a jury trial in all misdemeanor cases where the prosecution relies on police testimony, and eliminating consent searches in traffic stops. PDS also proposes four ways that the Council can more broadly achieve the purpose of this legislation: limiting pretextual police stops, reforming field arrest and citation and release practices, eliminating the "high crime area" basis for stop and frisk, and requiring consultation with counsel before any interrogation of youth who are under age 18.

PDS commends the Council and the Mayor for unanimously passing policing reforms through the temporary and emergency versions of this legislation. These reforms begin to address the danger that policing too often poses to the District's Black residents by banning neck restraints, legislating standards for the deadly use of force, and requiring

affirmative consent for searches. They also enhance training of police officers, make reforms to the Use of Force Review Board, and provide for more transparency in police conduct through the release of body worn camera footage in instances of substantial use of force or officer-involved killings.

Nonetheless, there is much more work to be done. The most recent data that MPD was compelled to provide through the NEAR Act showed that 72% of the individuals that MPD stopped during the reported period were Black.[1] Black youths made up nearly 89% of the people under 18 who were stopped and were stopped at 10 times the rate of their white peers.[2] MPD's Narcotics Special Investigation Division (NSID) reported 94% of the individuals who were searched or who had their property searched during the time reported were Black.[3] NSID reported that 100% of its use of force incidents were against Black residents.[4] Many of these stops, arrests, and searches create police or court records that then hinder Black residents from advancing in education, obtaining gainful employment, and securing stable housing. Thus, the targeting of Black residents for police enforcement helps drive a disparity in wealth that has amounted to white households in DC having a financial net worth that is more than 81 times greater than the

[1]MPD Stop Data Report, February 2020. Available at: https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Report.pdf

[2] NEAR Act data analysis by the ACLU. Available at: https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf

[3] A Limited Assessment of Data and Compliance from August 1, 2019 - January 31, 2020, MPD Narcotics and Specialized Investigations Division Available at: https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf

[4] *Id*.

net worth of Black households.[5] Addressing the systemic and race-based inequality and terror caused by policing will require much legislation and policy change. As the Council moves forward with this reform, PDS urges the Council to employ a public health approach and to consider practices such as Justice Reinvestment[6] that look at the billions of dollars spent on incarceration and policing and examine how those dollars could be better deployed to improve lives in the most-heavily impacted communities through education, jobs, housing, and medical and mental health care.

With respect to changes to the language of the Comprehensive Policing and Justice Amendment Act of 2020, PDS recommends extending the prohibition on the use of neck restraints to all DYRS and DOC staff. PDS also recommends including a mandate that an officer or staff member who witnesses the use of a neck restraint attempt to stop that officer or staff member.

Further, the Council should create an affirmative duty for all MPD, DOC, and DYRS staff, and prosecutors to report violent conduct, including neck restrains, unlawful threats, and known violations of constitutional rights committed by staff members to their agency's chain of command and for violations by MPD, to OPC. Many professions, such as teachers, social workers, and doctors, have mandatory reporting requirements because their professions lead them to learn of abuse that is often hidden from public view.[7] Correctional officers are already required to report instances of sexual abuse that occur

[5] Urban Institute, Research Report, The Color of Wealth in the Nation's Capital, 2016. Available at: https://www.urban.org/sites/default/files/publication/85341/2000986-2-the-color-of-wealth-in-the-nations-capital_8.pdf

[6] https://chicagosmilliondollarblocks.com/

[7] D.C. Code § 4–1321.02, Persons required to make reports; procedure.

hidden behind prison walls around the country.[8] Police officers should not be treated any differently. When a police officer witnesses a fellow police officer abusing their authority, they should be required to make an immediate report. When corrections staff abuse residents in their custody, at times the only way to ensure prompt reporting of the abuse and to prevent further abuse is through mandated employee reporting. To protect District residents and to assist the District in identifying abusive actors within MPD, DOC, and DYRS, staff at those agencies and prosecutors who see abuse, including on body worn camera footage, should be required to report it to agency leadership and to OPC.

Section 103 of the Comprehensive Policing and Justice Amendment Act requires MPD to release the "body-worn camera recordings of all officers who committed the officer-involved death or use of force." While this section has already resulted in greater transparency regarding officer caused deaths, limiting the disclosure to the officers who committed the death or serious use of force may provide only a partial picture of the circumstances leading up to the officer-involved death. In the interests of accountability and transparency, MPD should be required to release the body worn camera of "all officers at the scene prior to and during the officer-involved death or serious use of force." PDS also recommends that the Council codify the definition of "serious use of force" rather than incorporating an MPD general order, which could change without notice to the public. If the Council incorporates the definition from MPD General Order

[8] There are already some mandatory reporting requirements that apply to DOC and DYRS. Pursuant to the federal Prison Rape Elimination Act regulations at 28 CFR § 115.61, staff in jails and prisons are already required to "report immediately and according to agency policy any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility." Prisons and jails must designate an individual to whom sexual abuse and harassment is reported. PREA is enforced at local facilities including DOC and DYRS through federal grant programs.

901.07[9], it should include all body strikes with an impact weapon, rather than just strikes of the head, and instances of sexual abuse such as committed during searches by then MPD Officer Sean Lojacono.[10]

PDS believes that there are three changes that the Council can make to section 105 of the Comprehensive Policing and Justice Reform Amendment Act regarding OPC that would have an immediate and large impact in promoting police accountability. First, individuals should be able to submit anonymous complaints.[11] If allowing the submission of all anonymous complaints presents a budgetary hurdle, then at a minimum, individuals should be able to anonymously submit video to OPC through OPC's website and OPC should use that video as the basis of the complaint. Nationwide, bystander video has been sufficient time and again to expose abuse by police and to raise the need for investigation and action. Once video is submitted to OPC, OPC can investigate the complaint by pulling body worn camera for the incident and interviewing involved police officers. The

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[9] MPD General Order 901.07 provides the following definition of "serious use of force." PDS recommends defining the term in the bill and adding the underlined language.

Serious use of force – actions by members including: a. All firearm discharges by a member with the exception of range and training incidents, and discharges at animals; b. All uses of force by a member resulting in a serious physical injury; c. All head and body strikes with an impact weapon; d. All uses of force by a member resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ; e. All incidents where a person receives a bite from an MPD canine; f. All uses of force by an MPD member involving the use of neck restraints or techniques intended to restrict a subject's ability to breathe; ~~and~~ (g) all instances of sexual abuse; ~~g~~ (h) All other uses of force by a member resulting in a death.

[10] Video of then MPD Officer Sean Lojacono conducting an invasive and an unconstitutional search is available at: https://www.aclu.org/press-releases/aclu-dc-settles-case-against-dc-police-officer-anal-search-during-stop-and-frisk.

[11] Various cities allow the submission of anonymous complaints including Seattle (https://www.seattle.gov/opa/complaints/file-a-complaint/anonymous-complaint-form), Baltimore (https://www.baltimorecountymd.gov/Agencies/police/complaints.html), and Miami (https://miamiflpd.mycusthelp.com/WEBAPP/_rs/(S(5bjyoejoedl4loztkdzep2di))/RequestOpen.aspx?rqst=37&anon=1). Chicago won through arbitration the right to have individuals submit anonymous complaints against supervisory officers. See https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2020/june/PoliceUnionContracts.html

investigation could still be closed if it does not yield proof of a violation, but police should not be shielded from accountability simply because an individual wants or needs to remain anonymous.

Second, OPC should be required to increase the public accessibility of its information. [12] Each time OPC sustains an allegation against a police officer, the officer's name should be included in publicly available documents on OPC's website. Documents currently posted on the OPC's website do not reveal the officer's name, regardless of whether the complaint was sustained. As a result, District residents rarely have information about officers that police their communities, and defense lawyers typically have to wait until just weeks before trial to receive critical information about officer misconduct. [13]

Third, when OPC sustains an allegation against an officer, OPC should make a recommendation to MPD for the action that should be taken. Similar to the Use of Force Review Board's classification of serious use of force incidents, OPC should make a non-binding recommendation directly to MPD regarding any further action that should be taken by MPD. Having OPC recommend action ensures that an outside entity makes an

[12] See Mitch Ryals, *D.C. Office of Police Complaints' Records Leave Much to be Desired,* Washington City Paper, September 3, 2020. Available at: https://washingtoncitypaper.com/article/308805/d-c-office-of-police-complaints-records-leave-much-to-be-desired/

[13] Defense counsel in criminal cases receive information about police misconduct, including past violence and dishonesty, through disclosures from the United States Attorney's Office of information stored in MPD's Personnel Performance Management System (PPMS). USAO's stated policy is that they provide such police misconduct information two weeks before trial in most cases. When the material is provided, USAO requests, and DC Superior Court Judges almost universally grant, protective orders that prevent defense counsel from revealing any misconduct information contained in the PPMS files. Defense counsel are prevented by these protective orders from revealing to the public or to other interested parties, including other defense attorneys who may have cases involving the same officers, the materials contained in the PPMS files.

independent assessment of the gravity of the officer's conduct and the intervention warranted.[14] It would also encourage resident participation in the OPC investigation by connecting that investigation to a final, albeit non-binding, recommendation.

With respect to Section 106, the Use of Force Review Board Membership Expansion, PDS recommends clarifying the qualifications of the attorney member. The bill provides for appointing "one member of the District of Columbia Bar in good standing." There are tens of thousands of lawyers in the District whose legal expertise will have little connection to evaluating the use of force by police. Rather than general legal training, it would be useful for the appointee to be a "District resident who is a member of the District of Columbia Bar in good standing who has experience, within 10 years of their appointment, filing civil rights or Section 1983 actions."

Section 113 of the Comprehensive Policing and Justice Amendment Act gives a defendant a right to a jury trial when the defendant is charged with simple assault, resisting arrest, or threats, and the alleged victim of the offense is a police officer. This is an expansion of the NEAR Act's creation of a jury trial right for charges of assault on a police officer.[15] In response to the NEAR Act, the United States Attorney's Office began charging nearly all misdemeanor assault on a police officer allegations as simple assault, thereby eviscerating a defendant's right to have a jury of their peers decide the credibility and actions of the police officer. Allowing a defendant to elect a jury trial in simple assault, threats, and resisting arrest cases where the complainant is a police officer will close this

[14] The Civilian Complaint Review Board (CCRB) in New York City issues a recommendation at the end of its review process. See CCRB Rules: https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/CCRB_CharterCh18A.pdf.

[15] Neighborhood Engagement Achieves Results Amendment Act of 2016, D.C. Act 21-356.

single loop hole, but may invite prosecutors to find others. If the Council's goal is to provide for community accountability of police-resident interactions by allowing defendants to be judged by juries in cases that rely on the claims of police officers, then a jury trial should be provided in every misdemeanor case "where a police officer is called to establish an element of the offense."[16]

Given the concerns expressed by then DC Court of Appeals Chief Judge Washington in *Bado v. United States*, the Council should go much farther in extending jury trial rights. As Chief Judge Washington wrote:

> "[T]he Council could reconsider its decision to value judicial economy above the right to a jury trial. Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, especially communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise of police powers by the state. Those perceptions are fueled not only by reports that police officers are not being held responsible in the courts for police involved shootings of unarmed suspects but is likely also promoted by unwise decisions, like the one that authorized the placement of two large monuments to law enforcement on the plaza adjacent to the entrance to the highest court of the District of Columbia."[17]

All offenses that permit a maximum punishment that includes incarceration should be jury demandable, as they are in many other jurisdictions.[18] Or the District should return to the

[16] A jury trial would not be necessary if the only element an officer is called to establish is that the alleged offense took place in the District of Columbia.

[17] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018).

[18] For example, California provides a right to trial by jury for misdemeanor and felony offenses. California Constitution Article 1 § 16. Colorado guarantees the right of jury trial to all individuals accused of an offense other than a noncriminal traffic infraction, municipal or county ordinance. Colorado Revised Statutes Title 16 Criminal Proceedings § 16-10-101 Jury trials. In Illinois, every person accused of an offense shall have the right to a trial by jury unless the offense is an ordinance violation punishable by fine only. Illinois Compiled Statutes 5/103-6. Maine requires jury trials for all criminal prosecutions except decriminalized traffic offenses. Maine Constitution Article 1 § 6.

jury trial rights that preceded the Council's passage of the Misdemeanor Streamlining Act[19] in 1994, when the Council prioritized the speed at which cases move through the system over an individual's right to a jury trial.

Section 110 of the Comprehensive Policing and Justice Amendment Act of 2020 provides additional procedural protections for consent searches. However, this section does not address the additional scrutiny and harassment that consent searches, particularly in the context of traffic stops, create for the Black drivers in the District.[20] The availability of consent searches provides an incentive for police to stop drivers, and to make discretionary and discriminatory decisions about who to stop given that, if you follow any driver for long enough it is easy to find some infraction.[21] Stopped drivers, pulled over at the side of the road, are not free to leave.[22] Officers asking for permission to search may also, intentionally or unintentionally, create the impression that the traffic stop will be over sooner, or will terminate with a better result, such as with a warning rather than a fine, if the driver consents to a search. Given this dynamic, and the higher rates of stops of Black drivers, even with the added protections of Section 110, consent searches during traffic stops can never be truly voluntary. Rather than allowing police to ask

[19] Omnibus Criminal Justice Reform Act of 1994, D.C. Law § 10–151, 41 D.C. Reg. 2608 (effective Aug. 20, 1994).

[20] NEAR Act data analysis by the ACLU. Available at: https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf

[20]https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf

[21] See David A. Harris, Car Wars: The Fourth Amendment's Death on the Highway, 66 Geo. Wash. L. Rev. 556, 567_68 (1998) (describing how officers need simply follow motor vehicle for short periods of time in order to detect an infraction).

[22] D.C. Code § 50–2201.05b. Fleeing from a law enforcement officer in a motor vehicle.

for consent to search, the Council should ban MPD from asking for consent to search during routine traffic stops when there is no other reasonable articulable suspicion of criminal activity. In 2002, the New Jersey Supreme Court banned police from seeking consent to search lawfully stopped drivers or vehicles, for example drivers stopped for speeding, unless law enforcement had reasonable articulable suspicion of criminal wrong doing.[23] The Minnesota Supreme Court held that under the state constitution, police could not extend a valid traffic stop to request consent to search when the request was not supported by independent reasonable articulable suspicion.[24] Rhode Island legislated the same reform.[25] The Council should follow these precedents.

PDS also urges the Council to expand the reach of the Comprehensive Policing and Justice Amendment Act of 2020 through the enactment of a number of additional measures. Like the Virginia Assembly and the Virginia Senate, the Council should pass legislation that would limit the bases for what are often pretextual stops.[26] The Virginia Senate's bill prohibits stopping drivers for infractions that include failing to use a seatbelt, having broken head or tail lights, and violations of the state's window tint

[23] State v. Carty, 170 N.J. 632, 790 A.2d 903 (N.J. 2002).

[24] *Minnesota v. Mustafaa Naji Fort*, 660 N.W.2d 415 (Minn. 2003).

[25] Rhode Island Statute § 31-21.2-5(b) "No operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."

[26] Ned Oliver, *Virginia Lawmakers Pass Bill Limiting Pretextual Traffic Stops, Barring Searches Based on Smell of Marijuana*, Virginia Mercury, October 2, 2020. Available at: https://www.virginiamercury.com/2020/10/02/virginia-lawmakers-pass-bill-banning-pretextual-traffic-stops-and-searches-based-on-the-smell-of-marijuana/

requirements.[27] Instead, these infractions could only be cited if the driver is pulled over for another infraction.

Countless Black motorists in the District have been pulled over for window tinting that appears to be too dark.[28] A 2013 report of the Police Complaint Board found that 97% of police complaints about window tint were filed by African-American drivers and all but one of the 77 complaints received occurred east of Rock Creek Park. Each stop for an alleged window tint violation creates a potentially coercive police interaction that could be dangerous to the vehicle occupants. While the Council's passage of affirmative consent requirements may decrease MPD's incentive to initiate these stops, pretextual stops remain a legal way for police to harass Black residents and seek to bring charges against them. To rectify this the Council should, like Virginia, make tint violations only a secondary offense and to the extent that general equipment violations are a priority, it should delegate the enforcement of these regulations to the District Department of Transportation which could issue citations while also conducting checks of parked cars for residential parking permit violations, expired registrations, and meter violations.

Another meaningful step forward would be eliminating the ability of law enforcement officers to use an individual's presence in a "high crime area" as part of the legal calculus to support a *Terry* stop – meaning a stop and frisk of an individual.[29] While

[27] Virginia Senate Bill 5029, available at: https://legiscan.com/VA/text/SB5029/2020/X1.

[28] A 2013 report of the Police Complaint Board found that 97% of police complaints about window tint were filed by African-American drivers and all but one of the 77 complaints received occurred east of Rock Creek Park. Available at: https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Window%20tint%20policy%20recommendation%20FINAL.pdf

[29] *Illinois v. Wardlow*, 528 U.S. 119 (2000).

presence in a "high crime area" alone cannot be the sole reason for a stop, it is one of various, typically subjective, factors that the court considers when determining whether a *Terry* stop is justified, including time of day[30], flight,[31] furtive gestures[32], and nervousness[33]. Though it is cited with astonishing frequency by officers as one reason for a *Terry* stop, neither the Supreme Court nor the District of Columbia Court of Appeals (DCCA) has precisely defined what constitutes a "high crime area." In one case, the DCCA upheld a denial of a suppression motion, in part, on the basis that the "Georgia Avenue corridor" was a "high everything" area.[34] Until changed by the Council, the justification of "high crime area" will continue to serve as a basis for stopping and frisking Black residents since "high crime" maps onto high policing, high arrest rates, poverty, and, most alarmingly, race.

The Council made an analogous change when it decriminalized the possession of small amounts of marijuana and prohibited law enforcement from using the odor of burnt marijuana and the possession of small amounts of marijuana from "individually or in combination with each other, constitut[ing] reasonable articulable suspicion of a crime."[35] The Council justified this law in large part on the basis of the discriminatory enforcement of marijuana laws against Black residents.[36] The same justification merits

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[30] *Henson, 55 A.3d 859 (D.C. 2012).*

[31] *Id.*

[32] *Jackson v. United States*, 56 A.3d 1206, 1210 (D.C. 2012) (discussing furtive gestures).

[33] *Singleton v. United States*, 998 A.2d 295, 301-02 (D.C. 2010).

[34] *James v. United States*, 829 A.2d 963, 964 (D.C. 2003).

[35] Marijuana Possession Decriminalization Amendment Act, D.C. Law 20-305, codified at D.C. Code § 48-921.02.

[36] From 2009 to 2011, nine out of ten individuals arrested in the District for possessory drug offenses were Black. Committee Report, D.C. Marijuana Possession Decriminalization Amendment Act. Available at: https://lims.dccouncil.us/downloads/LIMS/29565/Committee_Report/B20-0409-CommitteeReport1.pdf

adding a section (4) to D.C. Code 48-921.02a, prohibiting the consideration of: the defendant's presence in a high crime area.

As part of comprehensive reform, the Council should also address the District's arrest and citation release practices. Under current law, MPD has only narrow authority to perform "field arrests" which while called "arrests" do not involve taking an individual into custody at all. Instead, field arrests result in a ticket that requires the individual to appear at the MPD district at a later time to complete the booking process.[37] In addition to field arrests, MPD can also perform a citation release. With a citation release, an individual is seized and taken to an MPD district for processing but is then released with a summons to appear in court on a specific date at which time the prosecuting authority will make a charging decision. As with field arrests, the offenses eligible for citation release are too narrow and have standards that provide too much discretion to law enforcement about whether to utilize citation release or whether to perform a full arrest including detention and transport to court. Even the expanded citation release provisions in effect during the pandemic are too narrow and allow for arrest for offenses that do not pose any public safety risk. The murder of George Floyd, which was precipitated by an arrest for allegedly passing a bad check and which prompted the Council's consideration of comprehensive policing reform, should also be a clarion call for the District to reform the laws surrounding when and for which offenses the police can take physical custody of individuals.

[37] D.C. Code § 23-584. The offenses that are currently eligible for field arrest are determined entirely by MPD. That list fails to include many commonly charged minor offenses like shop lifting.

Finally, PDS recommends reforming police interactions with youth under age 18 by taking a realistic and developmentally appropriate approach to interrogations. Rather than giving the same standard *Miranda*[38] warning to adults and to youth as young as age 10, the Council should require a more protective and youth-centered approach to any questioning of youth under age 18. Such legislation should require that MPD adequately warn the child about the implications of making any statement, give the child an opportunity to confer with counsel regarding any waiver of those rights, and provide the assistance of counsel for any waiver. No child under age 18 should waive the right to the presence of counsel during interrogation without first having the assistance of counsel in that decision.

PDS thanks the Council and the Judiciary Committee for its extensive efforts in aiming to create a more just and safer community through these reforms. PDS stands ready to assist the Council as this legislation moves forward.

[38] *Miranda v. Arizona*, 384 U.S. 436 (1966).

BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCILMEMBER CHARLES ALLEN, CHAIRMAN

PUBLIC HEARING
on

Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"
Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"
Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

STATEMENT OF ELANA SUTTENBERG
SPECIAL COUNSEL TO THE UNITED STATES ATTORNEY
UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA

Thursday, October 15, 2020, 9:00 a.m.

Virtual Hearing via Zoom

Chairman Allen and Members of the Council:

My name is Elana Suttenberg, and I am the Special Counsel for Legislative Affairs at the United States Attorney's Office for the District of Columbia. I thank you for the opportunity to appear today to share the Office's views regarding the proposed legislation.

As members of this community, we remain deeply disturbed by the death of George Floyd, and the circumstances surrounding his death. We support the fair and equitable treatment of individuals, regardless of race. In this time, we recommit ourselves to our duty as prosecutors—that is, to uphold the Constitution and the laws of the District of Columbia, and to serve justice for all. We support many of the goals of these bills, which include ensuring accountability for police misconduct, and we commend the Council for its role in furthering this goal.

Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

As to Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020," we have several concerns regarding proposals in this bill relating to body-worn camera (BWC) footage. First, the bill proposes prohibiting MPD members from reviewing their BWC recording or BWC recordings that have been shared with them to assist in initial report writing. It bears emphasizing that, before this same change was implemented by the Council's emergency legislation, MPD members were generally permitted to review their BWC recording or BWC recordings that had been shared with them to assist in initial report writing, but were precluded from reviewing their own BWC recording before writing an initial report *where a police shooting was involved*. As detailed in our June 8, 2020 letter to the Council regarding the emergency legislation, we support expanding that exception (that is, the preclusion of review) to encompass cases involving officer conduct that results in serious bodily injury or death, even where there is no firearm involved.

Our concerns, therefore, only apply to cases that do *not* involve a police shooting, or officer-involved death or serious bodily injury. These include homicides, sexual abuse, domestic violence, robberies, burglaries, assaults, and other violent crimes committed by civilians against other civilians.

Our primary objective is to ensure the accuracy of the initial police report. Particularly in less serious cases, where a detective may not be assigned, the initial police report is a crucial way to inform prosecutors, the defense, and judges about the facts of the case. Officer accuracy in report writing is paramount, and we are concerned about any change in law that could infringe on accuracy. Frequently, the language in the initial police report is the same language used in a

Gerstein affidavit filed in court or in an arrest or search warrant, upon which judges rely when making decisions that affect a person's liberty and privacy.[1]

Further, BWC footage may contain exculpatory material that is favorable to a defendant. This could include exculpatory statements made by civilian witnesses, exculpatory evidence captured on video, exculpatory suspects that could exonerate the accused, and misidentification of an arrestee. The law should encourage police to discover and capture exculpatory material at the earliest opportunity, and should not prohibit police from reviewing BWC footage where exculpatory material may exist.

Moreover, if officers are not permitted—outside of the context of officer conduct that results in serious bodily injury or death—to review BWC footage before writing a report, officers may be incentivized to write very brief initial reports that do not contain meaningful details, to the detriment of prosecutors seeking to make just charging decisions, defense counsel arguing probable cause and release conditions, and judges making probable cause and hold determinations.

Finally, the Police Executive Research Forum (PERF) clarified in a letter to this Committee that it continues to recommend that officers be allowed to view BWC recordings before writing an initial police report. We agree with PERF on this issue, and appreciate PERF resolving any ambiguity as to their current position.

Second, the bill proposes requiring the Mayor, within 5 business days after an officer-involved death or the serious use of force, to publicly release the names and BWC recordings of all officers who committed the officer-involved death or serious use of force, with certain exceptions. The Mayor would retain discretion to release other BWC recordings in matters of significant public interest.

We are concerned that this modification would, in fact, make it *more* difficult to investigate a serious officer-involved death or serious use of force. Such a result, of course, would be contrary to our shared goal of ensuring officer accountability for misconduct. Once the BWC footage is public, both the officer involved and any civilians involved would be able to watch it. The early publication of BWC could, in certain situations, create a narrative that makes it difficult to conduct an investigation, as it may lead witnesses to a conclusion that affects their testimony, or otherwise influence witness testimony. In our June 8, 2020 letter to the Council, we expressed concern about the initial proposal that BWC footage must be released 72 hours following an incident. This proposal has now been modified to mandate release after 5 business days, rather than 72 hours. Although 5 business days could allow for more investigation than 72 hours, it would still be very difficult for our office to conduct a full investigation within 5

[1] A *Gerstein* affidavit, which is sworn to by a law enforcement officer, is a document filed in court setting forth the facts of a cases that provides a basis for the judicial finding of probable cause. A judicial finding of probable cause is required for pretrial detention.

business days, as a full investigation could include all relevant parties, including involved civilians, testifying before the grand jury.

Because there are situations where it could be appropriate for the Mayor, in consultation with the relevant agencies, to release BWC footage, the Mayor should have discretion to release BWC footage at an appropriate time, balancing the needs of the community to see the footage with the needs of prosecutors to accurately investigate what happened, and the security and privacy rights of civilian witnesses who may be depicted in the footage.

Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"

As to Bill 23-0723, the "Rioting Modernization Amendment Act of 2020," we agree in principle with what we understand the Judiciary Committee Chairman's goal to be in proposing an amendment to the rioting statute: to clarify the current statute so that it is clear to all and to ensure that it provides for public safety by appropriately capturing rioting versus otherwise protected conduct. We have several concerns, however, with this amended offense as drafted.

Under current law, a "riot" is "a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger or injury to property or persons." D.C. Code § 22-1322(a). A person can be liable for the offense of rioting either for "willfully engag[ing] in a riot" or for "willfully incit[ing] or urg[ing] other persons to engage in a riot." D.C. Code §§ 22-1322(b) and (c).

Further, under current law, a riot is a group activity, and the presence of a "riot" must first be established. The subsequent question of whether a particular person is "engaging" in a riot is an individualized determination. Courts have upheld a wide range of behavior as "engaging" in a riot. In *Matthews v. United States*, 419 F.2d 1177 (D.C. Cir. 1969), the Court of Appeals for the D.C. Circuit held that a defendant who took liquor from a liquor store during a riot was deemed to have engaged in the riot. In *Carr v. District of Columbia*, 587 F.3d 401, 406 (D.C. Cir. 2009), the D.C. Circuit stated that "if members of the crowd were cheering acts of violence committed by other marchers, they would be engaging in criminal conduct" under the rioting statute.

The proposed bill would modify the rioting statute to create liability for rioting where 10 or more people are each committing or attempting to commit a specified criminal offense in the area perceptible to one another. By changing the law in this manner, it would be more difficult to establish both that a riot exists and that an individual is engaging in a riot—even under circumstances where most members of our community would agree that the conduct at issue constituted rioting.

This is the case because the bill would change the offense of rioting by making rioting liability contingent upon each individual's criminal or attempted criminal conduct, rather than contingent upon each individual's willful participation in the group activity. In other words, to

prove rioting under this bill, we would first have to prove that the defendant engaged in the underlying criminal conduct (for example, an assault, destruction of property, etc.), and then also prove that nine (9) other individuals engaged in underlying criminal conduct in the area perceptible to one another. Because this rioting bill provides the same maximum penalty as the penalty for much of the underlying criminal conduct on which the amended offense would rely, and creates additional elements to prove, there would be little incentive for prosecutors to charge a defendant with the offense of rioting. Rather, where appropriate, prosecutors likely would charge the defendant only with the underlying criminal conduct, such as assault or destruction of property.

Further, this proposal would remove liability for inciting or urging others to engage in a riot. This means that a person who organizes and coordinates a violent riot, but does not physically participate in it, would have no liability under this provision. Although other theories of accomplice liability could potentially apply, we believe that specific provisions for inciting a riot are warranted. Dispensing with specifically enumerated criminal liability for inciting others to riot will create gaps in the ability of law enforcement to address situations where a person or persons are actively encouraging others toward criminal behavior, and may reduce law enforcement's ability to thwart such rioting behavior before it even begins.

Moreover, this proposal limits rioting to a misdemeanor offense, and eliminates a felony gradation of rioting. Under current law, felony liability attaches where, "in the course and as a result of a riot[,] a person suffers serious bodily harm or there is property damage in excess of $5,000." D.C. Code § 22-1322(d). We recommend that the rioting statute maintain felony liability based on the level of bodily harm or the amount of property damage incurred.

Finally, the bill appears to use some language from the draft recommendations of the Criminal Code Reform Commission (CCRC). Without the context of the CCRC's full recommendations, however, this language creates gaps in liability. For example, the bill references "a criminal offense that causes or would cause . . . [b]odily injury." Under the CCRC's recommendations, the corollary offense to simple assault would require "bodily injury." Under current law, by contrast, simple assault does *not* require bodily injury as an element of the offense, *see* D.C. Code § 22-404(a)(1), although felony versions of assault do require various levels of bodily injury, *see* D.C. Code § 22-404(a)(2) (assault with significant bodily injury); D.C. Code § 22-404.10 (aggravated assault, which requires serious bodily injury). Because simple assault under current law does not require "bodily injury" as an element of the offense, simple assault would not constitute "a criminal offense that causes or would cause . . . bodily injury" under this bill. Thus, under this bill as drafted, a defendant who commits simple assault would not be liable for rioting—a result that we do not believe would be intended by the drafters.

* * *

The U.S. Attorney's Office for the District of Columbia looks forward to continuing to work with the Council, the community, and other stakeholders to ensure that our laws are just and equitable.

U.S. Department of Justice

Michael R. Sherwin
Acting United States Attorney

District of Columbia

Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530

October 14, 2020

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia

Dear Chairman Allen,

In anticipation of the October 15, 2020, public hearing before the Committee on the Judiciary and Public Safety, your office inquired of the U.S. Attorney's Office for the District of Columbia (USAO) as to the number of arrests from 2015–2020 for violations of the following offenses and the charging decisions in those cases. Below please find the following information responsive to your request. We are providing this information with the caveat that our case management system, which is supplied in part with data from external partners, may not capture every instance in which these charges were presented to us or in which we filed charges.

1. D.C. Code §§ 22-1322(b) (Rioting), 22-1322(c) (Inciting to Riot), and 22-1322(d) (Felony Rioting)

The below chart represents arrests presented to USAO for violations of D.C. Code §§ 22-1322(b), 1322(c), and 1322(d). "Papered case" means that USAO papered an offense based on that arrest, which could be the same offense as the arrest charge, or which could be a different offense from the arrest charge. "No papered case" means that USAO did not paper an offense based on that arrest. "RIP cases" are papered cases processed under USAO's Rapid Indictment Program.

	2015	2016	2017	2018	2019	2020	TOTAL
Arrests	2	5	230	2	0	111	350
Papered Cases	2	0	230	0	0	46	278
No Papered Cases	0	0	0	0	0	65	65
RIP Cases	0	0	0	0	0	0	0
TOTAL	2	0	230	0	0	111	343

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-1322(b), regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	2	0	193	0	0	3	198

Our case management system does not track charges for violations of D.C. Code § 22-1322(c), so we are unable to provide information about the number of separate USAO charges for violations of D.C. Code § 22-1322(c).

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-1322(d), regardless of the arrest charge. There are more total charges for both felony and misdemeanor rioting than there are arrests for rioting because, in some instances, USAO charged both felony rioting and misdemeanor rioting.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	0	0	234	0	0	1	235

2. D.C. Code § 22-3312.03 (Wearing hoods or masks)

The below chart represents arrests presented to USAO for violations of D.C. Code § 22-3312.03. “Papered case” means that USAO papered an offense based on that arrest, which could be the same offense as the arrest charge, or which could be a different offense from the arrest charge. “No papered case” means that USAO did not paper an offense based on that arrest. “RIP cases” are papered cases processed under USAO’s Rapid Indictment Program.

	2015	2016	2017	2018	2019	2020	TOTAL
Arrests	1	6	8	7	7	4	33
Papered Cases	0	3	5	2	5	2	17
No Papered Cases	1	0	3	2	1	2	9
RIP Cases	0	1	0	1	0	0	2
TOTAL	1	4	8	5	6	4	28

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-3312.03, regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	4	1	0	1	3	0	9

3. D.C. Code § 5-115.03 (Neglect to make arrest for offense committed in presence)

The below chart represents arrests presented to USAO for violations of D.C. Code § 5-115.03.

	2015	2016	2017	2018	2019	2020	TOTAL
Arrests	0	0	0	0	0	0	0
Papered Cases	0	0	0	0	0	0	0
No Papered Cases	0	0	0	0	0	0	0
RIP Cases	0	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0	0

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 5-115.03, regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	0	0	0	0	0	0	0

4. D.C. Code § 22-405 (Assault on member of police force, campus or university special police, or fire department)

The below chart represents arrests presented to USAO for violations of D.C. Code § 22-405. "Papered case" means that USAO papered an offense based on that arrest, which could be the same offense as the arrest charge, or which could be a different offense from the arrest charge. "No papered case" means that USAO did not paper an offense based on that arrest. "RIP cases" are papered cases processed under USAO's Rapid Indictment Program. There are more

papered/no papered cases than there are arrests because, in certain situations, more than one case was papered based on a single arrest.

	2015	2016	2017	2018	2019	2020	TOTAL
Arrests	**784**	**1175**	**864**	**818**	**842**	**607**	**5090**
Papered Cases	**551**	**887**	**649**	**594**	**590**	**456**	**3727**
No Papered Cases	**234**	**284**	**251**	**225**	**270**	**137**	**1401**
RIP Cases	**42**	**68**	**32**	**44**	**42**	**15**	**243**
TOTAL	**827**	**1239**	**932**	**863**	**902**	**608**	**5371**

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-405(b), regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	**745**	**514**	**135**	**24**	**24**	**133**	**1575**

The below chart represents USAO charges in D.C. Superior Court for violations of D.C. Code § 22-405(c), regardless of the arrest charge.

	2015	2016	2017	2018	2019	2020	TOTAL
Number of Cases	**49**	**65**	**36**	**48**	**32**	**21**	**251**

5. D.C. Code § 22-407 (Threats to do bodily harm), D.C. Code § 22-405.01 (Resisting arrest), and D.C. Code § 22-404(a)(1) (Simple assault), but only for those cases where the victim-complainant is a law enforcement officer, if your data system can easily sort out those cases.

As anticipated in the inquiry, our case management system is unable to easily sort out these cases, so we are not able to provide information responsive to this request.

We hope this information is helpful to you and the Committee on the Judiciary and Public Safety.

Sincerely,

Elana Suttenberg
Special Counsel for Legislative Affairs
United States Attorney's Office
for the District of Columbia

ATTACHMENT M

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
COMMITTEE OF THE WHOLE
NOTICE OF JOINT PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

AND

CHAIRMAN PHIL MENDELSON, CHAIRPERSON
COMMITTEE OF THE WHOLE

ANNOUNCE A JOINT PUBLIC HEARING ON

THE RECOMMENDATIONS OF THE D.C. POLICE REFORM COMMISSION

B24-0094, THE "BIAS IN THREAT ASSESSMENTS EVALUATION AMENDMENT ACT OF 2021"

B24-0107, THE "METROPOLITAN POLICE DEPARTMENT REQUIREMENT OF SUPERIOR OFFICER PRESENT AT UNOCCUPIED VEHICLE SEARCH – NO JUMP-OUT SEARCHES ACT OF 2021"

B24-0112, THE "WHITE SUPREMACY IN POLICING PREVENTION ACT OF 2021"

AND

B24-0213, THE "LAW ENFORCEMENT VEHICULAR PURSUIT REFORM ACT OF 2021"

Thursday, May 20, 2021, 9:30 a.m. – 6:00 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html
https://www.facebook.com/CMcharlesallen/

On Thursday, May 20, 2021, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, and Chairman Phil Mendelson, Chairperson of the Committee of the Whole, will convene a joint public hearing to consider the Recommendations of the D.C. Police Reform Commission; Bill 24-0094, the "Bias in Threat Assessments Evaluation Amendment Act of 2021"; Bill 24-0107, the "Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search – No Jump-Out Searches Act of 2021"; Bill 24-0112, the "White Supremacy in Policing Prevention Act of 2021"; and Bill 24-0213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021". The hearing will be conducted virtually via Zoom from 9:30 a.m. to 6:00 p.m.

The Council established the Police Reform Commission in the summer of 2020 through emergency legislation. The Council charged the Commission with "examin[ing] policing practices in the District and provi[ding] evidence-based recommendations for reforming and revisioning policing in the District", and specifically, analyzing and making recommendations on sworn and special police officers in District schools, alternatives to police responses, police discipline, the integration of conflict resolution strategies and restorative justice practices into policing, and the provisions of the emergency legislation. The Commission's members represent a variety of backgrounds, including government agencies, law enforcement, reentry services, labor organizations, educational institutions, criminal justice reform organizations, victim services, the faith community, mental and behavioral health care providers, business, and Advisory Neighborhood Commissions. On April 1, 2021, the Commission issued its final report, *Decentering Police to Improve Public Safety: A Report of the D.C. Police Reform Commission*, which offers dozens of recommendations. This joint hearing of the Committees will create an opportunity for public comment on the recommendations, which can be found at https://dcpolicereform.com.

The hearing will also include consideration of the legislation described below.

The stated purpose of B24-0094, the "Bias in Threat Assessments Evaluation Amendment Act of 2021", is to amend the Attorney General of the District of Columbia Clarification and Elected Term Amendment Act of 2010 to require the Attorney General to conduct a study to determine whether the Metropolitan Police Department engaged in biased policing when they conducted threat assessments of assemblies within the District and to grant the Attorney General subpoena power as needed to carry out the study.

The stated purpose of B24-0107, the "Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search – No Jump-Out Searches Act of 2021", is to prohibit the Metropolitan Police Department from conducting searches of unoccupied vehicles unless a superior officer is present, all officers present at the search have their body cameras on and functioning, the officer requesting the search provides a verbally stated reason to the superior officer to conduct the search, and the superior officer present at the search is viewed giving verbal authorization to conduct the search, to require a report by an officer present at the search to file the results of the search and that the owner of the vehicle be notified as to why the owner's vehicle was searched, and to provide that the owner of the vehicle has the right to sue the individual officers not adhering to the requirements of the act in their individual capacities.

The stated purpose of B24-0112, the "White Supremacy in Policing Prevention Act of 2021", is to require the Office of the District of Columbia Auditor to initiate an assessment into any ties between white supremacist or other hate groups and members of the Metropolitan Police Department that suggest an individual cannot enforce the law fairly, and to recommend reforms to Metropolitan Police Department policy, practice, and personnel to better detect and prevent ties to white supremacist or other hate groups in the Department that may prevent fair enforcement of the law in order to increase public trust in the Department and improve officer and public safety.

The stated purpose of Bill 24-0213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021", is to prohibit District of Columbia law enforcement officers from engaging in vehicular pursuits of an individual operating a motor vehicle, unless the officer reasonably believes that the fleeing suspect has committed or has attempted to commit a crime of violence and that the pursuit is necessary to prevent an imminent death or serious bodily injury and is not likely to put others in danger of death or serious bodily injury; and to prohibit the use of dangerous vehicular pursuit practices.

The Committees invite the public to provide oral and written testimony. Public witnesses seeking to provide oral testimony at the Committees' hearing must thoroughly review the following instructions:

- Anyone wishing to provide oral testimony must email the Committee on the Judiciary and Public Safety at judiciary@dccouncil.us with their name, telephone number, and organizational affiliation and title (if any), by the **close of business on Friday, May 14, 2021**.
- The Committees will approve witnesses' registrations based on the total time allotted for public testimony. The Committees will also determine the order of witnesses' testimony.
- Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals (and any subsequent representatives of the same organizations) will be allowed a maximum of three minutes.
- Witnesses are not permitted to yield their time to, or substitute their testimony for, the testimony of another individual or organization.
- If possible, witnesses should submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.
- Witnesses who anticipate needing language interpretation are requested to inform the Committee on the Judiciary and Public Safety as soon as possible, but no later than five business days before the hearing. The Committees will make every effort to fulfill timely requests; however, requests received fewer than five business days before the hearing may not be fulfilled.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be emailed to the Committee on the Judiciary and Public Safety at judiciary@dccouncil.us **no later than the close of business on Friday, May 28, 2021.**

ATTACHMENT N

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
COMMITTEE OF THE WHOLE
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

AND

CHAIRMAN PHIL MENDELSON, CHAIRPERSON
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B24-0112, THE "WHITE SUPREMACY IN POLICING PREVENTION ACT OF 2021"

AND

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To Watch Live:
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http://video.oct.dc.gov/DCC/jw.html
https://www.facebook.com/CMcharlesallen/

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

i. Public Witnesses

Panel 1

1. Robert Bobb, Co-Chair, Police Reform Commission
2. Christy Lopez, Co-Chair, Police Reform Commission
3. Charles Brown, Public Witness
4. Talib Atunde, Representative, Fred Hampton Gun Club
5. Perry Redd, Executive Director, Sincere Seven
6. Trupti Patel, Commissioner, ANC 2A03
7. Mo Pasternak, Commissioner, ANC 2B04
8. Danielle Robinette, Policy Attorney, D.C. Children's Law Center
9. Eduardo Ferrer, Policy Director, Juvenile Justice Initiative, Georgetown Law/Visiting Professor of Law, Juvenile Justice Clinic
10. Kaylah Alexander, Public Witness
11. Karthik Balasubramanian, Public Witness
12. Ron Thompson, Policy Officer, DC Transportation Equity Network
13. Jeremiah Lowery, Advocacy Director, Washington Area Bicyclist Association

Panel 2

14. Naïké Savain, Commissioner, Police Reform Commission
15. Ronald Hampton, Commissioner, Police Reform Commission
16. Josephine Ross, Public Witness
17. Zina Charles, Public Witness
18. Robin Nunn, Commissioner, ANC 2B03
19. Alexandra Bailey, Commissioner, ANC 2F08
20. Liz Odongo, Director of Grants and Programs, D.C. Coalition Against Domestic Violence
21. Kylie Hogan, Director of Crisis Intervention Services, D.C. SAFE

22. Robert Pittman, Chair, 1D Citizens Advisory Council
23. Evan Douglas, Policy & Advocacy Fellow, D.C. Justice Lab
24. Patrice Sulton, Commissioner, Police Reform Commission
25. Rajan Sedalia, Public Witness
26. Emory Cole, Public Witness

Panel 3

27. Jeffrey Richardson, Commissioner, Police Reform Commission
28. Samantha Davis, Commissioner, Police Reform Commission
29. Bethany Young, Project Manager, Police Reform Commission
30. Madison Sampson, Consultant, Impact Justice
31. Alexander Levey, Public Witness
32. Marina Streznewski, Public Witness
33. Zach Israel, Commissioner, ANC 4D04
34. Nassim Moshiree, Policy Director, ACLU of the District of Columbia
35. Natacia Knapper, Field Organizer, ACLU of the District of Columbia
36. Ahoefa Ananouko, Policy Associate, ACLU of the District of Columbia
37. Valerie Wexler, Organizer, Stop Police Terror Project D.C.

Panel 4

38. Emmanuel Caudillo, Public Witness
39. Matthew Broussard, Public Witness
40. Jordan Crunkleton, Lead Researcher, Stop and Frisk, D.C. Justice Lab
41. Caitlin Holbrook, Policy Advocate & Research Associate, D.C. Justice Lab
42. Robert Brannum, Commissioner, ANC 5E08
43. Anthony Lorenzo Green, Commissioner, ANC 7C04
44. Yonah Bromberg Gaber, Public Witness
45. Lauren Sarkesian, Senior Policy Counsel, New America's Open Technology Institute
46. Frankie Armstrong, Public Witness
47. Virginia Spatz, Public Witness
48. Imara Croons, Public Witness
49. Alida Austin, Public Witness

Panel 5

50. Mara Verheyden-Hilliard, Co-Founder & Executive Director, Partnership for Civil Justice Fund
51. Carl Messineo, Legal Director, Partnership for Civil Justice Fund
52. Keith Neely, Attorney, Institute for Justice
53. Chanel Cornett, Legal and Policy Officer, Fair Trials
54. Carlos Andino, Equal Justice Works Fellow, Washington Lawyers' Committee for Civil Rights and Urban Affairs
55. Ariel Levinson-Waldman, Founding President & Director-Counsel, Tzedek D.C.
56. Amber Rieke, Director of External Affairs, D.C. Health Matters Collaborative
57. Chris Hull, Senior Fellow, Americans for Intelligence Reform
58. Gordon Cummings, President, CantWait Foundation
59. Makia Green, Organizing Director - D.C., Working Families Party

ii. Government Witnesses

1. Chris Geldart, Acting Deputy Mayor for Public Safety & Justice
2. Michael Tobin, Executive Director, Office of Police Complaints
3. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

IV. ADJOURNMENT

ATTACHMENT O

Sincere Seven ◊ "*Fighting For Justice & Equality In Our Workplace*"

◊ 422 Marietta Place, NW, Suite L, Washington, DC 20011 ◊
(202) 239-6565 ◊ (202) 717-7729 ◊ e-mail: sincereseven@hotmail.com
www.sincere7.org

"Let us not grow weary in well-doing, for in due season we shall reap, if we faint not." _____Gal. 6:9

Written Testimony of Perry Redd, Executive Director, Sincere Seven

Before the Judiciary & Public Safety & Committee of the Whole of the Council of the District of Columbia regarding

B24-213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021"
Thursday, May 20, 2021
9:30 am Virtual Meeting Platform
1350 Pennsylvania Avenue, NW, Washington, DC 20004

Good day members of the Judiciary and Public Safety Committee. Thank you for this opportunity to testify. I am Perry Redd, Executive Director of the 21-year old 501 (c)(3) worker advocacy organization Sincere Seven. I herein offer testimony on **Law Enforcement Vehicular Pursuit Reform Act of 2021** or what we deem**, "Karon's Law."**

I testify before this Committee from the perspective of a former ANC Commissioner, community organizer and advocate for the family of the late Karon Hylton Brown, who was unjustifiably hunted down and chased into a tragic death at the hands of members of our Metropolitan Police Department. I herein, will express, on behalf of our Brightwood community—the indigenous, transplants and gentrifiers—the need for you to vote this bill into law, alongside the shortcomings and continuum of remedies in the paradigm and wake of Karon's murder.

Directly related to the incident of October 20, 2020, the officer directly responsible for Karon's must be extricated from the MPD. It is a travesty that he's still being paid from the tax dollars we commit to this District/state. My fellow Brightwoodians want him fired. Anything that prevents the Chief Executive, Mayor Bowser, from doing so is an affront to us. This bill needs amendments, including:

- **A community post-incident report**—within 30 days—of an incident to the sanctioned body (ANC) in the jurisdiction where a police-induced injury/conflict occurs...as Commissioner of ANC 4B05, such a report was committed to me through a letter of inquiry response from the commander of MPD's 4th District on the Police-Citizen confrontation of May 19, 2019. A solid two years later, the MPD has failed to honor its word and deliver that report to our community. Council, do something!

- **An end to qualified immunity and break from the District's relationship with the Fraternal Order of Police**...the Black American's third worst enemy. The disposition of the officer is currently DC's best-kept secret. The family, members of our community—organized as well as the organized—still ask me, "what's going to happen with Sutton." I call for his firing. He's collecting a salary—effectively, on vacation—a full six months after chasing a young man to his death. Help me understand what's right about that. Some courageous lawmakers in other jurisdictions, like Minneapolis—where I visited three weeks ago and met with organizers at the George Floyd memorial—have enacted a law to terminate first, with the ability to re-hire upon investigation and due process. Stop protecting dangerous people who possess policing authority...they do not make us safer.
- **Name the Officer Amendment**-the sordid history of this country's pride in "perp-walking" suspects—especially Black males—is in need of an equity balance. When clear and present evidence is offered in an incident such as this, our civil servants cannot remain nameless, faceless entities that cause wanton harm to our residents. So it is said, "If it's good for the goose, it's good for the gander." MPD has no problem with naming arrestees who have yet to partake of constitutional due process; no one is above the law—unless YOU elevate them to that position!
- **Support for Karon's partners** who still frequent the same space from which Karon was nurtured. The MPD presence there is reminiscent of a snapshot of the Israeli occupation of Palestine. You ought to be ashamed, but you're not. In lieu of tax breaks for corporate employers in the District, mandate hiring opportunities, not sorry-assed job training. Those young men are ripe for corrupted growth, absent opportunities of life-saving, well-paying career opportunities.
- Sadly, police chases often don't end well. We must have a mandate in the law to **render life-saving treatment to victims of a police chase or interaction**. That did not happen in Karon's case. Watching the video, Officer Sutton and his partners did go through Karon's pockets (what were they looking for?) but couldn't entertain the possibility of preserving the life they'd crashed? Jurisdictions have passed this provision into law. It is doable...do it!
- No more hiding and concealing video evidence...we must mandate **bodycams turned on—no off switch**—with redacting saved for later. In my 2020 Ward 4 Council campaign against the Honorable Councilmember Lewis-George, I proposed a bodycam system with a dual-output video streams—one feed to the District station, the other into a sealed database in another branch of government, the Superior Court. The video footage in the Court system, would only be realsed upon court order, ifnecessary. By the way, I strongly suggest that there is more audo/video evidence that you have not called for in the death of Karon Hylton-Brown...why haven't you gotten it?
- Petition the US Attorney General Merrick Garland to add the District's MPD to his list of pattern or practice jurisdictions along with Minneapolis and Louisville given MPD's clear problematic histories, practices, and/or settlements. The need to assess any/all types of force used by MPD officers, including use of force on individuals with behavioral health disabilities or individuals engaged in activities protected by the First Amendment. We need an uncovering of the officers who've engaged in discriminatory policing, and also whether MPD conducts unreasonable stops, searches, seizures, and arrests, both during patrol activities and in obtaining and executing search warrants for private homes. S7 calls for the DOJ investigation to

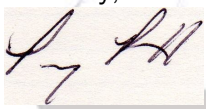
include a comprehensive review of MPD policies, training, and supervision, as well as MPD's systems of accountability, including misconduct complaint intake, investigation, review, disposition, and discipline. That would aid the Hylton-Brown family—and many other DC families—get the answers they so rightly deserve

In my heartfelt effort and duty to get answers, access and serve Karon's family, I encountered numerous roadblocks and non-transparency, which on its face, erodes confidence in our elected and appointed leaders. What I know—and for the past six years, have repeatedly petitioned that DC residents need formalized and recognized advocacy from outside the government. There MUST be legislation formalizing the role of the advocate—across ALL agencies. Some residents are intimidated and/ or cannot navigate the channels to address their concerns with this government. Help us, help you, help them. Recognize the community advocate with an amendment.

In closing, a sincere thank you to our new Councilmember Lewis-George for stepping up, stepping out, hearing our constituents and taking concerted action to respond and substantively address a clear and evident wrong.

Thank you for allowing me to testify in this Committee legislative hearing.

Sincerely,



Perry Redd
Executive Director

TESTIMONY REGARDING POLICE REFORM COMMISSION REPORT

Commissioner Trupti J. Patel, ANC 2A03

May 20, 2021

Good Morning Chairperson Allen and fellow Council Members. My name is Trupti Pateli. I am DC's first Indian-American woman ANC Commissioner. I represent the Historic Foggy Bottom and I'm testifying in solidarity and as an ally to the African American community.

I weigh the great responsibility of trying to be eloquent, articulate and succinct on an issue that is intensely emotional and deeply personal for myself and others.

I'm one of the As one of the 16,000 pieces of testimony submitted last year around the police.

Last night I sponsored a resolution before ANC 2A around the actionable recommendations written in the DC Police Reform Commission report. It passed unanimously.

The Commission with full transparency outlines the racist beginnings and legacy of policing in this country. It acknowledges the role that law enforcement has in upholding systemic racism and this entity does not evoke feelings of safety for our most vulnerable communities but instead of fear.

We've become a society that has become overly reliant on the police and expecting them to solve problems and provide solutions they are not equipped for.

Poverty is now being criminalized--when did we become punishers instead of problem solvers?

As a brown woman I have anxiety when I see a police officer-the reality is that I'm perceived as a threat i.e. a terrorist and am approached from a vantage point of being a danger.

In my very own commission I was made to feel unwanted and unwelcome when law enforcement arrived-at least 12 officers responded to a peaceful action I was conducting around economic and wage justice. Low-wage shift workers who are mainly

from communities of color were terrified for my safety as well as their own. That interaction could have gone in many different directions. I won't lie, I flashed my ANC credentials, while the officers on site were polite and professional-it disturbed me to think what if I didn't say who I was--how would that have gone?

The anger, hurt, and trauma we experienced from such a "response" to "us" being there compelled me to send a note to Chief Contee about it.

I appreciate Chief Contee taking me seriously-and I have faith and confidence that he can make MPD serve the city as it should.

I TASK YOU ALL TO DO BETTER-The roadmap provided by the commission is a starting point-it will not be a quick easy fix-but it's worth it to have a properly functioning police force that serves the community properly.

The following specific recommendations from the commission I'd like to see implemented while not exhaustive is as follows:

1. End no knock warrants
2. No purchase of military weapons
3. End use of deadly force
4. Ability to FOIA officers
5. Create Deputy Auditor position
6. End qualified immunity

The murder of counless Black and Brown individuals at the hands of law enforcement can no longer be tolerated and accepted.

We are all someone's beloved child, partner, parent, and sibling---no amount of money or apologies can bring someone back once they've died.

If one survives the traumatic encounters with the police, they leave individuals with PTSD.

No parent should have to pray and be anxious when their child leaves them to go out, no parent should have to train their child to deal with law enforcement so they don't get murdered.

I'm tired, but African-Americans are exhausted. They've been the whipping boy for 400 years.

My family immigrated to this country to escape casteism but they would discover the ugly underbelly in America known as racism. I'm able to stand before you today and testify due to individuals like John Lewis, Martin Luther King, and countless others.

Immigrants like myself owe a debt to the African American community-it's time to pay up and I'm gladly paying it by standing in solidarity and amplifying the fierce sense of urgency in shifting what policing means in D.C.

In Service & Solidarity

Testimony Before the District of Columbia Council
Committee on Judiciary and Public Safety
&
Committee of the Whole
May 20, 2021

Joint Public Hearing:
The Recommendations of the Police Reform Commission

Danielle Robinette
Policy Attorney
Children's Law Center

Introduction

Thank you, Councilmember Allen, Chairman Mendelson and members of the Committees, for the opportunity to testify. My name is Danielle Robinette. I am a policy attorney at Children's Law Center and a resident of Ward 6. Additionally, prior to law school, I was a public-school teacher. I am testifying today on behalf of the Children's Law Center which fights so every DC child can grow up with a loving family, good health and a quality education.[1] With almost 100 staff and hundreds of pro bono lawyers, Children's Law Center reaches 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year.

I appreciate this opportunity to testify regarding the recommendations of the Police Reform Commission (PRC). In December 2020, CLC joined the Every Student Every Day Coalition and a number of other youth advocacy organizations in submitting recommendations to the PRC. We were encouraged to see that the PRC included these recommendations into their final report.[2] These recommendations are consistent with neuroscience which tells us that adolescents are more likely than adults to be impulsive and sensation-seeking, to make decisions based on "immediate" gains rather than "long-term consequences, and to be susceptible to peer pressure.[3]

Over the past year, on top of a global pandemic, Black and brown young people have seen time and time again that they cannot trust the police to keep them safe. Through social media and the news, they face constant reminders that they are likely to

be treated worse by law enforcement than their white peers. These incidents of police brutality cause racial stress for all Black and brown people. We believe that now is the time to reimagine what a safe and positive school environment looks like. We need to move away from the utilization of police in schools and towards a school environment that supports students. We offer our recommendations on how to make this transition. Additionally, we believe that the involvement of youth voices, educators, parents, administrators, and school staff is fundamental to ensuring an effective transition to police-free schools.

Our testimony and recommendations are largely the same as those we submitted to the Committee on Judiciary and Public Safety for their performance oversight hearing for the Metropolitan Police Department (MPD) and to the Committee of the Whole for their roundtable on school security. We are repeating them here for the record to uplift the PRC's recommendations about police-free schools.

Our testimony today outlines on a two-part strategy which calls for the divestment of local dollars from the MPD School Safety Division and the investment of those dollars into programs that create and reinforce safety in our schools. Our divestment position is drawn from the often-harmful interactions our young clients have had with police in schools. Our investment recommendations highlight programs and partnerships which are already in existence and currently operate to varying degrees within our schools and communities. Our recommendations offer concrete alternatives to police in schools and

support a new vision of school safety that does not contribute to the criminalization of Black and Brown students, but instead enhances their educational experience in DC's public schools.

Beyond the police, the role of civilian security at the schools must be examined. The reimagining of school security must involve community input and reflect the needs of education stakeholders. While there has been a lot of focus on the DCPS security contract, DCPS represents only half of the District's public-school students. Conversations about reimagining security and investments in positive school cultures must not forget the 60+ charter LEAs that educate more than 40,000 children and young people in DC – nearly 75% of whom are Black[4] and 49% of whom live in Wards 7 and 8.[5] While our testimony today does not directly address the topic of contracted security guards in DC's public schools, we encourage the Committees to continue this dialogue with respect to all aspects of school security. We believe that school security, in whatever form it ultimately takes, must be trauma-informed and designed to integrate safety into a broader conceptualization of positive school climates and culture.

A. Divesting from MPD's School Safety Division

We believe that schools should be a safe space where students can learn and grow in a trauma-informed environment that supports their educational and socio-emotional learning goals. According to MPD's annual school safety report, the goal of the School Safety Division is "to support a safe learning environment for all students."[6]

Unfortunately, these goals are undercut when students experience negative, even traumatizing, interactions with MPD officers, School Resource Officers (SROs), and contracted security guards during the school day. These are just a few examples of the types of problematic interactions with police at school that our young Black and Brown clients have shared with us:

- An 11-year-old client who refused to get on the school bus and the response was for the DCPS school to call the police.
- A five-year-old client visited by a uniformed MPD officer, not a social worker, and taken away alone to be interviewed about abuse allegations.
- A fifth-grade student who left the school building but remained on campus. The elementary school called MPD who responded by escalating the situation to the point of putting the child into restraints.

Police are too often called when students are having behavioral difficulties. Children often have behavioral outbursts because of trauma they are experiencing outside of school and struggles that they face in school. Children who have become emotionally dysregulated should be helped – not arrested. The response from adults should be to ask, "Why is this child acting out and how can we address the underlying concern?" – rather than to call the police.

Black and Brown children are disproportionately affected by this practice. Students with disabilities are also dramatically affected. National trends show that students with disabilities are nearly three times more likely to be to be arrested than their general education peers.[7] When disability and race intersect the impact is compounded. SRO interactions with students with disabilities can be especially problematic. Because

SROs are not school employees, they do not have access to a student's Individualized Education Plan (IEP) and/or Behavior Intervention Plan (BIP). This leads to police officers responding to a behavioral health crisis with little or no information about the child's special needs, triggers, or preferred de-escalation strategies.

Our clients with disabilities have shared stories that illustrate the devastating consequences of what happens when police are called during an episode of emotional or behavioral dysregulation:

- A nine-year-old client who was experiencing a mental health emergency was handcuffed and accompanied by uniformed officers to the Emergency Department
- A 12-year-old client was threatened by staff at their group home that the police would be called when he was having a mental health crisis.
- An 11-year-old student was handcuffed at a DCPS school for running through the halls and then was transported by an SRO in handcuffs to Children's National Hospital for a psychiatric evaluation when a parent could not be reached.

In addition to these sorts of specific incidents with police in schools, many children in DC have negative reactions to police based on their experiences in the community. Many have witnessed friends and family being arrested or hassled by police. For some students, the mere presence of police officers at school can be enough to trigger fear and past trauma. For example, a Children's Law Center lawyer witnessed a child client withdraw and recoil into their sweatshirt after walking into a room at school with police present even though the police officers were not interacting directly with the client. For many students the regular presence of police in schools does not create a safe and secure

learning environment. In fact, due to their negative and traumatic experiences in their communities, the presence of police in schools creates an environment of fear and hostility for many students.

The cumulative effect of these school and community interactions, repeatedly highlighted by videos of police violence circulated on social media, is a sort of race-based traumatic stress[8] that has no place in a public school. By redirecting local dollar allocations away from MPD's School Safety Division and shifting those funds to critical programs like school-based mental health, we have an opportunity to create an environment where students are supported and not criminalized.

B. Invest Local Dollars to Create Safe Schools

In order for the transition toward police-free schools to be successful, the divestment from MPD's School Safety Division must be paired with investments in programming and supports that will improve school climates and create safe schools without a need for police. The below recommendations are based upon our experiences with and observations of programs that have been implemented to varying degrees in some schools across the District. Our recommendations include expansions of programs to support student behavioral health, alternative discipline practices, and professional development for teachers and other school staff. Additionally, we recommend that community-based programs with established and trusted relationships with young

people be brought into the school setting. These recommendations are consistent with those put forth by the Police Reform Commission in their final report.[9]

Increase investments in our School-Based Behavioral Health (SBBH) Program

The District's SBBH program provides children, youth, and their families with access to high-quality services that promote mental wellness and generate a positive school culture. Local community-based mental health providers partner with schools based on the school's individualized needs. As the SBBH project is implemented at each campus, students are able to access three distinct service tiers: mental health promotion and prevention for all students (Tier 1), focused interventions for students at-risk of developing a mental health problem (Tier 2), and intensive treatment for individual students who already have a mental health problem (Tier 3). The multi-tiered approach is intended to facilitate the effective and efficient use of the District's resources in the service of providing appropriate and reliable school-based behavioral health services to children and youth. This, in turn, makes it easier for students to access key mental health supports and also ensures that teachers and staff benefit from having clinicians available.

The SBBH program is currently in its expansion phase and will need additional local-dollar support in order for expansion to reach all schools in the District. There are several roles at each school to support the integration and expansion of the SBBH program, including the School Behavioral Health Coordinator, Community-Based Organization (CBO) clinician, Department of Behavioral Health (DBH) clinical specialist,

and DBH Clinical Supervisor. With these resources in place, schools have been able to complete the School Strengthening Tool and Work Plan, which are used by each school's administrative or behavioral health team to identify the specific behavioral health needs of each school and create a comprehensive and integrated plan for meeting those needs. At the community level, the DC Community of Practice (CoP) was established to facilitate strategic collaboration between school personnel, community leaders, and CBO clinicians. These various infrastructure components, along with robust interagency communication and coordination, are critical to the continued efficacy and functionality of the District's SBBH program.

Additional investments to the SBBH program in FY21-22 would allow DBH to expand the program to include the 80+ DCPS and public charter schools that are still waiting on vital behavioral health resources. We recommend increasing investments in the SBBH program in order to expand its reach to all public schools in DC.

Provide teachers and staff with trauma-informed training, professional development, and supports

Nationally, roughly one in five children have experienced adverse childhood experiences and traumatic experiences.[10] These traumatic experiences can range from food insecurity, neglect and abuse, and even chronic toxic stress. Trauma may manifest itself in students as absenteeism, performing below grade level in reading and math, and behavior problems.[11] Students experiencing these forms of complex trauma can benefit

from teachers and school staff who not only have been trained not only to recognize the signs of trauma in children and youth, but also who are also able to access trauma-informed training, professional development, and supports to assist these students.[12] We recommend that local dollars be allocated in the upcoming budget in order to provide these trainings and professional development opportunities for teachers and staff in our school community.

Expand restorative justice programming in schools and communities

The District has invested in the concept of restorative justice programming for children and youth and has supported its use within the community. Currently, SchoolTalk DC has provided restorative justice supports to both DCPS and DC public charter schools.[13] These supports range from individual training sessions for students and staff, facilitation of important restorative conversations, restorative justice conferencing, classroom circles, and dialogue circles.[14] We recommend that the District continue to invest in restorative justice programming for children and youth in schools and communities.

Invest in school-based violence interrupter programming and training and expand community-based violence interrupters

We recommend that the District continue to invest in and expand violence interrupter programs. Currently, the District is supporting violence interrupter programs through the Office of the Attorney General and the Office of Neighborhood Safety and

Engagement. The model takes a public health approach in addressing community violence by interrupting violence, identifying and treating those at highest risk for committing violent crimes, and changing community ideas around the normalization of violence.[15] In order to continue to build on a culture of school safety, we recommend that the District bring this model into the school community and provide students the opportunity to interact with violence interrupters and engage in training provided to violence interrupters.

Explore funding the expansion of credible messengers in communities and schools

We recommend that the District explore the expansion of credible messengers into communities and schools broadly. The Credible Messenger Initiative is a program for youth committed to the Department of Youth Rehabilitation Services (DYRS) that blends individual mentorship programming with restorative justice processes.[16] This program helps to connect young people with members of the community who share similar experiences (like being court-involved), are skilled in mentorship and community building, and demonstrate integrity and transformation. Expansion of this program would ensure that all students, beyond those who are involved with DYRS, would be able to access the benefits of the program, which include:

- Promoting family and community engagement
- Connecting young people to caring adults in their communities
- Enhancing city-wide violence intervention services
- Improving services to youth in the community
- Connecting youth to resources and relationships

In addition, expansion of this program would create job opportunities for DC residents who already serve as community leaders and could serve as credible messengers in schools.

Ensure adequate investments in socio-emotional learning curriculum and implementation

We recommend that the District remain committed to adequately funding a socio-emotional learning curriculum for students across all grade levels. Socio-emotional learning is the process through which children and adults understand and manage emotions, set and achieve positive goals, feel and show empathy for others, maintain positive relationships, and make responsible decisions.[17] DCPS is already implementing and integrating a socio-emotional learning curriculum with supports from the Collaborative for Academic, Social and Emotional Learning. We recommend that the District continue to fund socio-emotional learning in FY21.

Ensure fidelity in Positive Behavioral Intervention and Supports (PBIS) programs at schools

PBIS programs are evidence-based strategies that help to improve individual student classroom behavior and create safe schools by focusing on preventing problem behaviors rather than punishing students.[18] Studies have shown that schools that implement school-wide PBIS programs show a decrease in the number of suspensions, improved perceptions of safety, and improvements in academic performance.[19] In order to implement PBIS programs with fidelity, schools will need additional financial

resources to be sure that these programs are being properly implemented and evaluated. We recommend that local dollars be set aside for implementing PBIS programs in both DCPS and charter schools.

Adequately fund behavioral intervention support staff, administrative staff, and behavioral support technicians at each school

Many of the functions of security personnel could be replicated by existing and newly hired school staff if the District were to adequately fund behavioral intervention support staff, administrative staff, and behavioral support technicians at each school. We envision administrative staff being available to assist with checking-in parents, reviewing paperwork, and helping the registrar with attendance issues. Behavioral intervention support staff and behavioral support technicians can be key partners in ensuring school safety by using their training to assist classroom teachers and administrators with any behavioral issues before they escalate.

C. Models from Other Jurisdictions

The moment we are in calls for transformative, bold investments in students' and educators' behavioral health. Black and brown youth and educators have been especially traumatized as they are grappling with two pandemics: the coronavirus and the systemic racism that has been dramatically highlighted this past year. DC is not the only jurisdiction working to address these dual crises. Across the country, we have seen states, cities, and school districts pursue alternatives to law enforcement in schools. Earlier this

month, the Alexandria City Council voted to reallocate nearly $800,000 away from the SRO program and invest those funds in student mental health resources.[20]

We acknowledge that there are limitations in examining any plans that arose in response to the calls for racial justice following the murder of George Floyd in Summer 2020. Because so few students have returned to classrooms in-person, many of the newest police-free schools plans have not yet been implemented. However, a number of districts began removing SROs from schools before the activism we have seen over the last year. Below we examine those districts that removed police from schools prior to the COVID-19 pandemic. While no one model will work for every school district, we believe that there are lessons to be learned from those who have been doing this work in recent years. We encourage the Council to collaborate with all education stakeholders – especially parents and students – to decide which approach will be best for DC.

Minneapolis, MN

In 2017, Intermediate School District 287 (ISD 287) in Minneapolis, Minnesota replaced SROs with Student Safety Coaches. These Student Safety Coaches specialize in mental health, de-escalation, restorative justice and safe physical interventions.[21] Their primary focus is to build trusting relationships with students to ward off and mitigate behavior issues. Early evaluations of this model are largely positive. In the period between program implementation in 2017 and the pandemic-related transition to distance learning, ISD 287 saw "positive culture and safety on the rise, stronger

relationships, incidents with police involvement decreased by half over two years, significantly fewer arrests, and [limited] use of physical holds."[22]

Elsewhere in city, the school board Minneapolis Public School District unanimously voted to terminate its contract with police in June 2020. As an alternative, the district hired 11 "public safety support specialists" who are intended to act as a bridge between in-school intervention and law enforcement. The specialists will serve a security function but be trained to build relationships with students and de-escalate conflicts. Notably, this plan has faced criticism from activists stemming from reports that 14 of the 24 finalists for these positions have a background in law enforcement.[23] CLC strongly encourages the DC Council to be wary of proposed alternatives that simply create SROs by some other name.

Los Angeles, CA

The trustee of the Los Angeles Unified School District (LSUSD) recently approved a plan to cut 133 police positions from their schools. This reduction in force would remove 70 sworn officers with arrest powers, 62 nonsworn officers, and one support staff member.[24] Notably, this leaves in place 211 officers who will continue to monitor school and be available for emergencies. This reduction in police presence is paired with the implementation of School Climate Coaches who are individuals drawn from the community who are responsible for mentoring students, using socio-emotional learning strategies to strengthen student engagement, applying effective de-escalation strategies

to support conflict resolution, building positive relationships, eliminating racial disproportionality in school discipline practices, and understanding and addressing implicit bias.[25]

Furthermore, the reduction in school police officers frees up $25 million in the district's budget. This money has been redirected to fund, in part, a $36.5 million Black Student Achievement Program that aims to provide supplemental services to 53 high schools with a high proportion of Black students and high need indicators (below-average test scores and above-average suspension rates). The Black Student Achieve Program aims to:[26]

- Ensure that materials and instruction are culturally responsive to Black students and provide additional support and intervention to students to close literacy and numeracy skill gaps;
- Work with community groups that have demonstrated success with Black students and families; and
- Reduce the over-identification of Black students in suspensions, discipline and other measures through targeted intervention to address students' academic and social-emotional needs.

This model is the most similar to the two-prong divest-invest strategy that we outlined above. This removal of police reduces the harms that students suffer, and the investment in student supports will help repair the damage that has already been done.

Maryland

Beyond the district-level changes that have been described above, there are also two pieces of legislation under consideration by the Maryland General Assembly – the

Police Free Schools Act (PFSA)[27] and the Counselors Not Cops Act (CNCA).[28] Combined, these bills are designed to remove police from schools and redirect funding for mental health services, wraparound supports, and restorative approaches.

Specifically, these bills:

- Prohibit school districts from contracting with police departments;
- Repeal the creation of the Baltimore City Public Schools standalone police force;
- Require reporting on the use of force by school security and on calls to City or County police for incidents in school;
- Include families impacted by school-based arrest and experts in student mental health and conflict resolution to the School Safety Subcabinet Advisory Board; and
- Redirect the $10 million/year SRO fund to schools to be used only to (i) hire mental and behavioral health specialists, (ii) hire restorative approaches coordinators and expand restorative approaches in schools, (iii) hire community school coordinators, develop community schools, and provide wraparound services, and (iv) develop trauma-informed schools.

Importantly, these bills do NOT:

- Prohibit school districts from calling City or County police in an emergency;
- Prohibit school districts from developing "adequate law enforcement coverage" plans with City or County police;
- Remove school security guards who are unarmed and do not have the power to arrest students; and
- Prevent schools from installing door locks or other non-personnel safety measures.

The legislators leading the charge on these bills have specifically sought to dispel the fears of parents and other stakeholders regarding the purported benefits of SROs – namely that schools without cops will not be safe. Specifically, they argued that "SROs have not deterred or stopped school shootings. Active shooters do not avoid schools with armed

police, and it is extremely rare for police to successfully intervene when shootings occur. Police presence in schools hasn't reduced any other school-based violence. A study of approximately 3,000 schools nationwide found 'no evidence suggesting that SRO or other sworn law-enforcement contribute to school safety.'"[29]

D. Youth Policing Beyond the School Safety Division

Beyond our recommendations regarding the School Safety Division and SROs, we are also concerned by the ways in which MPD practices affect youth differently than adults and can contribute to school avoidance. To this end, we would like to uplift recommendations included in the Police Reform Commission's (PRC) report regarding developmentally appropriate policing.[30] Moreover, we believe this position is consistent with the District's sanctuary values that have historically protected students from enforcement actions by Immigration and Customs Enforcement on school grounds.[31] DC schools must be a sanctuary for students. To that end, in addition to the elimination of the School Safety Division,[32] DC should: 1) discontinue the practice of serving warrants on school grounds; 2) prohibit the arrest of youth in schools for non-school based offenses or custody orders; 3) prohibit the interviewing or interrogation of youth in schools; 4) prohibit youth and adults from carrying firearms in schools;[33] and 5) implement non-law-enforcement-driven crisis response and expand safe passage systems.

Conclusion

Thank you for this opportunity to testify, and I welcome any questions.

[1] Children's Law Center fights so every child in DC can grow up with a loving family, good health and a quality education. Judges, pediatricians and families turn to us to advocate for children who are abused or neglected, who aren't learning in school, or who have health problems that can't be solved by medicine alone. With almost 100 staff and hundreds of pro bono lawyers, we reach 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. And we multiply this impact by advocating for city-wide solutions that benefit all children.

[2] *Id*.

[3] *See J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011); *see also* Steinberg, Laurence, et. al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop'*, 64 AM. PSYCHOL. 583, 592 (2009). *Available at:* https://pubmed.ncbi.nlm.nih.gov/19824745/#:~:text=Simmons%20(2005)%2C%20which%20abolished,are%20as%20mature%20as%20adults.

[4] DC Public Charter School Board, "School Enrollment: PCS Demographics," *available at*: https://dcpcsb.org/student-enrollment (reporting that, in SY18-19, 73.66% of students enrolled in public charter schools identified as Black or African American).

[5] *Id*., at "Enrollment by Ward Where Students Live" (reporting that, in SY18-19, 22% of charter students lived in Ward 7 and 27% percent lived in Ward 8.)

[6] Metropolitan Police Department, *School Safety and Security in the District of Columbia: SY 2019-2020*, 1, *available at*: https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20School%20Safety%20Annual%20Report_School%20Year%202019-2020%20Final.pdf.

[7] *See* ACLU, *Cops and No Counselors*, *How the Lack of School Mental Health Staff is Harming Students*, 5, *available at:* https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/cops-and-no-counselors.

[8] *See* Kristin N. Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 57 American Univ. L. Rev. 1513, 1561, n. 313 (2018). *Available at:* http://www.aulawreview.org/au_law_review/wp-content/uploads/2018/08/675-%E2%80%93-02-Henning.pdf.

[9] District of Columbia Police Reform Commission, *Decentering Police to Improve Public Safety*, at 69, (Apr. 1, 2021), *available at*: https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf

[10] Sparks, S.D., *Some FAQs for Educators on Children's Trauma*. Education Week, (Aug. 9, 2019*), available at*: https://www.edweek.org/ew/articles/2019/08/21/some-faqs-for-educators-on-childrens-trauma.html.

[11] Blodgett, Christopher, and Jane D. Lanigan, *The association between adverse child experience (ACE) and school success in elementary school children,* Sch Psychol Q., doi: 10.1037/spq0000256, 37-146, (March 2018). *Available at:* https://pubmed.ncbi.nlm.nih.gov/29629790/.

[12] There are many robust reports and training materials available to support teachers and staff. For a non-exhaustive list, please visit: Trauma Sensitive Schools, *Helping Traumatize Children Learn, available at:* https://traumasensitiveschools.org/reports-and-resources/.

[13] *See* SchoolTalk, Restorative DC, *available at:* https://www.schooltalkdc.org/restorativedc1/.

[14] *See* RestorativeDC, Restorative Practices, *available at:* http://www.restorativedc.org/restorativepractices/.

[15] Office of the Attorney General for the District of Columbia, *Investing in OAG's Violence Interrupter Program* (Feb. 7, 2019), *available at*: https://oag.dc.gov/blog/investing-oags-violence-interruption-program.

[16] Department of Youth Rehabilitation Services, Credible Messenger Initiative, *available at:* https://dyrs.dc.gov/page/credible-messenger-initiative.

[17] The definition of socio-emotional learning can be found at https://casel.org/what-is-sel/.

[18] Lee, Andrew J., *PBIS: What You Need to Know*, Understood.org, *available at*: https://www.understood.org/en/learning-thinking-differences/treatments-approaches/educational-strategies/pbis-how-schools-support-positive-behavior.

[19] *See* Bradshaw, Catherine P., et. al., *Examining the Effects of Schoolwide Positive Behavioral interventions and Supports on Student Outcomes: Results From a Randomized Controlled Effectiveness Trial in Elementary School*, Journal of Positive Behavior Interventions, (April 2009). *Available at*: https://journals.sagepub.com/doi/10.1177/1098300709334798; Horner, Robert H., and George Sugai, *Defining and Describing Schoolwide Positive Behavioral Support*, Handbook of Positive Behavioral Support, (2009). *Available at*: https://link.springer.com/chapter/10.1007/978-0-387-09632-2_13; and Nelson, J. Ron, et. al., *Maximizing student learning: The effects of a comprehensive school-based program for preventing problem behaviors*. *Journal of Emotional and Behavioral Disorders*, Journal of Emotional and Behavioral Disorders, 136–148, (July 1, 2002). *Available at*: https://doi.org/10.1177/10634266020100030201.

[20] *See* Hannah Natanson, *Alexandria will remove police from public school hallways*, Washington Post, (May16, 2021), *available at:* https://www.washingtonpost.com/local/education/alexandria-police-middle-high-school/2021/05/15/55308846-b3fb-11eb-9059-d8176b9e3798_story.html

[21] Hicks, Rachel, *287 Student Safety Coach Model,* Intermediate District 287, (July 10, 2020), *available at:* https://www.district287.org/287-student-safety-coach-model/.

[22] *Id*., at Wilder Research Report and Data.

[23] *See* Keierleber, Mark, *Here are the People Minneapolis Schools Hired to Replace Campus Police After George Floyd's Death – And Why Some Are Raising New Red Flags,* The74, (Nov. 9, 2020), *available:* https://www.the74million.org/article/here-are-the-people-minneapolis-schools-hired-to-replace-campus-police-after-george-floyds-death-and-why-some-are-raising-new-red-flags/.

[24] *See* Cowan, Jill, et. al., *Protestors Urged Defunding the Police. Schools in Big Cities Are Doing It.,* New York Times, (February 18, 2021), *available at:* https://www.nytimes.com/2021/02/17/us/los-angeles-school-police.html.

[25] *Id*.

[26] Board of Education of the City of Los Angeles, Minutes from Special Meeting Order of Business, (Feb. 16, 2021), *available at:* http://laschoolboard.org/sites/default/files/02-16-21SpclBdOBWithMaterialsColor.pdf.

[27] Police Free Schools bills in Maryland have not been formally introduced but on the way. *See* McCord, Joel, *Bills Aim to Get Cops Our of Schools,* WYPR, (Feb. 3, 2021), *available at:* https://www.wypr.org/post/bills-aim-get-cops-out-schools.

[28] *Primary and Secondary Education – Mental Health Services – Expansion (Counselors Not Cops Act)*, House Bill 496, (January 15, 2021), *available at:* http://mgaleg.maryland.gov/2021RS/bills/hb/hb0496f.pdf.

[29] Acevero, Gabriel, and Jheanelle Wilkins, *Reimagining school safety in Maryland*, Washington Post, (Jan. 29, 2021) *available at*: https://www.washingtonpost.com/opinions/local-opinions/reimagining-school-safety-in-maryland/2021/01/28/6de4299a-5b38-11eb-8bcf-3877871c819d_story.html (*quoting* Na, Chongmin, and Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 Justice Quarterly 619 (2013)). *Available at:* https://www.tandfonline.com/doi/full/10.1080/07418825.2011.615754).

[30] *See Decentering Police to Improve Public Safety*, *supra* note 9 at 128.

[31] See, e.g., Office of Attorney General, A Message from the Attorney General, (May 11, 2017), available at: https://oag.dc.gov/sites/default/files/2018-02/Guidance-for-Schools-Re-Immigration-Concerns-English.pdf.

[32] Currently, the District spends at least $14 million on MPD's School Security Division. This division should be eliminated, and the money saved should be reinvested directly in youth and family in a manner consistent with the recommendations proposed in Part D *infra*.

[33] Specifically, officers of all types should disarm prior to stepping foot on a school campus unless they are specifically responding to the *very rare* report of a shooting or armed individual on campus. *See* Ropeik, David, *School Shootings are Extraordinarily Rare. Why is Fear of Them Driving Policy?,* Washington Post, (March 8, 2018), *available at*: https://www.washingtonpost.com/outlook/school-shootings-are-extraordinarily-rare-why-is-fear-of-them-driving-policy/2018/03/08/f4ead9f2-2247-11e8-94da-ebf9d112159c_story.html (finding that the statistical likelihood of any given public-school student being killed by a gun, in school, on any given day since 1999 was roughly 1 in 614,000,000).

WABA
WASHINGTON AREA
BICYCLIST ASSOCIATION

Judiciary & Public Safety & Committee of the Whole Public Hearing on The Recommendations of the D.C. Police Reform Commission

Thank you for the opportunity to testify today. My name is Jeremiah Lowery, and I am the Advocacy Director at the Washington Area Bicyclist Association (WABA). I am submitting testimony on behalf of Defund MPD Coalition's Police out of Traffic Enforcement working group.

I would like to first and foremost state the main point of my testimony: The Police have not been and will continue to not be the solution to traffic safety.

As the policy director at WABA, part of my job is to examine best practices to ensure everyone in the region has an opportunity to safely commute. From our perspective the best way to ensure walkers, bikers, and bus riders have safe commutes is to fund safe infrastructure to change driver behavior, and to educate drivers on safety rules and regulations. The police are not a sustainable solution.

Therefore, we agree with the police reform recommendations to remove MPD's traffic enforcement duties. Our Defund MPD working group of lawyers, research fellows, and advocates have combed through the DC Code and the DC MR. Based on this research, we propose the following changes:

Specifically, we would like to highlight the following MPD responsibilities that should be moved to DDOT or DPW (with a strong emphasis on ensuring DDOT or DPW staff are properly trained and resourced):

- Make secondary only (can't pull over for it, but can ticket if there's a basis for a stop)
  - *Operating Unregistered (18 DCMR § 411.1)*
    - Operating a vehicle without proper registration may be a secondary violation but cannot be used as the primary grounds for initiating a traffic stop.
  - *Light Violations (18 DCMR §§ 703-706)*

        - Violation of proper headlight (§ 704), taillight (§ 705), turn signal (§ 706), or other lighting equipment (§ 703) shall not be justification to initiate a traffic stop.
    - *Failure to Wear Protective Equipment While Riding (18 DCMR §§ 2215.3, 2215.4)*
    - *Failure to Wear a Seatbelt (D.C. Code § 1802)*
        - Failure to comply with District seatbelt laws shall be enforced by an alternative government agency.
    - Amend (narrow to dangerous driving)
        - *Littering (18 DCMR § 2221.6)*
            - Littering should only be a primary infraction justifying a traffic stop if the driver throws something out of the vehicle which will pose imminent danger to other drivers.
        - *Distracted Driving (D.C. Code § 50-1731.3)*
            - *Overlaps with other provisions governing texting, talking, etc.*

We believe that the following could still be retained by MPD (violations that pose a serious danger to persons or property), until adequate alternatives are found. Violations such as:

- DUI
- Reckless driving
- Driving On Wrong Side (18 DCMR § 2201.1)
- Driving Through Barricades (18 DCMR § 2217.3)

We also completely support the repeal of the *Window Tint Prohibition (D.C. Code § 50-2207.02(c)* prevision.

We also want to state on the record, that we also believe that automated traffic enforcement is not a sustainable long-term solution. DC fines residents more than any other city, yet at the same time the problems with traffic violence still persist. Also, the burden of traffic fines falls disproportionately on poor and Black residents, while at the time the money from traffic fines are not being fully invested in implementing infrastructure changes to dangerous corridors and intersections.

Long term, if we want to decrease traffic violence then we must change infrastructure, to give residents more safe locations to bike and walk in the city, away from cars. We must also change the roads to reduce speeding, which would lead to changed behavior.

Lastly, for the record we support the Law Enforcement Vehicular Pursuit Reform Act of 2021.

Today, we testify as a part of a growing number of people in the transportation advocacy community, we stand alongside the chorus of voices who will submit testimony on this matter, voices who state that we must divest from dated models that don't work and invest in sustainable solutions. The time is now. Thank You.

Statement Submitted by Professor Josephine Ross

To The

Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chair

The Recommendations of the D.C. Police Reform Commission

Regarding Section 110 of Act 23-336 ("Limitations on Consent Searches")

Submitted

Friday, May 28, 2021

By

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&

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Greetings Chairman Allen, Council members, staff, and residents of the District. We commend the Committee on the Judiciary and Public Safety for grappling with the complicated and necessary task of police reform and want to focus specifically on abolition of consent searches.

In addition to our oral testimony regarding the modification of Section 110 of Act 23-336 to eliminate the Metropolitan Police Department's use of consent searches, we take this opportunity to address a question that a council member asked another presenter during the hearing on May 20, 2021.

The question asks how the proposed change in consent law would affect a situation where a domestic violence victim wants police to search the home they share with another person?

There are two answers to this question, depending on the actual factual scenario.

1) If a victim of domestic violence wants police to enter to arrest an abuser who is in the home, this fits squarely within the "exigent circumstances" exception to the warrant and probable cause requirements. The new legislation does not change this.

The exigent circumstances exception allows the police to conduct a warrantless search when it is "objectively reasonable" under the Fourth Amendment. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (Court held that law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury). This factual example would be considered an exigent circumstance allowing a warrantless search. If the Council adopts the recommendation to abolish consent searches, this will not interfere with the police's ability to enter a home to provide emergency assistance.

2) If a victim of domestic violence wants to get their partner or child in trouble by asking police to search for drugs, the police cannot rely on consent but are not left without options.

If the situation does not qualify as an emergency, the police will need to evaluate the tip rather than harnessing the consent exception. The responding officer will ask the complainant why that person suspects that police will find contraband items in the home. If the allegation is credible, then police may obtain a warrant that allows them to search. To apply for a search warrant, the police must have "probable cause," that is, a reasonable basis for believing that evidence of a crime is present in the place to be searched. *Commonwealth v. Jacoby*, 642 Pa. 623, 652 (2017)(police need reasonably trustworthy information that would warrant a person of reasonable caution to believe that a search should be conducted).

Warrants can now be obtained by telephone. D.C. Code Ann. § 23-522(a). Moreover, police are empowered to secure the premises while they obtain a warrant. In the scenario envisioned by the council member's question, officers could prevent the domestic partner (alleged abuser) from reentering his or her home as a measure to guard against the destruction of evidence while police prepare the paperwork and assemble a team for the search. *See Illinois v. McArthur*, 531 U.S. 326, 337 (2001).

In fact, a warrant protects the domestic violence survivor who consented to the search by preventing police from conducting a fishing expedition within that person's home and possibly charging them based on something found during a general search. The new rule protects domestic violence survivors in another way too. Under current law, abusers can employ consent searches to retaliate against their partners, since people generally do not want police rummaging through their drawers. Survivors of domestic abuse who possess illicit drugs risk arrest and prosecution in addition to the unwanted intrusion and the inconvenience of repairing any damage caused by the officers during the process. Requiring the person seeking consent to give the police trustworthy information therefore adds a layer of protection for domestic violence victims against this type of retaliation.

Interestingly, warrants actually provide greater protection than consent searches if a defendant challenges the legality of the search in court. Notably, the Supreme Court excluded evidence seized during a consent search when one of the roommates refused consent. *See Georgia v. Randolph*, 547 U.S. 103 (2006); cf. *Fernandez v. California*, 571 U.S. 292 (2014). Similarly, courts will refuse to find implied consent for searches of spaces that belong to the non-consenting party, such as a son's bedroom. *See e.g., United States v. Robinson*, 999 F. Supp. 155 (D. Mass. 1998) (mother's consent did not extend to a closed vinyl bag within son's bedroom).

In sum, the proposed legislation will not hamper police efforts to respond to domestic violence victims. In the first scenario above, the search will continue to be permitted

through the exigent circumstances exception to the warrant. In the second scenario above, the legislation would prevent a consent search; however, the statutory change will actually improve police practices that better protect victims of domestic violence. This is in addition to protecting the general public against unwanted searches of their homes, bodies and property.

Council of the District of Columbia

Committee of the Whole and Committee on the Judiciary and Public Safety

DC Police Reform Commission Recommendations

May 28, 2021

Submitted written testimony of:

DC Coalition Against Domestic Violence

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Tel. 202-299-1181

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The DC Coalition Against Domestic Violence (DCCADV or The Coalition) is the federally-recognized statewide coalition of domestic violence service providers in the District. The Coalition's members include crisis and transitional housing providers, counseling and case management services, legal services, and culturally specific organizations serving: African-American; Latino; Asian and Pacific Islander; Immigrant; and LGBTQ survivors of domestic violence. Our members also serve teens and youth and survivors who are Deaf and Deaf/Blind. The sixteen member programs we represent are on the front lines each day providing life-saving services to more than 30,000 District residents each year. Domestic violence continues to be a leading public safety concern, with 39 percent of women living in D.C. having experienced sexual violence, physical violence, and/or stalking perpetrated by an intimate partner.[1]

The Coalition supports many of the recommendations put forth by the Police Reform Commission. For many years, DCCADV has testified at MPD's performance and budget oversight hearings around similar issues. We have testified to bring awareness to some of the awful things that we have heard from survivors and member programs about their experiences with law enforcement in the District. We have also testified because some of our programs are afraid to come forward and express their concerns about MPD directly. Even before last summer, we consistently heard from survivors and domestic violence service providers about many issues with DC's law enforcement agencies. In past efforts to address these concerns, we talked to MPD commanders, provided trainings for police officers and Detectives, and engaged law enforcement with ways to better support survivors. Yet, we continued to hear that law enforcement re-traumatizes survivors, sometimes does not believe them, and even worse, some officers initiates acts of violence against them.

[1] *Source: S.G. Smith, et al., The National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (2017)*

In response to this, in the summer of 2020, DCCADV held four listening sessions with survivors of domestic violence. The focus of these listening sessions was to hear form survivors about their experiences with law enforcement, specifically what happened when the police responded to a domestic violence incident. The listening forums were mostly comprised of survivors who identify as people of color and represented all ages. Survivors who participated described an overall lack of trust of law enforcement, due to negative experiences and abusive behaviors from officers. Some survivors expressed that they feared deportation if they were to complain about an officer or experienced further victimization by MPD after filing a complaint. Additionally, many survivors felt that a difficult situation, turned into a traumatic experience when law enforcement made the situation worse, by blaming them, exhibiting a lack of empathy, or making sexist jokes.

In January of 2021, DCCADV's membership voted to pass a position statement: The Intersection of Police Response and Domestic Violence in DC, on the intersections of police response and the needs of survivors of domestic violence. Our statement overlaps with a number of the Commission's recommendations related to the law enforcement's response to domestic violence. Secondly, on May 4, DCCADV released a response to the Police Reform Commission's Report. You can read both statements in full on our website, but this testimony will address a few points in the Police Reform Commission's Report.

First, recommendation 6(a) states that with funding from the Council, the Office of Victim Services and Justice Grants (OVSJG) should expand the number of domestic violence advocates and allied social workers and counselors who can be safely deployed as first responders in lieu of police or, alternatively, as co-responders along with officers in situations where violence is actively unfolding, could quickly escalate, or if a weapon is involved.

Every year, in addition to testifying at hearings for MPD, we also testify at OVSJG hearings, and every year we ask for more funding to provide critical services to survivors. Domestic violence service providers are under-funded, and many are working at capacity to provide critical services to survivors. We acknowledge that many survivors rely on law enforcement, but we are happy to see that the Commission recommends more funding to expand the number of domestic violence advocates to support alternative responses. The flat funding that many of our programs have received over the years or funding cuts mean DV programs do not have the capacity to fully implement programs that would allow this kind of collaboration. We strongly support the recommendation, and note that in addition to providing more funding to service providers, this initiative will require clear infrastructure as it relates to changes in practices and protocols and more training for 911 operators and responding organizations.

Another recommendation – recommendation 6(c) – advises that once a DV co-response model is in effect districtwide, the Council should repeal the mandatory arrest law and replace it with clear guidance that MPD officers should follow, making arrest decisions in consultation with domestic violence advocates on the scene and survivors themselves.

While mandatory arrest laws were originally praised as being beneficial to survivors, these policies may have made survivors less safe and increased mortality rates.[2] Incidents of domestic violence are already traumatic and can be lethal for survivors and their families. In 2019, MPD answered almost 29,000 calls for service related to domestic violence. However, that data only covers calls for service, incidents of domestic violence and the number of arrests. As the District examines

[2] Bridgett, Alayna., "Mandatory-Arrest Laws and Domestic Violence: How Mandatory- Arrest Laws Hurt Survivors of Domestic Violence Rather Than Help Them", *Health Matrix*, Volume 30, 2020, p. 455

alternatives to policing, the process should involve survivors in the community. The Coalition is in the process of establishing a Survivor Advisory Council and we will be happy to assist in further discussions or research regarding this recommendation.

Another recommendation in section II of the report states that the Council, Mayor, and Office of Victim Services and Justice Grants should develop public-private partnerships to expand temporary shelter for survivors of domestic violence. During FY 2020, the Community Partnership for the Prevention of Homelessness, DCCADV, and the six domestic violence housing organizations in DC worked with The Raben Group to develop a District-wide Domestic Violence Housing Strategic Plan. The funding to support the development of this strategic plan was made possible by the Council, who allocated fund to OVSJG to ensure a comprehensive plan was developed to guide the growth of survivor-specific housing in the District.

The DV Housing Strategic Plan was developed to identify the DV specific housing and services currently available, identify funding across the District that currently supports DV housing, outline barriers to safe and stable housing survivors of DV experience, and provide recommendations to improve housing options for survivors of DV in DC. In their February 2021 Performance Oversight response, the Department of Human Services (DHS) reported "in FY20, 677 families (95% of families) who were assessed for homeless services (through the Virginia Williams Family Resource Center (VWFRC) were) identified as, or disclosed being, survivors of domestic violence/having experienced domestic violence."[3]

It is clear survivors need DV specific housing assistance more than ever. In the one-day census of nationwide domestic violence services, 507 adult and child survivors sought assistance for

[3] https://dccouncil.us/wp-content/uploads/2021/02/DHS_2021-Performance-Oversight-Pre-Hearing-Responses.pdf

emergency shelters, transitional housing, or other housing in the District.[4] However, for survivors who made requests for services, during that one day in September 2020, 37 percent of the unmet requests were housing-related. DC doesn't need additional data or research to know that there is a need for housing for survivors. The Coalition supports the Police Reform Commission's recommendation to expand DV housing, and we look to the Mayor's Office to implement the DV Housing Strategic Plan.

A third recommendation in the report stated that The Council should invest in community-based organizations led by Black, Indigenous, and other people of color (BIPOC) to create safe and supportive spaces for communities to hold informal and organic restorative justice circles for healing in the wake of some violent crimes and traumatic events.

The Coalition believes restorative justice is a valuable option for some survivors who wish to pursue it. Many survivors don't want to access the criminal legal system or may not want to see the abuser charged or incarcerated. This is especially true for survivors who are Black, Brown, and/or are undocumented. During the listening sessions last summer, some survivors expressed they want different options, more than the police or courts.

DCCADV encourages the Council to invest in a restorative justice program that is led by BIPOC, is survivor-centered and trauma informed, and is developed by the community.

In Section III of the report, the Commission recommends that the school policing infrastructure should be dismantled and replaced with a holistic public health approach to school safety and crisis intervention that is relational, racially just, restorative, trauma-responsive, and trauma-informed.

[4] Domestic Violence Counts Report – District of Columbia Summary: https://nnedv.org/wp-content/uploads/2021/05/15th-Annual-DV-Counts-Report-District-of-Columbia-Summary.pdf

The Coalition supports this recommendation and we support the removal of MPD officers from DC Public Schools. In DC, Black students are more likely to be arrested when there are police officers in the schools.[5] The data on arrests and the way Black and Brown youth are treated by police doesn't even speak to the years of trauma, stress and pain youth have to endure because police are in schools. The $25 million that funded MPD in schools in FY2021 could have been invested in mental health programs and domestic violence prevention efforts. We support the Commission's call for increased trauma-informed training for teachers and staff, restorative justice programming, and expansion of school-based violence interrupter programming and training.

The Coalition has identified other ways to support survivors of domestic violence that expand on the Police Reform Commission's report that can be viewed in our statement on the PRC's recommendations. We thank the District for investing in this essential work and are proud to be a part of the solution.

[5] *The Black Swan Academy citing the 2019 School Report Card.*

Testimony

of

Robert Pittman

Chairman

First District Police Citizens' Advisory Council, Inc.

Before

The Committee of the Whole

Phil Mendelson, Council Chairman

Kenyan McDuffie, Esq. Chairman Pro Tempore

Brianne K. Nadeau, Ward 1 Member

Brooke Pinto, Esq. Ward 2 Member

Mary Cheh, Esq. Ward 3 Member

Janeese Lewis George, Esq. Ward 4 Member

Charles Allen, Esq. Ward 6 Member

Vincent Gray, Ward 7 Member

Trayon White, Ward 8 Member

Anita Bonds, At-Large Member

Robert White, Jr., Esq. At-Large Member

Elissa Silverman, At-Large Member

Christina Henderson, At-Large Member

J&PS and COW Joint Public Hearing

Thursday 20, May 2021

9:30 AM

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Committee's Joint Public Hearing with the Committee of the Whole this Thursday, May 20, 2021

Issues

I caution this Council to slow down in its mission to change everything policing! If you understand policy and management, you should know that moving quickly without the appropriate tools and the measurements I place will not yield solid results. What I have learned about government in over 30 years is that its best to let other agencies, corporations and governments go first with trends. While you are not executives, you are corporation officers and subject to lawsuits. Your chairman should remind you of this. I think you should remember this. Let others go first and shake the problems before you expose your own system to risks. There is no sense of urgency on a controversial report. Most of the recommendations of your Commission on Policing is bias and not well thought out. It points to police officer shootings and incidents only and does not address the self-inflicted harm that black children and adults bring upon themselves. In this version of my testimony, we will highlight the following points:

- Mary Cheh stated in opening remarks that a police officer told her pick out a car and he can stop it? If that happened, it is my hope that she reported this to the District Commander. That is a dangerous and illegal statement in and of itself. If an elected official does not know how to handle an action or statement like this, then it highlights what I have been saying for years. We must train community on how to react to specific problems like this. That means police (MPD), and any other agencies that our residents interact with. People don't know. It's not just Black people, its White, Asian, Latino, African people and all others. Every month new businesses and residents in PSA, Sector and Police Advisory Council meetings ask the same questions. That shows us education of all people is necessary. Your police commission does not address this.

- Tell your Police Commission to share their view of policing with the latest victim, 65-year-old Ms. Ella-Mae Neal, of Southeast, DC family and neighbors. You will see how far that goes. No amount of gun violence interrupters is going to stop this type of random shootings. In England they used knives, here its guns.

- The majority of the community does not support what this Council or your Police Commission is proposing, related to public safety. Simply having a hearing where the advocates of what you are pushing in the middle of the day, when most can't attend or even know is not an excuse to push through this agenda.

- Slow down! You are making the city less safe and exposing the Council to lawsuits.

- Police are not the center of public safety. It appears your Commission understands that now, so the verbiage has changed to De-Centering policing. Laughable. The young and black juveniles that usually find themselves as the center of attention by police is a direct result of the failed DC and PG County schools. Teachers and others in schools who attempt to use police as a force to remove students from classrooms need training, cultural and sociological. Oftentimes, we hear black parents telling crying children, that if they don't stop crying, they will give them to that police officer standing over there. These are the types of statements many black children grow up hearing. So, the inherent fear of police is rooted in the family and neighborhood systems long before a child is old enough to fully understand what police are. SROs have worked to change that socialization. Teachers often perpetuate that fear and misunderstanding of police and political systems based on their own bias.

- I reject the recommendations of the DC City Council's Police Commission because it not thorough. It's not well thought out and it has a bias to policing in general and does not look at why specific actions occur by police in the District of Columbia. The report uses a broad-brush approach to issues related to policing and does not speak to the incidents driven by the action of those who find themselves arrested. A more comprehensive methodology would examine how individuals find themselves in these situations in the first place. It would use case studies and approach the topics in a rigorous manner. This report does none of that. It is tunnel visioned and composed by and for those who are singularly focused. If you don't know policing, don't have an understanding of policing, specifically in Washington, and you have anxieties toward policing or have seen acts of police officers that were less than any of us would expect or except, then and only then, I clearly understand how you can except that this is a well-rounded and exceptionally written report.

- It is not. As one of its members articulated later in the hearing, the understanding of the criticisms of the report. I recognize that the composition of the body is smart, and agenda focused. I'm sure they know that they stacked the deck against an agency which is taking the heat for the failures of DCPS, PGCPS, DC Social Services, Child and Family Services, DC Courts, DPR, and DYRS. These are all players of equal and greater responsibility to children and families.

- Your Police Commission missed the opportunity to highlight how the above agencies were in decades past the disposal grounds for employees that no one wanted. They didn't perform well even when we would advocate for budget increases! We achieved those budget requests and the agencies still failed to perform. They did not know how to charge employees for incompetence and even when they did, missed deadline on reviews and ultimately those were returned to their jobs by arbitrators.

- Your Police Commission missed the opportunity to highlight how the past sins of government and favoritism of councilmembers and management overlooked many problems in those agencies and allowed a system of promotion to be the answer to getting rid of a problem employee. Everyone knew that the person would not succeed as a manager and that was the thinking to ridding individuals from agencies and the System.

- Speaking of bias, bias is already listed in current code in terms of bias policing. Why do you need a bias threat assessment evaluation and if you do, what is the definition of BIAS? It should be defined…

- There is no discussion about the black youth killing each other and how to address this. Violence Interrupters (VI) are not reliable, burn out and must be careful of which neighborhood they go into. There was no comprehensive review, city to city on how effective they are and whether they will show up at 3AM or 3PM. The report did not detail immunity for VI's and who pays for their death, injury or that they find themselves in the wrong neighborhood and are beaten by angry parents. There is so much more to instituting a program like this in the District of Columbia.

- Your Police Commission missed the opportunity to highlight whether public trust would come to VI's in general as a result of their work.

- Your Police Commission missed the opportunity to highlight the enormous cost for all of the social workers and psychologists qualified to work with communities of color. There are not enough of those individuals in the county. So where would they come from and at what cost. The drain on the DC budget would be huge.

- Your Police Commission missed the opportunity to highlight the increase of crime during a pandemic and beyond and how this affects the needs for additional policing. The only discussion of Security and Special Police Officers is massively deficient. As a direct result of a push to Defund and De-Center policing consequences will occur. One unintended effect of this very naive attempt to implement this absurd plan will be more security police and private protection services. This will drive up cost of services and goods. The political backlash will be extreme. There is also a chance the Council of the District of Columbia will face lawsuits for negligence and failure to protect the city.

- The Council does not address crime as it is at this writing and how to stem the tide of juvenile crime.

- There is no discussion about the black youth who are starting fights and bringing weapons into the schools.

- There is no discussion of juveniles who commit murder and strong penalties needed to deter others from doing the same.

- Your Police Commission missed the opportunity to highlight, that many of the cities referenced don't have the same the crime or type of crime that you see in the District of Columbia. None of those cities is a city-state like the District. As an entity that is a collection of neighborhoods, a city, a county, a state, a federal enclave, a federal district and a national capital with a host of foreign nationals and embassies.

- Your Police Commission missed the opportunity to highlight that because of the number of demonstrations that occur almost daily, whether you hear about them or not, and the threat of terrorism, foreign and domestic, the readiness factor of MPD is expected by the President of the United States and the citizens of the District to be at a higher standard. I suspect they did not include this because they don't know it.

- Your Police Commission missed the opportunity to discuss what is domestic terrorism. It was an opportunity to open debate on Black people killing Black people. The causes, the hatred of Black people to Black people and neighborhood turfs where people fight over what side of the block you are from.

- Is that not domestic terrorism? Is that not a pandemic on top of multiple pandemics? This would have been an opportunity for free form discussion open to ideas across the spectrum, not just one type of thought. Where is the BLM outrage and protest for Blacks killing Blacks?

- As one witness pointed out when SROs don't have the background on a student in crisis there is a handicap. The answer is amending federal and local statues to allow for that access as I have stated in past testimonies. When juveniles are arrested, why not have a balanced discussion on what a SRO should have access to regarding records? SROs are specially trained. It is not true that they are regular police, they are not. The Police Advisory Councils would like to see more training, in many areas including that of SRO.

- As I have pointed out in previous testimonies, OUC can be restructured to provide a great deal of the information that Police Advisory Councils seek, and that the Council seeks. I have a detailed plan as to how that would be implemented and have shared this with the Chief of Police and OUC.

- The Deputy Auditor position can work because the infrastructure is already in place and I think this would be better than an IG for reasons stated today.

- Your commission is clearly tunneled visioned and does not have a clear understanding of policing in DC. If they did, they would have been able to address the issues they raise in a more comprehensive manner. In reviewing their meetings, they were confused, did not understand policing and relied solely on documents. That is a huge mistake when attempting to determine cause and effect. The handicap they have and did have is, because they chose to have an adversarial relationship with those of us who could provide answers that were relevant, including the police and the Mayor.

- This group makes references to specific incidents in schools as though it is the general order of response. That is a bias that hurts the credibility of the report.

- Your Police Commission missed the opportunity to highlight how police are blamed for crime, even though the issues start at home with abusive behavior and corporal punishment. This teaches young children how to react to other children by hitting, fighting and causing harm to themselves and others.

- This group calls on the Jail study that was published as a template in agreement with its own report. However, if fails to mention that many of them were the members of that commission report. That is not transparent.

- The Metropolitan Police Department has many more responsibilities to include the protection of the entire city regardless of how many other federal law enforcement agencies exists. I have stated in the past and has become very clear not only in the last year but on January 6th, January 20th and especially on April 3rd 2021.

- Christie Lopez does not have the capacity to understand the Metropolitan Police Department and the many different organizational parts. She expresses that a smaller leaner department is more efficient. That is an academic view looking at the fact that the majority of police departments in the United States are small departments. They do not carry the complexities or the needs and responsibilities of a department such as the one that we have. Lopez can't possibly understand the organizational structure and what it takes to create matrices for it on a monthly basis simply by reading a few reports and speaking to a few officers in the short period that she has been in this position. The 2D CAC invited Lopez to attend its last meeting. She accepted, then cancelled for CCE. No reschedule no further comment. That is insulting. Perhaps she knew a CAC audience of people who really know the police would be intimidating. She would not be capable of responding to the scrutiny.

- Your commission was weighted in their views. One must free oneself from the weight of one's own convictions. Without the ability to be free of the traumas and visions of past experiences can or could they have made choices that were fair and equitable to the police and to the greater community. That did not happen. That is the greatest injustice of all. To ask that others be fair, but you are not!

- You insist that police officers not have bias. Everyone has bias. You have bias and you show that each time I appear before you. The issue is not bias, but how you suppress that bias and still perform in the interest of the whole community.

You are sending a message to juveniles that they can get away with murder and they do. You are sending a message that adults can get away with murder and judges, who we don't elect are releasing people back to the community who are committing more murders and other crimes. The reasons children make poor decisions is the lack of education and being loss in the school systems by third grade. That is the failure. This commission does not address these issues. You are heaping the failures of parents and government on the police.

There are close to 750,000 people in this city now and over a million other from businesses and tourism. I will continue to support the need for a police force of 5000 because if you want the training and the type of policing that you say do, Members must have the ability to leave patrol and attend classes. We also know that we must protect the city and federal land whether you understand that or not.

Professor Ross raised the issues of decreased Stop and Search numbers in the United Kingdom. There is also a Section 60 stop in the UK. That is a country that I look at the amount of criminal activity and the response by the Metropolitan Police. While I don't know the study of which she references, I am providing the reports I have out of the UK which shows something very different. I have included studies from the UK in past testimonies. The people there kill with knives and blunt force objects.

I know each of you mean well, however your decisions are not well informed. I caution you to not make choices that the people least likely to show up in a community meeting but get pimped by well-meaning activists who are going to write books and make television appearances; those people will be left behind. The people who call 911 more than anyone due to the lack of resources. Let us meet in the middle. At the end of the day decentering the police should be an issue at the ballot box. It is too big of a decision for 13 people to make.

https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest

https://www.gov.uk/police-powers-to-stop-and-search-your-rights

https://www.met.police.uk/sd/stats-and-data/met/stop-and-search-dashboard/

https://www.statista.com/statistics/284662/weapons-found-during-section-60-stop-and-searches-in-england-and-wales/

https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/disproportionate-use-of-police-powers-spotlight-on-stop-search-and-use-of-force.pdf

https://www.researchgate.net/publication/225633689_Racial_Disparity_in_Police_Stop_and_Searches_in_England_and_Wales

Committee's Joint Public Hearing with the Committee of the Whole this Thursday, May 20, 2021Addendum

I write this as my personal comments related to the DC Council's Police Commission Report and the 90 recommendations for change in policing. Once again, I counsel this 13 Member body to move cautiously through this minefield and consider the following:

1. Increasing the age from 18 to 21 where a juvenile may be charged as an adult will not reduce crime as data shows. Potentially you will encourage a certain subset of juveniles to become willing participants in criminal enterprises where for profit the juvenile is willing to commit adult crime for a payout with the understanding that if arrested and convicted the sentence will be minimal. You also put into play the opportunity for adults to force their own children in criminal activity to support a way of life.
2. All of my comments past, present and future are about the safety and security of the District of Columbia. My testimonies and that of others who associate themselves with my tone and posture are about what city police must do everyday to protect all interest in the city, not just the area of juveniles or people of a certain color or background. When applying this approach to every single facet of what police do, the percentage of the issues raised by your Commission is miniscule, however these issues deserve additional scrutiny.
3. Policing must be prioritized based on the categories of violent crime, whether committed by juveniles or adults.
4. Even if I could agree with 50% of your Commission's work, the cost associated with implementation and then the cancellation of many of these measures when you find that they are ineffective, would be millions of dollars, not to include all the litigation against the council and the city.
5. Your Commission never convinced me in their report that they used a tool to adjust for the data they used from other jurisdictions to be compatible with the actions of police in our city, based on population, duties, arrests, citations, and overall responsiveness to the person who came into contact with a police officer. It is difficult to legitimize a report that does not create a fair basis from which to start.

I hope you will consider these points.

Evan Douglas
PRC Hearing 5/28/2021

Goodmorning,

Thank you council and committee for allowing me to speak at today's hearing. I want to affirm all the speakers that have come before me and all of the speakers who will come after me. I hope that we can find a common ground as we look forward to rethinking our public safety here in the District.

My name is Evan Douglas and I am a born and raised Washingtonian and I am currently Policy and Advocacy fellow at the DC Justice Lab. A graduate of School Without Walls and a recent graduate from GW with my masters in criminology. I am also an official spokesperson for the LEAP which stands for the Law Enforcement Action Partnership. More importantly I served as a proud public servant on the Metropolitan Police Department from 2016 until March 2021.

I want to talk to you today about the Police Reform Recommendations. Not all 90 of the recommendations but a select few that I can provide an inside perspective on. I will be talking about 1) Police training/Guardian Model 2) Jumpouts-GRU/CST 3) Qualified Immunity 4)Divestment. I have provided a written testimony with pictures and statistics as well.

The First one I would like to talk to you about is Training reform and adopting the guardian model. We need a severe and drastic shift in police culture and police powers. We need to reteach our officers on how we want them to protect us but we as a community also need to unlearn what we think police officers should be doing in our communities. We don't need them to respond to mental health calls, loose dogs or calls regarding juveniles. The wide majority of calls don't require an armed individual to save the day.

Imagine this, an officer comes to work and has a completely different job description than what he/she is used to. He has more tools for his belt. Measures for de-escalation. A brand new vision of public safety and has positive incentives for community engagement. Police officers true mission is to combat all of the sociological ills that are the offspring of poverty.

Obama's 21 Century Taskforce recommended that rebuilding trust and legitimacy should be our number one priority when we talk about improving our police. By adopting equitable training practices and encouraging the guardian mentality, we will start to gain the trust of the community.

The second recommendation I want to talk about are Jumpouts HOW LONG ARE WE GOING TO CONTINUE TO IGNORE THE DECADES AND DECADES OF RESEARCH DATING BACK TO THE 80s, that shows us TerryStops, Stop & Frisks, or jumpouts, whatever you want to call them, JUST DONT WORK. From New York to Chicago, the results were always poor. .04% poor.

Having these units not only ruins the legitimacy of policing but divides the police and our communities. Treating innocent people like criminals isnt the solution to anything.

We want to resort back to a “community policing model” but as long as you have units like GRU and CST, it doesn’t matter how many school resource officers you have or how many community engagement officers you have. The negative interactions from these jumpout groups leave permanent scars on the community.

Qualified Immunity, if we put more liability on officers, maybe they will think twice before kneeling on someone’s neck……...We need officers to think before reacting and creating a situation that can permanently change someone’s life,

Disinvesting in MPD, particularly in overtime. In 2020, 43 million dollars of our DC taxpayer dollars were donated to MPD to put on facade image of public safety. With all that money homicides still increased, homicides were still not closed, carjackings still went up, and stolen vehicles went up...But we sure did always have police presence down BLM plaza. Whenever we see an All Hands on Deck Activation, we need to question, do we really need that. What will all of those officers be doing? There aren't that many calls of service or details to be covered. …..

I look forward to any questions and would love to meet with The Council in future. Thank you.

My name is Emory Vaughan Cole, II and I am a law student who is in support of the recommendations made by the Police Reform Commission. Specifically, I urge the Council to adopt Section III Recommendation 2a which would prohibit MPD officers from arresting or detaining students while on school campus grounds for non-school related offenses.[1] Currently, 25% of all students within the District are missing 10% or more of in-class learning and as a result, these students' abilities to achieve their full academic potential is severely weakened.[2] In order to combat this troubling issue, this Council must approve of initiatives that will both encourage students to come to class and will guarantee that the educational environment within these schools goes undisturbed. These two objectives cannot be achieved if MPD is allowed to arrest and detain students while on school campus grounds.

Firstly, numerous black and brown students nationally have voiced how they feel unsafe and are unable to concentrate academically when they observe a police presence within their schools.[3] Notably, when these students witness their fellow peers being publicly detained or arrested, they fear the possibility that they too could be forcibly restrained by a police officer and this fear cripples these students' abilities to focus in-class.[4] Secondly, not only are MPD detentions and arrests of students distracting to the entire school community but it is also demoralizing to the student being detained or arrested. As former educators within the District that I interviewed highlighted, it is very difficult for students to stay in school once they are detained or arrested on school property. The moments after a student's detention or arrest, the

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[1] Page 73 of DC Police Reform Commissions' Decentering Police To Improve Public Safety Report, https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf

[2] *District of Columbia Public Schools at a Glance: Attendance*, https://dcps.dc.gov/page/dcps-glance-attendance#:~:text=The%20Office%20of%20the%20State,believes%20that%20every%20day%20counts

[3] Page 31-32 and 40 of *We Came To Learn, A Call to Action for Police-Free Schools*, https://advancementproject.org/wp-content/uploads/WCTLweb/docs/We-Came-to-Learn-9-13-18.pdf?reload=1536822360635

[4] *Id.*

student's peers either humiliate them or actively avoid the student while on campus. Additionally, teachers also fear and avoid students that have been detained or arrested because they frequently assume, despite having proof, that the student must have committed an extremely heinous crime to have been restrained by an MPD officer while at school. Resulting from their public humiliation and isolation, it is no wonder why a student who has been detained or arrested on school property would not want to skip out or drop out of school. To ensure that these students do not abandon their efforts in securing their education, MPD officers should not be allowed to publicly arrest or detain students while on school campuses.

Lastly, when MPD officers are allowed to detain or arrest students at school, these officers jeopardize the lives of undocumented students within the District. Roughly 28% of all DC students are undocumented and many of them fear coming to school because any interaction that they have with an MPD officer could lead to these students being deported.[5] Additionally, the educators that I interviewed stated that undocumented students tend to miss days of in-class learning when they feel that their chances of deportation are greater. To alleviate these students' real fears of deportation and in order for DC to fully realize its sanctuary city status, MPD officers should never be allowed to arrest or detain students at schools.

In summary, I fully support the Police Reform Commissions' recommendations because they will ensure that all students within the District feel safe and supported while they pursue their right to an education.

[5] American Immigration Council's *Immigrants in the District of Columbia* Report, https://www.americanimmigrationcouncil.org/research/immigrants-in-washington-dc

Testimony of Eduardo R. Ferrer
Policy Director, Georgetown Juvenile Justice Initiative*
Visiting Professor, Georgetown Juvenile Justice Clinic*
***Opinions provided are those of the Clinic & Initiative but not the University as a whole.**

Public Roundtable on the Recommendations of the DC Police Reform Commission
Thursday, May 20, 2021

Good morning, Chairperson Mendelson, Councilmember Allen, and members of the Committee of the Whole and the Committee on Judiciary and Public Safety. My name is Eduardo Ferrer. I am a Ward 5 resident and, for identification purposes, the Policy Director at the Georgetown Juvenile Justice Initiative and a Visiting Professor in the Georgetown Juvenile Justice Clinic. The views expressed are based on the research and experience of the Georgetown Juvenile Justice Clinic & Initiative and not given on behalf of Georgetown University as a whole. Thank you for the opportunity to testify today in support of the recommendations of the DC Police Reform Commission. In particular, my testimony will focus on some of the specific recommendations in sections 3 and 6 relating to re-establishing police-free schools and promoting a developmentally appropriate approach to the manner in which youth are policed.

I. Re-establishing Police Free Schools

First and foremost, we wholeheartedly endorse the Police Reform Commission's general recommendations in Section 3 that the District: (1) "[d]ismantle the school policing infrastructure and replace it with a holistic public health approach to school safety and crisis intervention that is relational, racially just, restorative, trauma responsive, and trauma-informed,"[1] (2) reduce the opportunities for youth to be arrested in schools; and (3) make schools weapon-free for youth and adults alike. We also endorse each of the specific recommendations in that section.[2]

A. Reimagining school safety and creating police free schools

School can often be a site of trauma and fear for many students. In 2019, 9.4% of DCPS and public charter high school students[3] and 15% of middle school students reported they had

[1] *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission*, District of Columbia Police Reform Commission (2021), 69.

[2] *See id*. 67-70.

[3] D.C. OFFICE OF THE STATE SUPERINTENDENT OF EDUC., 2019 YOUTH RISK BEHAVIOR SURVEY RESULTS: HIGH SCHOOL SURVEY 5 (2020) https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/2019DCBH%20Summary%20Tables.pdf (last visited October 16, 2020) [hereinafter YRBS HIGH SCHOOL RESULTS].

skipped one or more days of school because they felt unsafe.[4] In 2016, 25.3% of youth under 18 years old in DC had experienced at least one traumatic event in their lifetime.[5] Given that schools have contact with most students every day, schools have the potential to transform and play an impactful and positive role in creating real safety in school and supporting students who have experienced trauma.

However, the way that DCPS staffs its schools is inadequate to provide the individualized resources necessary to support the high numbers of students with histories of trauma. Indeed, during the 2019–2020 school year, there was, on average, one contracted security guard for every 165 students in DCPS.[6] In stark contrast, there was only one budgeted social worker for every 254 students, one budgeted psychologist for every 529 students, and one budgeted counselor for every 352 students.[7]

In addition, students of color are more likely to be policed in school than their white peers in DC, adding another source of potential trauma to their school experience. For example, Ballou High School, which is 98% Black, has one security guard for every sixty-two students,[8] whereas Woodrow Wilson High School, which is 37% white, 31% Black, and 21% Hispanic/Latino has only one security guard for every 189 students.[9] This statistic is particularly troubling when one considers the well-documented harms posed by police officers in schools to students, including police intervention for minor misconduct, increased loss of instruction, and lower rates of graduation and college enrollment.[10]

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[4] D.C. OFFICE OF THE STATE SUPERINTENDENT OF EDUC., 2019 YOUTH RISK BEHAVIOR SURVEY RESULTS: MIDDLE SCHOOL 44 (2020) https://osse.dc.gov/sites/default/files/dc/sites/osse/page_content/attachments/2019DCBM%20Summary%20Tables.pdf (last visited October 16, 2020) [hereinafter YRBS MIDDLE SCHOOL RESULTS].

[5] *Indicator 6.13: Has this child experienced one or more adverse childhood experiences from the list of 9 ACEs?*, DATA RESOURCE CTR. FOR CHILD & ADOLESCENT HEALTH, https://www.childhealthdata.org/browse/survey/results?q=5150&r=10 (last visited Oct. 16, 2020).

A "traumatic event" is fully defined as one of the nine following Adverse Childhood Experiences: 1) Experiencing economic hardship; 2) experiencing a parental divorce or separation; 3) living with someone who had an alcohol or drug problem; 4) being a victim of neighborhood violence or witnessing neighborhood violence; 5) living with someone who was mentally ill, suicidal, or severely depressed; 6) witnessing domestic violence; 7) having a parent who was currently or formerly incarcerated; 8) being treated or judged unfairly due to one's race or ethnicity; and 9) experiencing the death of a parent.

[6] *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission*, District of Columbia Police Reform Commission (2021), 68.

[7] *Id.*

[8] *Ballou High School*, DC SCHOOL REPORT CARD, https://dcschoolreportcard.org/schools/1-0452 (last visited Oct. 16, 2020); 2019-2020 MPD SCHOOL SAFETY REPORT at 11.

[9] *Woodrow Wilson High School*, DC SCHOOL REPORT CARD, https://dcschoolreportcard.org/schools/1-0463/profile (last visited Oct. 16, 2020); 2019-2020 MPD SCHOOL SAFETY REPORT at 13.

[10] DANIEL J. LOSEN & PAUL MARTINEZ, LOST OPPORTUNITIES: HOW DISPARATE SCHOOL DISCIPLINE CONTINUES TO DRIVE DIFFERENCES IN THE OPPORTUNITY TO LEARN 33 (2020), https://www.civilrightsproject.ucla.edu/research/k-

Real safety for our students means both that they are safe (physically free from harm) and feel safe (psychological and emotional safety). To achieve both, DC must reimagine school safety by adopting a holistic, public health approach to school safety that is relational, racially just, restorative, and trauma-responsive. This means: 1) eliminating the outsourcing of school security to a private corporation and 2) diversifying the school staff responsible for promoting safety to include credible messengers, roving leaders, student safety coaches, social workers, counselors, restorative justice practitioners, among others.

B. Schools as sanctuaries

Additionally, DC schools must be a sanctuary for our students. To that end, DC must: 1) prohibit the arrest of youth in schools for non-school based offenses or custody orders; 2) prohibit the interviewing or interrogation of youth in schools; 3) eliminate the MPD School Safety Division;[11] 4) prohibit youth and adults from carrying firearms in schools;[12] and 5) implement non-law-enforcement-driven crisis response and safe passage systems.

II. Ensuring Developmentally Appropriate Policing

Second, in addition to reestablishing police-free schools, our laws must also reflect the reality that kids are different from adults in ways that must guide the manner in which youth are policed. This is especially true when we are deciding whether a police response is the appropriate way to respond to common adolescent behavior and when police officers are asking youth to waive their constitutional rights. As such, we must reform our laws to both to decriminalize normative youth behavior and provide youth more than just the bare minimum constitutional protections, particularly when it comes to youth waiving their rights under the Fourth and Fifth Amendments. Specifically, as I discuss in more detail in my written testimony, this means, among other things, 1) decriminalizing normative youth behavior like status offenses, threats,

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12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v12.pdf; Denise C. Gottredson, Erin L. Bauer, Scott Crosse, Angela D. Greene, Carole A. Hagen, Michele A. Harmon & Zhiqun Tang, *Effects of School Resource Officers on School Crime and Responses to School Crime*, 19 CRIMINOLOGY & PUB. POL'Y 905, 930 (2020).

[11] Currently, the District spends at least $14 million on MPD's School Security Division. This division should be eliminated and the money saved should be reinvested directly in youth and family in a manner consistent with the recommendations proposed in Section III *infra*.

[12] Specifically, officers of all types should disarm prior to stepping foot on a school campus unless they are specifically responding to the *very rare* report of a shooting or armed individual on campus. See David Ropeik. *School Shootings are Extraordinarily Rare. Why is Fear of Them Driving Policy?* Washington Post. (March 8, 2018). *Available at*: https://www.washingtonpost.com/outlook/school-shootings-are-extraordinarily-rare-why-is-fear-of-them-driving-policy/2018/03/08/f4ead9f2-2247-11e8-94da-ebf9d112159c_story.html (finding that the statistical likelihood of any given public school student being killed by a gun, in school, on any given day since 1999 was roughly 1 in 614,000,000).

disorderly contact, etc.; 2) abolishing the consent searches of youth; and 3) requiring counsel prior to youth being able to validly waive their Miranda rights.

A. Decriminalizing Youth Behavior

In order to reduce the oversized footprint that police have in the lives of DC youth, the District of Columbia also should revisit the manner in which it has criminalized adolescent behavior.[13] For example, youth can be charged in DC with being a person in need of supervision for status offenses – behaviors such as truancy or running away from home that are only unlawful because of the age of the person engaged in such behavior.[14] These offenses bring children into the juvenile legal system as a result of issues that do not have a direct connection to public safety and are more productively and effectively addressed within schools, families, and communities.

In addition, certain offenses – for example, threats, disorderly conduct, loitering, etc. – too often criminalize hallmark characteristics of normative adolescent development, such as emotional speech, impulsivity, high energy, and the seeking of social groups. Indeed, too often youth are stopped or arrested by police for such behaviors despite the lack of any criminal intent behind the behavior.[15] As a result, decriminalizing certain offenses for youth should reduce unnecessary (and often unjust) contact with the police and juvenile legal system.

B. Abolishing Consent Searches for Youth

DC's approach to "consent" searches of youth is not developmentally appropriate. It fails youth by treating them as if they are the same as adults, which they are not. Adolescents are more impulsive, sensation-seeking, likely to make decisions based on "immediate" gains rather

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[13] *See* District of Columbia Juvenile Justice Advisory Group Recommendation to Mayor Bowser: *Create New Opportunities for "Persons in Need of Supervision" (PINS) to Succeed without Legal Intervention*, February 21, 2020, https://ovsjg.dc.gov/sites/default/files/dc/sites/ovsjg/service_content/attachments/JJAG%20PINS%20Alternatives%20Report%20February%202020.pdf.

[14] *Id*.

[15] Analysis of the most recent stop-and-frisk data released by the Metropolitan Police Department (MPD) revealed that of the people under 18 who were stopped by police in the District, Black youths made up 89 percent and were stopped at 10 times the rate of their white peers. *See* ACLU-DC, RACIAL DISPARITIES IN STOPS BY THE D.C. METROPOLITAN POLICE DEPARTMENT: REVIEW OF FIVE MONTHS OF DATA, *at* https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf.

than "long-term" consequences, and susceptible to peer pressure than adults.[16] Youth are also less aware of their legal rights.[17]

Additionally, DC's current policy does not account for the personal and cultural context for DC youth, especially Black youth. Black youth – who are grossly overrepresented in DC's juvenile legal system[18] – living in over-policed areas often feel compelled to consent to searches based on their own personal, often traumatic, experiences with law enforcement and the historical experiences of police violence against Black people in DC.[19] They have essentially been conditioned to "consent" without even being asked; when they see an officer, youth lift up their shirts and to display their waistbands unprompted to avoid harassment by the police.[20]

The current legal framework for "consent" is a constitutional floor. DC can and should implement a consent search policy which is developmentally appropriate and adequately protects youth from police coercion. The law in DC should be changed so that the fruits of a search are *inadmissible* in any criminal or delinquency proceedings if seized when: (1) the subject of the search is a youth under 18 years old; (2) the justification for the search by sworn members of a DC law enforcement agency is consent; and (3) the search is not executed pursuant to a warrant or another exception to the warrant requirement. This new exclusionary rule would apply even when law enforcement officers did not know the age of the individual when they were searched. Significantly disincentivizing consent searches by making their fruits inadmissible in court will hopefully reduce the harassment youth face on the streets and the trauma they experience as a result of that harassment.

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[16] *See J.D.B.*, 564 U.S. at 273; Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop'*, 64 AM. PSYCHOL. 583, 592 (2009).

[17] Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513, 1536-1537 (2018).

[18] Rights4Girls & Georgetown Juvenile Justice Initiative, *Beyond the Walls: A Look at Girls in DC's Juvenile Justice System*, 30 (March 2018), https://rights4girls.org/wp/wp-content/uploads/r4g/2018/03/BeyondTheWalls-Final.pdf.

[19] *See* Dylan B. Jackson et. al, *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 Journal of Adolescent Health 627, 629; Dylan B. Jackson et. al, *Low self-control and the adolescent police stop: Intrusiveness, emotional response, and psychological well-being*, 66 Journal of Criminal Justice, 2020, at 1, 8; Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am. Journal of Pub. Health 2321, 2324 (2014); Nikki Jones, "The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men, *in* Pathways to Adulthood for disconnected young men in low-income communities. New Directions in Child and Adolescent Development, 33, 45 (K. Roy & N. Jones 2014); B.M. Tynes et al., Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color, 65 Journal of Adolescent Health 371, 376 (2019).

[20] *See, e.g.* Sam Sanders & Kenya Young, A Black Mother Reflects On Giving Her 3 Sons 'The Talk' ... Again And Again, NATIONAL PUBLIC RADIO (June 28, 2020), https://www.npr.org/2020/06/28/882383372/a-black-mother-reflects-on-giving-her-3-sons-the-talk-again-and-again; *United States v. Gibson*, 366 F. Supp. 3d 14, 21 n.4 (D.D.C. 2018) "the MPD's rolling roadblock practice is so prevalent in the District of Columbia that individuals living in high-crime neighborhoods sometimes show MPD officers their waistbands 'without [MPD officers] even saying anything." (citation and internal quotation marks omitted).

C. Requiring Counsel Before *Miranda* Waivers

Similarly, the *Miranda* doctrine represents the minimum of what is required under the Constitution to advise a child of their rights, but that does not make it sound policy. For instance, due to their psychosocial immaturity, among other things, young people as a class are far less equipped than adults to waive their *Miranda* rights.[21] Additionally, some adolescents who are questioned by DC police lack the cognitive ability to even understand *Miranda* warnings.[22] Finally, just as the backdrop of police violence against Black people in DC undermines the ability of youth to give meaningful consent for searches, it also creates a powerful force undermining the voluntariness of any waiver Black youths may make.[23] They may waive their *Miranda* rights just to get out of the interrogation room. In this respect, for Black youth *Miranda* warnings do not serve as an effective deterrent against the coerciveness of police interrogation.

As such, DC's policy of police interrogations of youth must also be reformed. The law in DC should be changed so that statements made by youth under 18 during custodial interrogation are inadmissible *unless*: (1) they are read their *Miranda* rights by a law enforcement officer in a developmentally appropriate way; (2) they have the opportunity to consult with counsel before making a waiver; and (3) in the presence of their attorney, they make a knowing, intelligent, and voluntary waiver of their rights.[24] A more mature *Miranda* doctrine for youths in DC that includes the right to counsel before they make a waiver decision preserves the rights of children, cuts down on coerced confessions, and protects the purpose that animated *Miranda* in the first place.[25]

Conclusion

Thank you for the opportunity to testify today.

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[21] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 10 (2006).

[22] *See* Kerstin Konrad, et al., *Brain Development During Adolescence*, 110(25) DEUTSCHES ARZTEBLATT INT'L 425, 426–27.

[23] Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. ___ (forthcoming December 2020).

[24] Katrina Jackson & Alexis Mayer, Demanding a More Mature Miranda for Kids, D.C. Justice Lab & Georgetown Juvenile Justice Initiative, at bit.ly/mature-miranda.

[25] Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29(6) LAW AND HUMAN BEHAVIOR 723, 737 (2005).

Testimony
District of Columbia City Council
Committee on the Judiciary and Public Safety
Committee of the Whole

Thursday, 18 May 2021

Ronald E. Hampton

My name is Ronald E. Hampton; I am a retired D.C. Metropolitan Police Officer and former Executive Director of the National Black Police Association. Presently, I am serving on the D.C. Police Reform Commissioner. The council established the D.C. Police Commission in the third quarter of last year. I and my colleagues were selected in and around August 2020 with a mandate to delivery our recommendations originally by December2020. That date/deadline was extended to April 2021 due to the extensive work involved in the collection and analysis of finalizing the recommendations.

I am testifying in support of the recommendations and encouraging this legislative body to accept as well as start the implementation process. We need these recommendations if we are serious about changing the way policing have been done in Washington, DC. Believe it or not, I have been involved in this work for over fifty years. Twenty-four of those years serving in a police department that was an excellent example of a systemic racist organization for those in the department as well as how the department's behavior in the Black neighborhoods. The last twenty seven years I and many others social justice organizations and individuals have spent an awful amount time and efforts to talking about and working on so called reform only to be met with resistance and out right refusal to treat and respect the rights of Black and Brown people.

So, this is our best chance at bring about the much needed changes across the department. These recommendations are comprehensive and in my opinion must be implemented together in order to provide the level of community health, safety and healing deserved now.

Thank you for the opportunity to present this testimony today regarding this very important matter.

THE BLACK SWAN ACADEMY

Making the exception...the Rule

Testimony of Samantha Paige Davis
Executive Director, Black Swan Academy
Commissioner, Police Reform Commision
Joint Public Hearing with COW and J&PS
May 20, 2021

Good afternoon, Councilmembers.

I am Samantha Davis, the Founder and Executive Director of the Black Swan Academy (BSA). BSA is a racial justice and advocacy organization building a pipeline of Black youth civic leaders, committed to improving themselves and their communities through advocacy and organizing. We unapologetically lead with racial equity, fight for systemic change, and trust and invest in youth leadership. I am also a commissioner with the Police Reform Commission. We are approaching a year since the residents of this city rallied in historic numbers to demand racial justice, removing police from schools, defunding the police and investing in communities. I still believe the delayed response to take bold actions, has made the city in many ways complicit in the continued harm and trauma Black residents experience day to day by the system of policing. Now, we are presented with yet another opportunity to boldly and strategically invest in true safety for young people. We can do so knowing that the 15,000 plus residents who testified last year, Black and Brown youth all over the city, the State Board on Education, the Taskforce for Jails and Justice and the Police Reform Commission (a body formed by this council) all agree that we must immediately remove police from schools and reimagine school safety by divesting from positions and practices that are carceral or punitive in nature and investing in resources that promote a liberatory, healthy, safe and positive school environment.

I want to give honor and express gratitude to the Black youth and youth of color, parents, educators and organizers who have been organizing on this issue for years and whose organizing efforts are responsible for moving this work forward. Their efforts have forced us all to think critically about the ways in which our reliance on police causes harm and the urgent need to invest in the social emotional well being of young people.

As a commission we stand in solidarity with young people, calling for the Mayor, the city council, DCPS, DC Public Charter Schools, OSSE and all other stakeholders to make the necessary changes in the budget, policies and practices to ensure that schools are a sanctuary, where all young people can learn, develop, and make mistakes without fear of harm or persecution. To make this vision a reality, the Council should prohibit MPD and other law enforcement agencies from serving warrants, detaining, or arresting youth on campus or at school-related events. The Council should enact similar safeguards that extend to school personnel to protect students and

their family members from District and federal immigration enforcement agencies. Schools should be weapon-free zones. Law enforcement officers should be required to disarm before entering a school, unless responding to a violent incident.

We are also joining the call for police- free schools; by the end of FY21, the Council should eliminate the Metropolitan Police Department School Safety Division and create a community-led process to re-allocate those resources (roughly $14 million); and make additional investments supporting positive youth development and promoting safe and healthy learning environments. Our call to remove police from schools is one grounded in the understanding that the conversation around police free schools is about the system of policing, not the individual police officer. It is about investing in approaches to safety that are trauma informed, preventative, restorative and equitable. We understand the system of policing is rooted in systemic racism. It is designed to suppress the voices of young people and otherwise marginalized communities. That policing relies on coercion, escalation and fear as tactics to control undesired behaviors. This history is why when police are in our schools, the most marginalized students are more likely to experience harm and be arrested, Black students, immigrant students, disables students, queer students, students dealing with housing instbility. In DC, 100% of school-based arrests are youth of color, 92% Black, nearly ⅓ youth of color with disabilities.[1]

We couple our call for divestment with the need to radically invest in the health and safety of young people. Our failure to invest in appropriate resources and care-based positions in our schools, forces schools to rely on police (and security personnel) to do the jobs they are simply not meant or capable of doing. More often than not we are criminalizing youth for normal adolescent behavior, for their responses to trauma or for their disabilities. In practice this is:

- A 7 year old, austitic Black boy who had the police called on them for removing his masks on a school bus;
- The students who missed a few days of virtual school and had the police at their home door to do a “wellness check” instead of a teacher or social worker.
- The young people that MPD picked up over 1,500 times before the pandemic for truancy.

And case examples provided by Children’s Law Center, including:

- A five year old who was visited by a police officer, instead of social worker, taken away and interviewed alone aout abuse allegations
- A nine year old who was handcuffed for being emotionally distraught
- A 11 year old who was handcuffed for running through the halls and then transported by MPD in handcuffs to this hospital when a parent couldnt be reached

The District must radically invest in our schools! We must increase investments in community-competent, trauma-informed school-based mental health professionals.The Commission’s own analysis shows that many D.C. schools fall far short of national standards regarding student-to-staff ratios. In a sample of 114 schools, 71% did NOT meet the staffing

[1] 2019 School Report Card indicates that there were 338 total arrests of students across the District – 312 of the arrests were of Black students and 26 of the arrests were of Latino students. (104 of the arrests were for students with disabilities).

standard for school counselors; 62% did NOT meet the staffing standard for school social workers; and 38% did NOT meet the staffing standard for school psychologists—professionals who are critical to student well-being. While DC public schools have, on average, one security guard for every 165 students, they have only one social worker for every 254 students, one counselor for every 352 students, and one psychologist for every 529 students. Increased funding would support other valuable services and resources, including Positive Behavioral Intervention and Supports (PBIS) programs, violence interrupters, community-led safe passage initiative and restorative justice, more art classes, and extracurricular activities. Resources should be distributed based on a school's needs and the needs of its surrounding neighborhoods.

The Police Reform Commission recognizes that to achieve police-free schools we must address the larger policing culture within our education system that contributes to the school to prison pipeline. That includes police officers, security personnel, disciplinary policies and practices among others. We found that like national stats, D.C too, is choosing to police Black youth in schools more than peers. The increased presence of school security personnel as well as school police is correlated with racial demographics. Of the 44 DCPS schools that are part of SRO beats/clusters, 70% have student populations that are at least 50% Black. Where Black students make up <25%, there is one security guard every 312 students. Schools with 75% or higher Black student population. One security guard for every 203 students. For example: According to MPD, School without Walls has an enrollment of 590 students and has 4 guards assigned. Anacostia has 321 students and 7 guards assigned. Woodson has 468 students and 8 guards assigned. Ballou has 573 students and 12 guards. Wilson has 1872 and 10 guards assigned. I want to be clear, this is what institutional racism looks like. We can no longer stand by such blatant forms of over policing and criminalizing Black youth. We need to completely eliminate the presence of school police, drastically reduce the number of traditional security guards in our schools; and increase our overall investment in a holistic public health approach to school safety.

We have heard the concerns of these recommendations and we believe that all of these concerns can be addressed with 1.) further education on alternatives to policing that are preventative, anti-racisit and trauma informed approaches to safety. In conversations we have had with school leaders, it has been a common understanding (even among school leaders that have expressed opposition to our recommendation), that school police are not the best approach to discipline or safety, but simply the approach is most known, has sustained investments and is therefore the most reliable. 2.) a sustained and long-term commitment from the Executive, Council, and Education Government Agencies to radically invest in the non-law enforcement resources that are proven to be more effective and aligned with schools' stated missions of positive, equitable, restorative school climate. The greatest concern we have heard is the lack of trust that DCPS in particular will continue to invest in school based resources at the levels necessary to maintain true safety. 3.) an overall increased investment in public safety, that decenters the police and builds community capacity to keep ourselves safe. A genuine and valid fear that continues to be expressed is the impact community violence has on our neighborhood schools. The removal of police in schools needs to be coupled with the increase

in both the school based AND community resources that are outlined in this report. The reality is there are schools within the same neighborhoods that don't have assigned SROs and yet have found ways to still be informed of external threats of violence happening in their communities. We must acknowledge, review and adopt the policies and practices some schools have already put in place to intentionally prohibit/limit the role law enforcement and security personnel play in their schools. That includes the schools without security officers, the 25% of DCPS schools that do NOT have school police assigned to them, the schools that prohibit security personnel and law enforcement from getting involved in school disciplinary actions, the schools that have created systems for support staff to do wellness checks instead of police, the schools that prohibit law enforcement from arresting or detaining students on school grounds. 4.) Lastly, we must all do the hard internal work to unpack and unlearn the problematic and anti-black beliefs we have about our young people. Solutions that call on police, at the core, are rooted in a belief that Black people, Black young people are inherently bad, violent, and criminal. Policing our young people is never acceptable. Arresting young people is never acceptable. The perceived need to do so, is only a reflection of our failure to provide youth and communities with the support and safety they deserved from the beginning. The issue is not with our black youth, the issue is with the violent and criminal societal norms, policies and practices that are the foundation of our policing infrastructure AND our education system. We must be honest as school leaders, electeds, educators, organizers, “do-gooders” that we all are complicit in perpetuating that harm. Then, we must do the work.

The goal is not to reimagine police or security. The goal is to create the conditions necessary for true safety to exist, for thriving communities and schools to exist without relying on fear, punishment, police and otherwise carceral approaches.

We implore you to implement these recommendations to go in effect by School Year 2021-2022. Again, we also call on education agencies to create written protocols that compliment these recommendations, discourage employees from engaging security or police as first responders and make it possible for them to coordinate the appropriate non law enforcement response to ensure youth and their families have the support they need.

In a commitment to building a world where young people are met with the dignity and love they deserve, I thank you for the opportunity to testify today.

TESTIMONY REGARDING POLICE REFORM COMMISSION REPORT

Marina Streznewski

May 20, 2021

Good afternoon. My name is Marina Streznewski. I am 45-year resident of the District of Columbia, now living in Foggy Bottom. This testimony is mine alone and does not reflect the position of any organization with which I am affiliated.

As the report of the Police Reform Commission is extensive and detailed, I plan to limit my testimony. I would like to begin with a few general comments about the report. It is excellent and clearly shows evidence of the hard work and commitment of Commission members. However, it appears to assume that ALL crime will end if people are provided with basic human needs – jobs, physical and mental health care, nutrition, housing, etc. It discounts the human character flaws which lead to crime – greed being among the most significant. As such, the report fails to address the fact that police will be necessary in some instances, or to describe the precise responsibilities of police once their role in public safety is decentralized. In addition, the timeline is too optimistic for the major culture shift – both inside and outside of MPD - the report envisions. Simply reallocating funds in the District budget will be insufficient to achieve the laudable goals set forth in the report.

The Commission proposes important goals that are achievable, albeit over a longer timeframe than suggested. Among these are shifting the mindset of police – and the expectations of those they serve – to guardian as opposed to warrior. Warriors view those they are pledged to serve as the enemy. We see the poor outcomes created by the warrior mindset. A full shift to the guardian mindset will require changes in the way MPD recruits, trains, promotes, and rewards officers. While the Academy has taken steps in the guardian direction, recent graduates are often told to "forget everything you learned at the Academy" once they are in the field with veteran training officers. This allows the warrior mindset to flourish. MPD should establish more specific criteria for selection of training officers and develop training modules for potential training officers that reinforce the guardian mindset.

Another important goal noted in the report is the adoption of a harm reduction model of policing. It is not the purpose of police officers to leave a situation worse than they found it. To achieve the harm reduction goal, it is essential that officers are encouraged and empowered to find solutions other than arrest or the use of force. Decriminalization of low-level, victimless offenses will help, as will creation of more diversion-based options. Moreover, MPD should find other ways of evaluating officers besides numbers of arrests. As one officer noted, "I play basketball with kids in the community. They are not committing crimes when we're playing, and I am developing relationships with them. Yet I am not given credit for this, even though I am preventing crime."

Another goal stated in the report is the ending of qualified immunity for police officers. This is an enormously controversial goal. Growing realization by the general public of the horrible

ways many police treat people of color – especially Black people – has caused us to question this longstanding concept. Pundits on the left complain about how the concept of qualified immunity has long been abused; they note its origins in efforts to maintain segregation. Pundits on the right express fear that ending qualified immunity will reduce the number of individuals entering police work, place officers in danger because they may hesitate to act, and potentially create a huge financial burden for police who must defend against lawsuits.

Discussions with active-duty officers – even good officers - reveal many of the same fears. While the vast majority agree that qualified immunity has become a shield for bad behavior by bad officers, they fear that ending it completely will place even good officers at risk for frivolous lawsuits. One officer noted the number of complaints filed against him throughout his career with the Office of Police Complaints – none of which have been sustained. Without qualified immunity, he notes, those complaints could become lawsuits. In one case, a citizen filed an OPC complaint against this officer for failing to arrest someone who was not, in fact, breaking any law. Defending oneself from lawsuits – even frivolous ones – is expensive. And even though MPD officers are reasonably well paid, legal fees could prove devastating.

The solution seems to be somewhere in the middle. There are occasions when qualified immunity is appropriate. But we may be better served with more attention to “qualified” rather than “immunity.”

One problem with qualified immunity is that it can prevent the finding of facts in a particular circumstance. If a district attorney declines to file criminal charges in an incident where an officer is accused of, for example, violating an individual’s rights with inappropriate use of force, that person and their family have no recourse. They are not even able to benefit from the discovery process that would accompany any other civil action. Perhaps discovery could take place prior to deciding whether qualified immunity applies in a particular case. Perhaps a group of citizens – similar to a grand jury in criminal actions – could assess the facts and decide whether the officer should benefit from qualified immunity. This approach would protect officers from frivolous lawsuits, but would ensure those who violate laws, regulations, and/or MPD policies would be held to account.

Overall, the Police Reform Commission has taken essential first steps toward the reform of public safety and redefining the role of the police in the system. But more work to refine processes and define details is necessary.

Thank you for your time and consideration.

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Statement on behalf of the
American Civil Liberties Union of the District of Columbia
before the
DC Council Committee on Judiciary and Public Safety & Committee of the Whole
Public Hearing on
The Recommendations of the D.C. Police Reform Commission
Thursday, May 20, 2021
by
Nassim Moshiree, Policy Director

Good afternoon. My name is Nassim Moshiree, and I am the Policy Director of the American Civil Liberties Union of the District of Columbia (ACLU-DC). I present the following testimony on behalf of our more than 15,000 members and supporters across the District.

The ACLU-DC is committed to working to dismantle systemic racism, improve police accountability, safeguard fundamental liberties, and advocate for sensible, evidence-based solutions to public safety and criminal justice policies. The ACLU-DC is also an active member of the Police Free Schools Coalition and the Fair Budget Coalition.

We are pleased to testify in broad support of the comprehensive recommendations put forth by the D.C. Police Reform Commission (PRC) in their report, "Decentering Police to Improve Public Safety."[1] We found the recommendations to be thoughtful, evidence-based, and largely reflective of concerns and solutions that community members have been raising for years.

This testimony includes some recommendations of the report that the ACLU-DC views as critical to restricting harmful police practices and holding police accountable to the law and to the communities they serve. My colleague Natacia Knapper will address recommendations on decentering the role of police and strengthening the safety net to achieve public safety in separate testimony.

The mass movement for racial justice and police accountability has led the District and the country to this watershed moment. The time to act is now, and we believe that the Police Reform Commission has provided a clear blueprint of the many and varied steps we must take as a community to achieve true public safety and to reverse the decades of trauma and injustice inflicted on Black and Brown community members that continues to this day. Many of the suggested reforms in the report can and should be included in the permanent version of the "Comprehensive Policing and Justice Reform Amendment Act" ("Comprehensive Policing Act") that the Council passed as emergency and temporary legislation last year.

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[1] District of Columbia Police Reform Commission (PRC). "Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission." April 1, 2021. Available at https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf.

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I. Restricting police powers, practices, and policies that routinely violate the rights of civilians interacting with law enforcement.

A. Limitations on MPD's Stop and Frisk Practices

MPD's alarming stop and frisk tactics persist. In March of this year, after yet another lawsuit against the District over NEAR Act data, the ACLU-DC published a report[2] analyzing the stop data from 2020. This data showed continued stark racial disparities in police stops, with Black people making up 74.6% of all stops in the District. Furthermore, Black people made up 90.7% of searches that resulted in no warning, ticket, or arrest. Because these searches are the ones most likely to arise from innocent conduct, these statistics suggest that MPD is overwhelmingly subjecting Black residents to intrusive police encounters despite their not violating the law. The data reaffirms community members' repeated, urgent calls year after year about the need to limit these harmful practices. To this end, we seek to highlight the Police Reform Commission's recommendations in Section V.

1) First, per recommendations 1[3] and 2,[4] MPD should disband "specialized" units like the Gun Recovery Unit. Our data analysis shows that MPD's claims about gun recovery are vastly overstated: only 1% of all stops and 2.2% of all non-traffic stops in 2020 led to the recovery of a firearm. [5]So not only is the GRU's efficacy questionable, but its aggressive tactics are more likely to result in unwarranted stops, searches, arrests, and uses of force, including potentially lethal force. MPD should instead require all officers – including those in specialized units – to be readily identifiable as police officers with names and badges visible and in marked police cars. These recommendations are crucial in reducing dangerous stops.

2) In line with Recommendations 3,[6] 4,[7] and 7,[8] the Council should prohibit "jump outs," end pretextual stops, and require reasonable articulable suspicion to justify a protective pat-down. Reasonable articulable suspicion must not be based on boilerplate language such as "bulge in clothing," "characteristics," or "for officer safety," or on factors such as nervousness or presence in a "high crime area," but instead be based on specific, individualized facts. Black people made up over 90.5% of those who experienced a search or pat-down of their person or property in

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[2] ACLU Analytics & ACLU of the District of Columbia. "Racial Disparities in Stops by the Metropolitan Police Department: 2020 Data Update." March 10, 2021. Available at https://www.acludc.org/sites/default/files/field_documents/2021_03_10_near_act_update_vf.pdf.

[3] District of Columbia Police Reform Commission (PRC). "Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission." April 1, 2021. Available at https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf

[4] Id at 1. Section V, Recommendation 2. Page 95.

[5] Id at 2. Page 5.

[6] Id at 1. Section V, Recommendation 3a. Page 96.

[7] Id at 1. Section V, Recommendation 4. Page 100.

[8] Id at 1. Section V, Recommendation 7. Page 104.

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2020..[9] Despite there being a negligible difference in weapons recovered after searches of Black people as compared to searches of white people, Black people were 5 times as likely to undergo a pat-down or search.

3) MPD must also be restricted from conducting intrusive searches. The Council should prohibit body cavity searches, in line with PRC Recommendation 9 and MPD General Order 502.01. Despite MPD's General Order prohibiting officers from conducting body cavity searches, MPD regularly violates this policy. The list of individuals who have been subject to these traumatic, sexually invasive searches continues to grow.

4) Finally, the Council's passage of the NEAR Act and its data collection requirements formed the basis for better transparency and public accountability of MPD. However, the quality, transparency, and impact of NEAR Act data can and must be improved. We've submitted specific recommendations to the Council and the Commission for improving the quality and transparency of the data and we generally support the PRC's recommendations on this.

B) Limitations on Use of Force and Weapons

The recent report issued on March 23, 2021 by the D.C. auditor found that not only is compliance with Use of Force restrictions and policies poor, but that MPD does not recognize that problems even exist and is therefore not compelled to remedy them. The Use of Force reports by the Office of Police Complaints over the past several years have identified similar resistance to change. Similarly, the militarization and use of aggressive tactics and unchecked surveillance by police has created an environment in which certain communities view police as an occupying force rather than as a civil servants charged with ensuring safety.

1) The ACLU-DC supports all of the recommendations of the PRC with regard to use of force and urge the Council to immediately amend the temporary Comprehensive Policing Act to expand prohibited use of force beyond neck restraints,[10] and to include that provision as well as the law's restrictions on deadly use of force,[11] and its expansion of the membership of the Use of Force Review Board[12] in the permanent version of the law. We further urge that use of force legislation passed by the Council include remedies for those whose rights are violated by officers acting outside the confines of the law.

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[9] Id at 2. Page 4.

[10] District of Columbia Police Reform Commission (PRC). "Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission." April 1, 2021. Page 120 Available at https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf As the report correctly points out, "because there are restraints other than neck restraints that cause asphyxia, including certain restraints that cause positional asphyxia (e.g., "prone restraint," or "hogtying" an arrestee face down, especially with a knee in their back), the prohibited types of restraints should be expanded beyond "neck restraints."

[11] Id at Page 121. Section V, Recommendation 21. Use of Deadly Force, under Subtitle N, which restricts the use of deadly force in DC Code 5-337.01

[12] Id at Page 122. Section V, Recommendation 22.

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2) We urge the Council to make permanent the prohibition on the use of chemical weapons and other less-than lethal munitions during First Amendment assemblies, as well as the prohibition on MPD officers wearing riot gear except when they face an immediate threat of significant bodily injury.[13] However, to truly protect District residents, we recommend that these restrictions be expanded beyond First Amendment rallies.

3) We further urge the Council to make permanent provisions restricting District's law enforcement agencies from acquiring and using military weaponry, including requiring agencies to publish notices of requests or acquisition of any property from the federal government within 14 days of the request or acquisition and to return any such equipment that they have already acquired within 180 days of the enactment of the law. However, as we testified in October 2020 on the Comprehensive Policing Act, to make this provision enforceable, the Council should require periodic audits by an independent agency outside of law enforcement to ensure compliance, and enact penalties for failure of law enforcement agencies to comply.[14] Additionally, the legislation should ban DC Police from acquiring or purchasing such weapons from private companies, and should prohibit agencies from entering into non-disclosure agreements that that prevent public transparency or oversight of their acquisition of these harmful tools.

4) We are pleased that the PRC recommends that the Council adopt legislation to bring oversight and accountability to government use of surveillance tools. Although we know about a handful of surveillance technologies MPD uses, neither the public nor the Council know the full extent of the types of surveillance tools MPD currently has, how they are procured, how they are used, and how they impact people in the District. We also do not know what/if any data retention policies MPD has in place or with what other entities, government or otherwise, the data gleaned from such technologies, is shared. The lack of oversight and transparency of such use of technology by the Metropolitan Police Department especially has serious consequences for District residents. Unchecked surveillance threatens the civil rights and civil liberties of all D.C. residents, and especially of those who are already overpoliced–including Black and Brown communities, low-income communities, Muslim communities, immigrant communities, and activist groups.

The ACLU-DC is a member Community Oversight of Surveillance-DC (COS-DC), a coalition of local and national organizations and individuals committed to bringing public oversight to how District agencies procure and use surveillance technology. We urge the Council to introduce and pass legislation that requires Council approval anytime a District agency wants to purchase, acquire, or use surveillance technology.

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[13] Id at Page 123. Section V, Recommendation 24.

[14] ACLU-DC testimony on B23-882. Available at https://www.acludc.org/en/legislation/aclu-dc-testifies-dc-council-committee-comprehensive-police-and-justice-reform-amendment#:~:text=The%20ACLU%2DDC%20has%20testified,at%20the%20hands%20of%20law.

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C) Limitations on warrant executions

The ACLU-DC strongly supports the recommendations of the PRC to permanently ban the use of no-knock warrants and to strictly limit quick-knock warrants. While MPD asserts that it does not execute no-knock warrants, this dangerous practice is still permitted by case law and the exception to the warrant requirement remains part of the District's criminal code.

Additionally, we urge the Council to amend the D.C. Code 23-524(g) and for MPD to modify General Orders to ensure that MPD officers execute search warrants lawfully, safely, and in a manner that minimizes harm to people and property. [15] Specifically, the Council should require officers to comply with constitutional requirements for patting down and searching occupants; and authorize prompt compensation for damage to property.

II. Strengthening transparency, oversight, and accountability mechanisms to hold police accountable to the communities they serve.

In addition to explicitly limiting police powers to reduce harms, the most immediate action the Council can take now is to increase transparency of police practices.

A) Increasing public access to police actions and records

One of the most significant barriers to police accountability is the culture of opaqueness and resistance to transparency that permeates MPD. There are mountains of evidence of this, from MPD's refusal to comply with the NEAR Act data collection requirements for years, its denial of FOIA requests, its non-compliance with recommendations made by the Office of Police Complaints in their annual reports, and most recently, its poor response to requests for data and information from the Police Reform Commission. And as findings like that in the recently released Use of Force report by the Bromwich Group and D.C. Auditor demonstrate, a direct consequence of this resistance is the infliction of physical harm and trauma to communities.[16]

1) We support the PRC creation of a searchable public databases, like those that exist in New York City,[17] enabling the public to easily access, for any officer, the status of open investigations, the outcome of administrative investigations, and the disciplinary action taken with respect to each act of misconduct. Lack of access to police disciplinary history has long

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[15] District of Columbia Police Reform Commission (PRC). "Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission." April 1, 2021. Page 112. Available at https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf

[16] The Bromwich Group LLC, "The Durability of Police Reform: The Metropolitan Police Department and Use of Force, 2008-2015," A report of the Office of the District of Columbia Auditor, (2016)

[17] The NYPD Member of Service Histories can be accessed at https://www1.nyc.gov/site/ccrb/policy/MOS-records.page.

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been a barrier to holding officers who have engaged in repeated violations of civilian rights accountable. We strongly support the recommendation of the PRC to expand retention and public access to disciplinary records and proceedings through FOIA and other means.[18]

2) We also strongly support the need to amend DC's FOIA statute to increase public access to body-worn camera (BWC) footage, narrowing the personal privacy exception which MPD regularly invokes to both deny access to public records and charge exorbitant fees to redact BWC recordings.[19] One problem that the report does not address, however, is MPD's practice of denying fee-waivers in FOIA requests, which continues to be a significant barrier to transparency and accountability. Under D.C. law, agencies have the discretion to provide documents free of charge or at a reduced rate where the information being sought is considered to primarily benefit the public. However, the ACLU-DC's experience is that MPD consistently denies fee waivers, abusing its discretion. The Council intended DC agencies to waive fees when furnishing information would primarily benefit the public, and DC's FOIA law should be updated to fix this.

3) Finally, with regard to body worn cameras, we urge the Council to prohibit officers from reviewing their BWC recordings or those that have been shared with them to assist in initial report writing and make permanent other provisions of the Comprehensive Policing Act regarding public release of body-worn camera footage, about which we have testified before.[20]

B) Removing Disciplinary Authority Outside of Police

The ACLU-DC has for years testified about the need to completely move the disciplinary process out of MPD, and to significantly expand the authority and capacity of the Office of Police Complaints only to investigate complaints into police misconduct, as it currently does, but to actually impose and enforce discipline when there has been a determination of wrongdoing; two things the law does not currently authorize it to do. Putting the authority of discipline in the hands of police is a clear conflict of interest.[21]

1) First, we support the recommendation to expand the Police Complaints Board and give it the authority to review and approve MPD policies, prior to issuance, that are not purely administrative in nature.

2) We also strongly support the PRC's recommendation that OPC have the authority and resources to investigate all in-custody deaths and serious uses of force by MPD officers,

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[18] District of Columbia Police Reform Commission (PRC). "Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission." April 1, 2021. Section VIII, Recommendation 9, Page 176. Available at https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf

[19] Id at Page 183. Section VIII Recommendation 16.

[20] Id at Page 182. Section VIII, Recommendation 15.

[21] Id at Page 163. Section VIII, Recommendation 3.

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regardless of whether a complaint has been filed. OPC must also be given the statutory authority and access to relevant officer personnel records, including their entire history of complaints and internal investigations, to make informed disciplinary recommendations. We also believe that the process that the PRC proposes for removing disciplinary decisions from the sole discretion of MPD in section VIII is a good start to removing disciplinary authority outside of MPD.[22]

3) Other recommendations that we urge the Council to adopt quickly include authorizing OPC to investigate anonymous complaints and to permanently extend OPC's jurisdiction to investigate cases of police misconduct that OPC discovers during other investigations.[23] From our own conversations with community members, we know that DC residents are hesitant to file complaints against police officers for fear of retaliation, and that residents often are not aware of the duties of officers and of their own rights.

C) Expand access to remedies for those whose rights have been violated by the police.

One of the greatest barriers to police accountability nationwide and in the District is the inability of civilians who are harmed by police officers' actions to hold them accountable in court. While the District has passed progressive legislation meant to improve police accountability, too many DC laws fail to include remedies for violations of these laws. The result of this is that people have no recourse when their rights have been violated and especially for police, bad actors know that they can continue to violate the rights of people without serious consequence.

1) We strongly agree with the PRC recommendations that the D.C. Council include an explicit private right of action in legislation intended to hold police officers accountable. Doing so will not only provide an important avenue for recourse to those who are harmed by the actions of law enforcement but will serve as a deterrent to violating the law.[24] One place where this is critically needed is in the First Amendment Assemblies Act, D.C. Code §§ 5–331.03 to 5-331.17 (the "FAAA"). That statute, enacted by the Council in 2005, provides significant protection to the rights of peaceful demonstrators in D.C. But when MPD does not follow the law, people can suffer real injuries—for example, when MPD improperly uses chemical weapons, or assaults and arrests people who don't leave an area because the police didn't give an audible dispersal order as the FAAA requires. But the act does not include an express private right of action provision which is a barrier for those who are harmed by these police actions to hold them accountable in court.

2) Currently, D.C. law requires individuals filing personal injury or other damages claims against the D.C. government (including against the Metropolitan Police Department) to "give[] notice in writing" of their claims "within six months after the injury or damage was sustained." D.C. Code § 12-309(a). Thus, for an individual to hold MPD accountable for police misconduct, they must

[22] Id at Page 165, Section VIII, Recommendations 3(e)-3(j).
[23] Id at 164, Section VIII, Recommendation 3(b).
[24] Id at Page 185. Section VIII, Recommendation 19.

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learn of this specific deadline and file a detailed written statement within six months. The PRC recommends tolling this six-month notice requirement for claimants who are incarcerated or facing criminal charges related to an arrest.[25] We feel that the Council should go one step further and abolish this requirement altogether because it does not serve any legitimate function. In theory, the §12-309 notice requirement exists to promote informal resolution of claims but, in practice, functions as a trap for uncounseled litigants, killing off their D.C. law claims with a quick 6-month notice requirement that most laypeople will not know about. The ACLU-DC sends notices of claim all the time and have not had a single case in the last 40 years in which the notice led to a pre-litigation resolution of claims. This provision arbitrarily closes the doors to the courthouse to people who cannot afford a lawyer. That is fundamentally at odds with creating a more equitable system of accountability for official misconduct by the police or, frankly, any other government officials.

3) And lastly, we urge the Council to pass legislation to end qualified immunity, which emboldens police officer to use excessive force and otherwise violate the constitutional rights of civilians without fear of repercussions. Under this doctrine, even if officers violate the Constitution, courts cannot hold them liable unless binding precedent previously held very similar conduct unlawful. Our colleagues at the Institute for Justice have drafted a strong bill to end qualified immunity that is based on best practices and legislation passed in Colorado, New Mexico, and New York. The ACLU-DC supports this draft legislation. We also appreciate Councilmembers Trayon White, Lewis George, and Nadeau in expressing support for ending this practice by recently introducing legislation as well.[26] We hope to work with them, and all other Councilmembers to end this major obstacle to police accountability.

III. Conclusion

The Police Reform Commission's report makes clear that real public safety goes beyond policing and that it cannot be achieved through a piece-meal approach. The ACLU-DC supports recommendations needed to the criminal legal system outside of policing, including restoration of jury trials for all criminal cases and criminal code reform that decriminalizes behaviors and activities that are better addressed through other avenues. We applaud the many reforms the Council passed in last year's emergency bill and look forward to working with you to incorporate additional reforms discussed today into permanent legislation.

[25] Id at Page 185. Section VIII, Recommendation 19
[26] B24-0241 – "Law Enforcement Qualified Immunity Cessation Act of 2021." Introduced May 3,2021. Available at https://lims.dccouncil.us/Legislation/B24-0241.

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Statement on behalf of the
American Civil Liberties Union of the District of Columbia
before the
D.C. Council Committee on the Judiciary and Public Safety & Committee of the Whole
Public Hearing on
Bill 24-94 – "Bias in Threat Assessments Evaluation Amendment Act of 2021"
and Bill 24-213 – "Law Enforcement Vehicular Pursuit Reform Act of 2021"
by
Ahoefa Ananouko, Policy Associate
May 20, 2021

Hello Councilmember Allen, Chairman Mendelson, and members of the Council. My name is Ahoefa Ananouko, and I am a Policy Associate at the American Civil Liberties Union of the District of Columbia (ACLU-DC). I present this testimony on behalf of our more than 15,000 members and supporters across the District.

The ACLU-DC is a non-partisan, nonprofit organization committed to working not only to reverse the tide of criminalization and overincarceration, but to dismantling the systems and notions on which they were founded and continue to be undergirded. We advocate for sensible, evidence-based public safety and criminal justice policies and solutions that safeguard fundamental civil liberties and rights of District residents. This testimony will focus on Bill 24-213 – "Law Enforcement Vehicular Pursuit Reform Act of 2021"[1] and Bill 24-94 – "Bias in Threat Assessments Evaluation Amendment Act of 2021."[2]

For nearly a year now, we have all become familiar with the names of Breonna Taylor, George Floyd, and countless other lives taken at the hands of police officers across the nation. Although it was their tragic murders that launched our society into a historic moment of unrest and increased our communities' demands for justice, we should not forget that there are families right here in the District who continue to mourn and seek accountability for the tragic loss of their loved ones at the hands of the Metropolitan Police Department (MPD). We need to say *their* names— Marqueese Alston, Karon Hylton-Brown, Jeffrey Price, Terrence Sterling, and D'Quan Young.

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[1] Bill 24-213 – "Law Enforcement Vehicular Pursuit Reform Act of 2021." Introduced by Councilmembers Lewis George, Nadeau, Cheh, R. White, Bonds, and T. White. Available at https://lims.dccouncil.us/Legislation/B24-0213.
[2] Bill 24-94 – "Bias in Threat Assessments Evaluation Amendment Act of 2021." Introduced by Councilmembers R. White, Cheh, Nadeau, Silverman, Lewis George, and Pinto on February 22, 2021. Available at https://lims.dccouncil.us/Legislation/B24-0094.

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Bill 24-213 – "Law Enforcement Vehicular Pursuit Reform Act of 2021"

Across the country and here in the District, laws exist that penalize members of the public for speeding. Because at a fundamental level, our society recognizes the inherent dangers speeding cars pose to anyone in their vicinity. Police chases pose the same threat. As stated by the Police Reform Commission (PRC) in its April 1 report:

> "[Vehicular] pursuits are inherently dangerous and can be fatal… Because of the serious danger that [vehicular] pursuits pose, police departments across the country now strictly limit them to situations involving fleeing suspects who pose an immediate risk of killing or injuring another person. Police departments also strictly forbid intentionally using police cars to obstruct or stop fleeing vehicles."[3]

In recent years, there have been at least three incidents of police chases that ended up in deaths of District residents—Terrence Sterling in 2016,[4] Jeffrey Price in 2018[5] and Karon Hylton-Brown[6] in 2020. It has been reported[7][8] that MPD policies[9] may have been violated in all three cases.[10]

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[3] District of Columbia Police Reform Commission (PRC). "Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission." Page 103. April 1, 2021. Available at https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf.

[4] Goncalves, D., Scott McCrary, S., and Olmos, D. "Terrence Sterling: Unarmed & Killed by Police, His Family Speaks Out." WUSA9, June 2018. Available at https://www.wusa9.com/article/news/local/fort-washington/terrence-sterling-unarmed-killed-by-police-his-family-speaks-out/65-453167664.

[5] Lambert, E. "Report Sheds Light on Dirt Bike Rider's Deadly Crash With Police Vehicle, But Raises More Questions." Fox 5 DC, June 15, 2018. Available at https://www.fox5dc.com/news/report-sheds-light-on-dirt-bike-riders-deadly-crash-with-police-vehicle-but-raises-more-questions.

[6] NBC Washington Staff. "4 DC Officers on Leave After Karon Hylton-Brown's Fatal Scooter Crash; Body Cam Video Released." NBC Washington, October 29, 2020. Available at https://www.nbcwashington.com/news/local/dc-police-to-release-video-in-karon-hylton-browns-fatal-scooter-crash/2457158/.

[7] Supra at 5.

[8] Flack, E. "Internal Documents Show MPD Officers Involved in Karon Hylton's Death May Have Violated Policy." WUSA9, October 29, 2020. Available at https://www.wusa9.com/article/news/local/dc/dc-police-chase-policies-karon-hylton-moped-death/65-1e7f17ea-6b2f-4fa6-a3c0-fab44b70e539.

[9] See Metropolitan Police Department General Order on Vehicular Pursuits (GO – OPS-301.03). Available at https://go.mpdconline.com/GO/GO_301_03.pdf.

[10] Brian Trainer, the officer who shot and killed Sterling, was terminated in June 2018 after an investigation into the incident found that he had violated MPD policy. See Hermann, P. and Alexander, K.L. "D.C. Police Panel Upholds Firing of Officer Who Fatally Shot Motorcyclist in 2016." The Washington Post, May 11, 2018. Available at https://www.washingtonpost.com/local/public-safety/dc-police-panel-upholds-firing-of-officer-who-fatally-shot-motorcyclist-in-2016/2018/05/11/269e87ea-5390-11e8-9c91-7dab596e8252_story.html.

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Bill 24-213 would prohibit D.C. law enforcement officers from engaging in vehicular pursuits of an individual operating a motor vehicle—outlining requisite factors that would justify a chase—and would also prohibit the use of certain vehicular pursuit practices. The ACLU-DC strongly supports this bill and we offer a few recommendations to improve enforceability of the legislation.

Generally, the bill clearly outlines factors that must be taken into consideration before commencing a vehicular pursuit—"the officer reasonably believes that the fleeing suspect has committed or has attempted to commit a crime of violence and that the pursuit is necessary to prevent an imminent death or serious bodily injury and is not likely to put others in danger of death or serious bodily injury." The last two factors are particularly significant, especially when considering the fact that a police chase itself poses the risk of imminent death and the danger of serious injury. The second two outlined circumstances also align with the PRC's recommendations[11] aimed at increasing public safety and harm prevention.

One thing the bill fails to do is outline penalties for officers who do violate the law by unlawfully engaging in a vehicular pursuit, or remedies for those who are harmed as a result. The most significant action taken against any of the officers involved in the three cases mentioned in this testimony was the firing of Officer Brian Trainer in the Sterling case. Without the possibility of consequences to deter misconduct, officers will continue to defy the law and MPD policies with impunity. To that end, we also strongly recommend that the Council include a provision providing private right of action for individuals who are harmed by an officer's violation of the provisions of this legislation.

Furthermore, it would be helpful for the Council to clarify what is meant by "unlawful" in part (d) under Section 3 of the legislation, which reads: "It is unlawful for a law enforcement officer to knowingly violate this section."[12] This is the only instance the word is used, and nowhere in the legislation is there a clear definition of the term. The lack of a clear definition of what constitutes an "unlawful" pursuit, coupled with the lack of any provision outlining disciplinary actions, make this bill largely unenforceable.

<u>Bill 24-94 – "Bias in Threat Assessments Evaluation Amendment Act of 2021</u>

On April 6 of this year, the Council unanimously approved PR24-107 – "Sense of the Council Regarding the Disparate Treatment of Protesters by Law Enforcement Resolution of 2021."[13] In

[11] Supra at 3.
[12] Id at 2. Page 5, line 117 of the legislation.
[13] Council of the District of Columbia. PR24-107 – "Sense of the Council Regarding the Disparate Treatment of Protesters by Law Enforcement Resolution of 2021." Approved unanimously on April 6, 2021. Available at https://lims.dccouncil.us/Legislation/PR24-0107.

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passing this resolution, the Council recognized the double standards in how MPD and other local law enforcement entities responded to Black Lives Matter protesters during the summer 2020 protests, versus the response to white supremacist insurrectionists at the Capitol on January 6th.

B24-94 is intended to address this issue of disparate treatment and would require the Attorney General to "conduct a study to determine whether the Metropolitan Police Department engaged in biased policing when they conducted threat assessments of assemblies within the District." The bill would also grant the Attorney General subpoena power as needed to carry out the study.

We support a deep analysis into MPD's actions during assemblies, as it aligns with recommendations outlined in our Swann St. Report,[14] which investigated MPD's excessive use of force against protesters on June 1, 2020. However, the scope of the study mandated by B24-94 is limited in the legislative text, and we offer the following recommendations to clarify and improve the scope of the study.

Although it is important to know the number of officers deployed, the types of weapons they used, and how many people were arrested, these details alone do not give the full picture of how MPD conducts threat assessments. Equally, if not more, important are the decision points and procedures that lead to those actions. In addition to analyzing police actions at assemblies, the study should also scrutinize specific aspects of MPD's threat assessment policies and practices. For example, who is/was responsible for assessing threats and what checks are in place? How do/did they determine the number officers that were/are deployed, etc.?

[14] Recommendations stemming from questions raised in the Swann Street Report:

1. *The Council should direct MPD to develop guidance that would restrain officers' discretion to arrest individuals for curfew violations, especially in situations when doing so may itself be dangerous. The Council should also amend the First Amendment Assemblies Act to require that police attempt to disperse an unlawful but non-violent assembly before engaging in kettling tactics or arrests.*
2. *The Council should inquire into the factual basis of MPD's threat assessment, and into the steps MPD took to confirm its suspicions before kettling and arresting hundreds of individuals. These facts are critical to determining whether changes of law or procedure are warranted to ensure that any decision to conduct mass arrests rests on a firm factual foundation and sound policing judgment.*
3. *The Council should direct that MPD have clear protocols in place to ensure that restraints are not abused or tightened to the point where individuals' wrists are bruised and cut, as some protesters reported, including trainings and accountability mechanisms when MPD officers violate their duty to treat arrestees fairly and provide basic provisions.*

ACLU of the District of Columbia, Washington Lawyers' Committee for Civil Rights and Urban Affairs, and Sidley Austin LLP. "Protest During Pandemic: D.C. Police Kettling of Racial Justice Demonstrators on Swann Street." March 9, 2021. Available at https://www.acludc.org/en/swann-street-report.

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There are also other aspects of officers' actions that the Council should consider adding to the scope of the study—namely, whether individuals arrested were treated fairly. For example, did those arrested receive basic necessities (i.e., medical attention, access to restrooms, food, water)? What types of restraints were used and were they used properly and according to District laws and regulations (e.g., ensuring that zip ties were not causing injury)?

We also recommend making definitional improvements to the bill. First, the legislation should explicitly define "biased policing". This would ensure that the study captures different levels/types of bias that may influence how MPD assesses threat for different groups of people. And second, the legislation should also define "threat assessment."

It is important to note that the D.C. Council should not wait for the results of this study before taking action to address the significant problems with MPD's response to First Amendment demonstrations. While we support the goals of this legislation, we urge the Council to take immediate steps to address MPD's use of force, including chemical and other non-lethal weapons, aggressive crowd control tactics, lengthy detentions, and execution of arrests that have characterized the Department's response to many First Amendment rallies over the past several years.

We hope you take these recommendations into consideration as you go through mark up of these bills and welcome any questions you may have.

Thank you for this opportunity to testify.

Good afternoon, my name is Jordan Crunkleton and I am a researcher for DC Justice Lab. Over the past year my organization and I have researched the issue of jump-outs. We have written a report emphasizing its problems, and created solutions to put an end to its use. We have also drafted a bill implementing these solutions to ensure that stops and searches are conducted in a lawful manner. I am honored to say that our report was considered by DC's police reform commission, who examined this issue in-depth and adopted many of our proposed reforms.

Before you now are bills meant to improve policing in the District. While these proposed changes are a great start, there is still work to be done, and I am here today on behalf of DC Justice Lab to ensure that jump-outs and their negative effects are not lost in translation. I am also here to advocate for legislative action that will stop jump-outs from being used in and against our community.

"Jump-outs," are a callous and aggressive stop-and-frisk tactic whereby specialized paramilitary units within MPD called "jump-out squads" target and infiltrate predominantly Black and poverty stricken neighborhoods in plain-clothes and unmarked cars, then surround, stop, and search individuals without cause. This practice was technically banned by MPD, however, whistleblower testimony has confirmed that it is still in use today. Although there are many issues with jump-outs, I want to highlight some of the most troubling. First, these tactics are discriminatory in practice. According to the National Police Foundation's 2020 report on the Narcotics and Special Investigations Division, 94% of DC residents stopped and searched by NSID in the six month data collection period were Black, despite the fact that Black residents only make up 46% of DCs total population.

Jump-outs are also violent, as this report noted that in just 6 months NSID officers used force against 59 residents, and complaints were filed against 30 of the 167 officers in the division. Of the incidents of force reported, 100% of cases involved Black residents. Although jump-outs are said to reduce gun violence, this practice has been proven to be ineffective, as this report found that 65% of NSID searches produced no contraband. The Police Reform Commission similarly noted that only 1.8% of non-traffic stops conducted between July 31, 2019 and December 31, 2020 resulted in the recovery of a gun.

Further, it should go without saying that allowing quasi-undercover officers to trail our neighbors in search of alleged criminal wrongdoing destroys community relations with MPD. It also undermines the constitutional safeguards established by the 4th amendment, as jump-outs are often conducted without probable cause or reasonable suspicion required by the constitution to search a civilian.

Between the available data, reports, and the Commission's recommendations, the Council has everything that it needs to take necessary legislative action. Today, we ask the Council to take

that action. We ask that the recommendations put forth by the Police Reform Commission and DC Justice Lab be followed, including striking pretextual bases for conducting a stop from the definition of reasonable suspicion, requiring that officers have probable cause to conduct a waistband search, and requiring that MPD officers work in uniforms and marked cars while patrolling our neighborhoods. Finally, we want to remind the Council that DC Justice Lab stands ready to assist in ensuring that there are no more jump-outs in Washington DC.

Jump-Outs Prevention Act of 2021

Purpose:

To prohibit District of Columbia law enforcement officers from engaging in unconstitutional stop-and-frisk procedures, known as "Jump Outs" by prohibiting the use of pretextual grounds for conducting a waistband search of a civilian, unless the officer can make a specific showing of probable cause that a civilian is armed and dangerous; to prohibit District of Columbia law enforcement officers from patrolling neighborhoods in plain clothes and unmarked cars to search for individuals who may be in possession of a weapon unless conducting a specific and targeted undercover operation.

Section 1 - Articulable Suspicion

(a) None of the following, shall, individually or in combination with each other, constitute reasonable articulable suspicion of a crime:

(1) Presence in a high crime neighborhood, hotspot, or designated redzone;

(2) Time of day;

(3) Nervousness in the presence of law enforcement, whether known or unknown;

(4) Furtive gestures or movements including running or walking away;

(5) A generic bulge in a person's clothing, unless the bulge reasonably appears to be a dangerous weapon; and there is probable cause to believe:

(A) It is illegal for the person to possess or carry the dangerous weapon; or

(B) The person intends to use the dangerous weapon unlawfully against another person; or

(C) The dangerous weapon is evidence of a crime.

(b) In cases where the factors listed in subsection (a) of this section form the basis for searching a civilian, the search is invalid and any evidence seized as a result of that search is inadmissible against any person in a criminal trial.

(c) It shall be unlawful for a law enforcement officer to knowingly conduct an invalid search and the Police Complaints Board shall promulgate rules to implement the provisions of this section, pursuant to D.C. Code § 5-1106(d).

(d) Any civilian or class of civilians who suffer one or more violations of subsection (a) of this section may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following:

(1) A declaratory judgment;

(2) Injunctive relief;

(3) Reasonable attorney's fees and costs;

(4) Actual damages;

(5) Punitive damages; and

(6) Any other equitable relief which the court deems proper.

Section 2 - Limitations on Waistband Searches

(a) Law enforcement officers shall be prohibited from demanding that a civilian lift up their shirt and show their waistband to demonstrate that the civilian is not carrying an illegal firearm, unless there is probable cause to believe that the person is carrying a dangerous weapon, and there is probable cause to believe:

(A) It is illegal for the person to possess or carry the dangerous weapon; or

(B) The person intends to use the dangerous weapon unlawfully against another person; or

(C) The dangerous weapon is evidence of a crime.

(b) In cases where one or more violations of subsection (a) of this section occurs, the waistband search is invalid and any evidence seized as a result of that search is inadmissible against any person in a criminal trial.

(c) It shall be unlawful for a law enforcement officer to knowingly conduct an invalid search and the Police Complaints Board shall promulgate rules to implement the provisions of this section, pursuant to D.C. Code § 5-1106(d).

(d) Any civilian or class of civilians who suffer one or more violations of subsection (a) of this section may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following:

(1) A declaratory judgment;
(2) Injunctive relief;
(3) Reasonable attorney's fees and costs;
(4) Actual damages;
(5) Punitive damages; and
(6) Any other equitable relief which the court deems proper.

Section 3 - Identification of MPD Personnel Patrolling District Communities

(a) The MPD shall implement a method for enhancing the visibility to the public of the presence of officers patrolling District neighborhoods by requiring all law enforcement officers to work in full uniform and marked police cars, except as provided in subsection (b) of this section.

(b) Subsection (a) of this section shall not apply when law enforcement officers are conducting specific and targeted undercover operations.

WRITTEN TESTIMONY

before the DC Council Committee on the Judiciary and Public Safety

and the Committee of the Whole

Joint Public Hearing on the Recommendations from the Police Reform Commission

and on B24-0094, B24-0107, B24-0112, B24-0213

by Caitlin Holbrook

DC Justice Lab

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May 20, 2021

WRITTEN TESTIMONY
before the DC Council Committee on the Judiciary and Public Safety and Committee of the Whole

Joint Public Hearing
by Caitlin Holbrook

DC Justice Lab

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Caitlin Holbrook

Hello Councilmembers, my name is Caitlin Holbrook, and I am a policy advocate and research associate at the DC Justice Lab and a resident of Ward 6. I am here to testify on behalf of the DC Justice Lab to demand meaningful oversight of correctional officers in the DC jail. These recommendations are also in Section 8 in the "Decentering Police to Improve Public Safety Report", which was presented to the council in April 2021 by the Police Reform Commission. We recommend, to have meaningful oversight, the DC Council and Mayor make changes that include **(1) provide a deputy auditor for public safety within the Office of District of Columbia Auditor, (2) expand the responsibilities and authority of the Office of Police Complaints and the Police Complaints Board (3 Repeal the six-month deadline for prisoners to file a grievance under DC Code §12-309, and (4) end qualified immunity both for police officers and at the center of my testimony, correctional officers.**[1]

As stated in the "Decentering Police Report," no accountability mechanism in the District is operating as it should be. Establishing a deputy auditor for public safety within the Office of the District of Columbia Auditor would provide meaningful oversight and

[1] The DC Justice Lab fully endorses the statutory language regarding ending qualified immunity, stated in Keith Neely's oral and written testimony for Institute for Justice, excluding the language directed towards Section 10, regarding DC Code §12-309, which the recommendation is changed to a full repeal rather than to toll the six-month deadline for people incarcerated in the DC jail to file a grievance.

accountability in that it would both provide a review of DC DOC correctional officer policies, procedures, and practices designed to be preventative while also providing instructions on how to respond when something has gone wrong.[2]A deputy auditor is imperative to improve the timeliness and quality of the investigation into the misconduct of correctional officers. Additionally, granting resources and authority to the Office of Police Complaints will empower the OPC to investigate all in-custody deaths and serious uses of force.[3]The DC Council should expand the Office of Police Complaints and rename the Police Complaints Board to the DC Police Commission, which would have greater authority over policies for correctional officers in addition to police officers prior to their issuance, thus ensuring greater transparency.[4]

The DC Council should fully repeal[5] the six-month deadline under DC Code §12-309 for a prisoner to file a claim against a DC DOC staff due to the constraints of incarceration.[6] The six-month deadline would present a challenge for any person who has experienced trauma, or who has no legal experience, but particularly one who is operating in the physical and mental constraints of incarceration, **and even more so for the 1500 people in the DC jail who have been kept in isolation for the past 400 days.[7]**

Finally, the DC council should legislate an independent cause of action for constitutional violations that explicitly excludes the defense of qualified immunity to mitigate the effect of the federal qualified immunity doctrine in DC.[8] **The qualified immunity doctrine protects individuals who commit extra-legal brutality and holds them at a lower standard of compliance with the law.[9] An officer committing an act of brutality is operating under the belief that they must control a population they deem undesirable, undeserving, and under punished by established law.[10]** This means that the act of brutality, as an extra-legal force used by a law enforcement officer, is a personal determination by that officer that an individual is not being punished enough by law. This should not be a practice overlooked in any correctional facility, but particularly

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[2] DC Police Reform Commission, Decentering Police to Improve Public Safety Report (Washington DC) "Summary of Recommendations", p. 25-26
[3] DC Police Reform Commission, Decentering Police Report, p. 26
[4] Ibid
[5] The DC Justice Lab endorses the testimony made by Nassim Moshiree from the ACLU-DC, regarding the recommendation to fully appeal the six month deadline rather than toll as stated in the Police Reform Commission's *Decentering Police to Improve Public Safety* Report.
[6] DC Police Reform Commission, *Decentering Police to Improve Public Safety Report (*Washington DC) "Section VII: Holding Police Accountable", p. 186-187
[7]Jamison, Peter, "An 'Insane' Coronavirus Lockdown Two Miles from the Capitol, with No End in Sight" The Washington Post, April 19, 2021
https://www.washingtonpost.com/dc-md-va/2021/04/19/dc-jail-lockdown-covid/?request-id=989dd54e-52df-451a-9937-3e2e47da6588&pml=1
[8] DC Reform Commission, "Decentering Police Report", p. 188
[9] DC Reform Commission, "Decentering Police Report", p.187
[10] Skolnick Jerome and Fyfe James, "Above the Law: Police and the Excessive Use of Force", Free Press, New York, NY, 141219, 1993, pg. 157

in a jail where the individuals are pre-trial and whose legal punishment is undecided as much as a guilty verdict.

I and DC Justice Lab implore you to consider your complacency in these human rights violations and your duty to stand up for your constituents within the jail.

DC Justice Lab is a team of law and policy experts researching, organizing, and advocating for large-scale changes to the District's criminal legal system. We develop smarter safety solutions that are evidence-driven, community-rooted, and racially just. We aim to fully transform the District's approach to public safety and make the District a national leader in justice reform. www.dcjusticelab.org

Cite as: 592 U. S. ____ (2020)
1 Per Curiam

SUPREME COURT OF THE UNITED STATES

TRENT MICHAEL TAYLOR v. ROBERT RIOJAS, ET AL.
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
No. 19–1261. Decided November 2, 2020

PER CURIAM.

Petitioner Trent Taylor is an inmate in the custody of the Texas Department of Criminal Justice. Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells.[11] The first cell was covered, nearly floor to ceiling, in "'massive amounts' of feces": all over the floor, the ceiling, the window, the walls, and even "'packed inside the water faucet.'" *Taylor v. Stevens*, 946 F. 3d 211, 218 (CA5 2019). Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and

[11] The Fifth Circuit accepted Taylor's "verified pleadings [as] competent evidence at summary judgment." Taylor v. Stevens, 946 F. 3d 211, 221 (2019). As is appropriate at the summary-judgment stage, facts that are subject to genuine dispute are viewed in the light most favorable to Taylor's claim.

raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.

The Court of Appeals for the Fifth Circuit properly held that such conditions of confinement violate the Eighth Amendment's prohibition on cruel and unusual punishment. But, based on its assessment that "[t]he law wasn't clearly established" that "prisoners couldn't be housed in cells teeming with human waste ``"for only six days," the court concluded that the prison officials responsible for Taylor's confinement did not have "'fair warning' that their specific acts were unconstitutional." 946 F. 3d, at 222 (quoting *Hope v. Pelzer*, 536 U. S. 730, 741 (2002)).

The Fifth Circuit erred in granting the officers qualified immunity on this basis. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*). But no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time. See *Hope*, 536 U. S., at 741 (explaining that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question'" (quoting *United States v. Lanier*, 520 U. S. 259, 271 (1997))); 536 U. S., at 745 (holding that "[t]he obvious cruelty inherent" in putting inmates in certain wantonly "degrading and dangerous" situations provides officers "with some notice that their alleged conduct violate[s]" the Eighth Amendment). The Fifth Circuit identified no evidence that the conditions of Taylor's confinement were compelled by necessity or exigency. Nor does the summary-judgment record reveal any reason to suspect that the conditions of Taylor's confinement could not have been mitigated, either in degree or duration. And although an officer-by-officer analysis will be necessary on remand, the record suggests that at least some officers involved in Taylor's ordeal were deliberately indifferent to the conditions of his cells. *See, e.g.,* 946 F. 3d, at 218 (one officer, upon placing Taylor in the first feces-covered cell, remarked to another that Taylor was "'going to have a long weekend'"); *ibid*., and n. 9 (another officer, upon placing Taylor in the second cell, told Cite as: 592 U. S. ____ (2020) Taylor he hoped Taylor would "'f***ing freeze'").

Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution.[12] We therefore grant Taylor's petition for a writ of certiorari, vacate the judgment of the Court of Appeals for the Fifth Circuit, and remand the case for further proceedings consistent with this opinion.

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[12] In holding otherwise, the Fifth Circuit noted "ambiguity in the case law" regarding whether "a time period so short [as six days] violated the Constitution." 946 F. 3d, at 222. But the case that troubled the Fifth Circuit is too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor's right. See Davis v. Scott, 157 F. 3d 1003, 1004 (CA5 1998) (no Eighth Amendment violation where an inmate was detained for three days in a dirty cell and provided cleaning supplies).

It is so ordered.

JUSTICE BARRETT took no part in the consideration or decision of this case.

JUSTICE THOMAS dissents.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19–1261. Decided November 2, 2020

JUSTICE ALITO, concurring in the judgment. Because the Court has granted the petition for a writ of certiorari, I will address the question that the Court has chosen to decide. But I find it hard to understand why the Court has seen fit to grant review and address that question.

I

To see why this petition is ill-suited for review, it is important to review the procedural posture of this case. Petitioner, an inmate in a Texas prison, sued multiple prison officers and asserted a variety of claims, including both the Eighth Amendment claim that the Court addresses (placing and keeping him in filthy cells) and a related Eighth Amendment claim (refusing to take him to a toilet). The District Court granted summary judgment for the defendants on all but one of petitioner's claims under Federal Rule of Civil Procedure 54(b), which permitted petitioner to appeal the dismissed claims. On appeal, the Fifth Circuit affirmed as to all the claims at issue except the toilet-access claim. On the claim concerning the conditions of petitioner's cells, the court held that the facts alleged in petitioner's verified complaint were sufficient to demonstrate an Eighth Amendment violation, but it found that the officers were entitled to qualified immunity based primarily on a statement in *Hutto v. Finney,* 437 U. S. 678 (1978), and the Fifth Circuit's decision in *Davis v. Scott,* 157 F. 3d 1003 (1998).

The Court now reverses the affirmance of summary judgment on the cell-conditions claim. Viewing the evidence in the summary judgment record in the light most favorable to petitioner, the Court holds that a reasonable corrections officer would have known that it was unconstitutional to confine petitioner under the conditions alleged. That question, which turns entirely on an interpretation of the record in one particular case, is a quintessential example of the kind that we almost never review. As stated in our Rules, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated

rule of law," this Court's Rule 10. That is precisely the situation here. The Court does not dispute that the Fifth Circuit applied all the correct legal standards, but the Court simply disagrees with the Fifth Circuit's application of those tests to the facts in a particular record. Every year, the courts of appeals decide hundreds if not thousands of cases in which it is debatable whether the evidence in a summary judgment record is just enough or not quite enough to carry the case to trial. If we began to review these decisions we would be swamped, and as a rule we do not do so.

Instead, we have well-known criteria for granting review, and they are not met here. The question that the Court decides is not one that has divided the lower courts, see this Court's Rule 10, and today's decision adds virtually nothing to the law going forward. The Court of Appeals held that the conditions alleged by petitioner, if proved, would violate the Eighth Amendment, and this put correctional officers in the Fifth Circuit on notice that such conditions are intolerable. Thus, even without our intervention, qualified immunity would not be available in any similar future case. We have sometimes granted review and summarily reversed in cases where it appeared that the lower court had conspicuously disregarded governing Supreme Court precedent, but that is not the situation here. On the contrary, as I explain below, it appears that the Court of Appeals erred largely because it read too much into one of our decisions.

It is not even clear that today's decision is necessary to protect the petitioner's interests. We are generally hesitant to grant review of non-final decisions, and there are grounds for such wariness here. If we had denied review at this time, petitioner may not have lost the opportunity to contest the grant of summary judgment on the issue of respondents' entitlement to qualified immunity on his cell conditions claim. His case would have been remanded for trial on the claims that remained after the Fifth Circuit's decision (one of which sought relief that appears to overlap with the relief sought on the cell-conditions claim), and if he was dissatisfied with the final judgment, he may have been able to seek review by this Court of the cell-conditions qualified immunity issue at that time. *Major League Baseball Players Assn. v. Garvey, 532 U. S. 504, 508, n. 1 (2001) (per curiam)*. And of course, there is always the possibility that he would have been satisfied with whatever relief he obtained on the claims that went to trial.

Today's decision does not even conclusively resolve the issue of qualified immunity on the cell-conditions claim because respondents are free to renew that defense at trial, and if the facts petitioner alleges are not ultimately established, the defense could succeed. Indeed, if the petitioner cannot prove the facts he alleges, he may not be able to show that his constitutional rights were violated.

In light of all this, it is not apparent why the Court has chosen to grant review in this case.

II

While I would not grant review on the question the Court addresses, I agree that summary judgment should not have been awarded on the issue of qualified immunity. We must view the summary judgment record in the light most favorable to petitioner, and when petitioner's verified complaint is read in this way, a reasonable fact-finder could infer not just that the conditions in the cells in question were horrific but that respondents chose to place and keep him in those

particular cells, made no effort to have the cells cleaned, and did not explore the possibility of assignment to cells with better conditions. A reasonable corrections officer would have known that this course of conduct was unconstitutional, and the cases on which respondents rely do not show otherwise.

Although this Court stated in *Hutto* that holding a prisoner in a "filthy" cell for "a few days" "might be tolerable," 437 U. S., at 686–687, that equivocal and unspecific dictum does not justify what petitioner alleges. There are degrees of filth, ranging from conditions that are simply unpleasant to conditions that pose a grave health risk, and the concept of "a few days" is also imprecise. In addition, the statement does not address potentially important factors, such as the necessity of placing and keeping a prisoner in a particular cell and the possibility of cleaning the cell before he is housed there or during the course of that placement. A reasonable officer could not think that this statement or the Court of Appeals' decision in *Davis* meant that it is constitutional to place a prisoner in the filthiest cells imaginable for up to six days despite the availability of other preferable cells or despite the ability to arrange for cleaning of the cells in question.

For these reasons, I concur in the judgment.

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Excerpts from Relevant Sections of the DCPRC Report

Section VII: Holding Police Accountable

1. Recommendation: The DC Council and the Mayor should create a deputy auditor for public safety within the Office of the District of Columbia Auditor.

1(a) Recommendation: The law should specify that the deputy auditor for public safety's term be six years (DC auditor's term is six years), subject to reappointment; that the auditor shall appoint the deputy auditor for public safety, pursuant to a nationwide search; and that the auditor can only remove the deputy auditor for public safety for cause.

1(b) Recommendation: The law should specify that the deputy auditor for public safety possess subpoena authority, authority to compel District employees to provide statements and submit to interviews, direct access to all digital/electronic MPD, HAPD, District Department of Corrections (DOC), and Office of Police Complaints (OPC) records, access to all non-digital MPD, HAPD, DOC, and OPC records, and access to all records of other District agencies.[13] In addition, the law should require that the deputy auditor for public safety's budget be insulated

[13] The Office of the District of Columbia Auditor already possesses subpoena authority. See: Code of the District of Columbia § 1- 301.171, https://code.dccouncil.us/dc/council/code/sections/1-301.171.html (accessed February 15, 2021).

from politics and sufficient for the deputy auditor for public safety to perform all its responsibilities.

1(c) Recommendation: The law should specify that the deputy auditor for public safety possess broad authority and jurisdiction, with respect to the MPD, HAPD, special police officers,[14] DOC, and the PCBOPC,[15] including authority to review, analyze, and make findings regarding: System-wide patterns and practices. **Any MPD, HAPD, and DOC policy, practice, or program, including constitutional policing, uses of force, use of canine, warrantless searches and seizures, use and execution of search warrants, hiring, training, promotions, internal investigations, and discipline.** Any other policy, practice, or program that affects these law enforcement agencies' integrity, transparency, and relationship with District residents or of concern to the community.

1(d) Recommendation: The law should mandate that, at least bi-annually, the deputy auditor for public safety review, analyze, and make findings regarding: MPD's and OPC's handling of misconduct complaints and cases. Timeliness and quality of all MPD and OPC administrative investigations, particularly serious uses of force and other incidents that result in death. Disciplinary process. Disciplinary appeal process (grievances, arbitration, and DC Office of Employee Appeals). Civil judgments and settlements and MPD use and handling (if any) of these judgments and settlements. MPD use and handling (if any) of adverse findings (the USAO's or a judge's) regarding MPD officer credibility, official false statements, perjury, and any prosecutor list of officers who cannot be relied on as witnesses due to credibility issues (known as Brady or Lewis list).[16]

- **1(d)(i) Recommendation:** The law should require that the deputy auditor for public safety and MPD work with the U.S. Attorney's Office for the District of Columbia (USAO) to develop a system for the USAO to advise the deputy auditor for public safety

[14] See District of Columbia Municipal Regulations, Chapter 6A §§ 1100.1 to 1110.1, https://securityofficerhq.com/files/dc-title- 6a.pdf (accessed March 13, 2021).
[15] Depending on the District's acceptance and implementation of recommendations two and three, the Commission recommends renaming (not eliminating) the PCB and the OPC. To prevent confusion, the report will, unless otherwise noted, refer to the Police Complaints Board and the Office of Police Complaints by their current names.

[16] See Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); Lewis v. United States, 408 A.2d 303) (DC 1973). These cases generally require prosecutors to provide to defendants material that may be used to impeach prosecution witnesses, including prior convictions, pending investigations or criminal charges, cooperation agreements, and bad acts related to the witnesses' veracity and credibility. Some prosecutors keep a list of officers for whom they must turn over such material and/or whom prosecutors have determined are not reliable witnesses.

and MPD of adverse findings (the USAO's or a factfinder) regarding an MPD officer's credibility; or regarding a determination that the officer made false official statements or committed perjury; and that the USAO provide to MPD and the deputy auditor for public safety its Brady or Lewis list, on a quarterly basis.

1(e) Recommendation: The law should require that the deputy auditor for public safety produce an annual report on its activities and operations, and reports following each investigation, review, study, or audit; and provide these reports to the Mayor, the Council, MPD, and the PCB-OPC; and publish the reports on the Office of the DC Auditor's website, with the respective agency's response. The law should require that MPD and/or PCB-OPC be required to respond, in writing, to the deputy auditor for public safety reports' recommendations within 30 days, and that their responses must include: 1) a description of the corrective or other action the agency plans to take; 2) the basis for rejecting the Decentering Police to Improve Public Safety recommendation, in whole or in part; or 3) a request for an extension to provide substantive written responses.

- **1(e)(i) Recommendation:** With the creation of the deputy auditor for public safety, the Council and the Mayor should shift from the PCB-OPC to the deputy auditor for public safety the responsibility for (as detailed in Code of DC § 5-1104(d-2)(1):[17] reviewing and reporting annually on MPD resolution of citizen complaints, the demographics of those involved in these complaints, and the proposed and actual discipline as a result of sustained citizen complaints; all MPD use of force incidents, serious use of force incidents,[18] and serious physical injury incidents; [19] and in-custody deaths.

1(f) Recommendations: The law should require that the deputy auditor for public safety engage in regular and sustained public outreach to inform the community and relevant law enforcement agencies about its mission, policies, and operations.

Discussion

[17] Code of the District of Columbia § 5-1104(d-2)(1), https://code.dccouncil.us/dc/council/code/sections/5-1104.html (accessed February 15, 2021).
[18] See Recommendation 3(a)(iii) and corresponding discussion for definition of "serious use of force," which can be found in MPD GO-RAR-901.07 (Use of Force), § III.9, effective November 3, 2017, https://go.mpdconline.com/GO/GO_901_07.pdf (accessed February 14, 2021).
[19] Id., § III.8. See Recommendation 3(a)(iii) and corresponding discussion for definition of "serious physical injury."

Modeled after agencies that exist in other cities throughout the United States,[20] the deputy auditor of policing is designed to improve MPD's policing practices and procedures and make these practices clear and understandable to the public, thereby enhancing the legitimacy of and public trust in MPD. Extending the deputy auditor of public safety's jurisdiction to the OPC should have the same effect: revealing the strengths and weaknesses of OPC's internal case processing, improving the quality and timeliness of OPC investigations, and increasing the public's confidence in OPC's work.

Although independent auditors, inspectors general, and monitors are the most common forms of external police oversight across the country,[21]DC currently lacks an agency empowered and dedicated to auditing MPD or the OPC. (For the sake of simplicity, this report uses the term "auditor.")

Auditors possess the capacity to provide both front-end [22] and back-end accountability.[23] **On the front end, they audit complaint processes and police operations and make recommendations for changing training, policies, or procedures. On the back end, auditors retrospectively examine individual incidents, administrative investigations, and the disciplinary process, determining what went wrong or right, and making recommendations for change, as appropriate.** In the view of Samuel Walker, emeritus professor of criminology and criminal justice at the University of Nebraska at Omaha, recommending policy changes "is potentially the most important accountability function that any public oversight agency can perform because it is directed toward organizational change that hopefully will prevent future misconduct."[24] Reports that the auditors author make visible to the public details about the police department's operations. They provide the basis for informed public dialogue regarding controversial issues and police practices. [25]

Auditors can repeatedly revisit issues they examined in the past: their "continuous review of policies, training, and supervision" can prevent "a police department from slipping backward

[20] Cities that have established auditors, monitors, or inspectors general dedicated to auditing and examining their police departments' operations include: Chicago, Denver (police and sheriff departments), Los Angeles, New Orleans, New York, San Jose, and Seattle. See: City of Chicago Office of the Inspector General, "Public Safety," https://igchicago.org/about-the-office/our- office/public-safety-section/ (accessed February 13, 2021); City and County of Denver, "Office of the Independent Monitor," https://www.denvergov.org/Government/Departments/Office-of-the-Independent-Monitor (accessed February 13, 2021); Los Angeles Police Commission, "Office of the Inspector General—Los Angeles Police Commission," https://www.oig.lacity.org (accessed February 13, 2021); Independent Police Monitor, "The New Orleans Independent Police Monitor," https://nolaipm.gov (accessed February 13, 2021); New York City Department of Investigation, "Inspector General for the NYPD," https://www1.nyc.gov/site/doi/offices/oignypd.page (accessed February 13, 2021); City of San Jose, "Independent Police Auditor," https://www.sanjoseca.gov/your-government/appointees/independent-police-auditor (accessed February 13, 2021); Seattle.gov, "Office of Inspector General," https://www.seattle.gov/oig (accessed February 13, 2021).

[21] Walker and Archbold, The New World of Police Accountability, 214.

[22] Policing Project New York University School of Law, "Front-end Voice in Policing," https://www.policingproject.org/front-end- landing.

[23] See testimony of Barry Friedman, Creating a Community Commission for Public Safety and Accountability, Hearing before the Chicago City Council Committee on Public Safety, January 23, 2020, at 3-11, https://www.policingproject.org/ccpsa-testimony (accessed February 28, 2021).

[24] Walker and Archbold, The New World of Police Accountability, 217.

[25] Id., 217, 232-233.

… and keep it moving forward and adopting the newest ideas and best practices."[26] That the Council has, in recent years, tasked the PCB-OPC with producing an annual report on MPD's investigation of public complaints, use of force incidents, and in-custody deaths,[27] and with conducting an independent review of MPD's Narcotics and Specialized Investigations Division,[28] indicates that the Council is aware of the need for independent audits of MPD's operations.

In line with robust auditor models elsewhere, the enabling legislation should give the deputy auditor for public safety a broad scope of authority, rather than a narrow list of functions that could limit the deputy auditor for public safety's authority. In a 2020 survey, the NYU Law School Policing Project identified five auditors (Chicago, Los Angeles, New Orleans, New York, and Seattle) that possessed "broad authority to review any policy or practice that may be of interest to the public." The reports these inspectors generals published "have in turn prompted significant policy change."[29]Broad authority allows an auditor to proactively investigate issues that it deems important and to respond to the concerns of officials from the Council, MPD, or other organizations.[30]

The Commission's recommendations regarding the deputy auditor for public safety's tenure, hiring, basis for removal (for cause only), subpoena authority, access to employees and records, and resources are intended to ensure that the deputy auditor possesses the power and resources needed to conduct mandatory and discretionary audits independently, while being insulated, to the extent possible, from politics.

Sunlight is said to be the best of disinfectants. Secret investigative and disciplinary processes leave the public in the dark—skeptical, doubting, and unable to hold the department or individual officers to account. ... Specifically, the MPD should, as other jurisdictions have done, make officers' disciplinary records public.

To promote independence, the deputy auditor for public safety should be housed within the Office of the DC Auditor, which reports directly to the Council, rather than under the auspices of the Mayor, who has direct oversight of the MPD Chief and the DC inspector general. In addition, the DC auditor has demonstrated an interest, in recent years, in assessing certain

[26] Id., 235-236.
[27] Code of the District of Columbia § 5-1104(d-2)(1) (codifying provisions of DC Law 21-125, the Neighborhood Engagement Achieves Results Amendment Act of 2016), https://code.dccouncil.us/dc/council/code/sections/5-1104.html (accessed February 14, 2021).
[28] Code of the District of Columbia § 5-1104(d-3) (codifying provisions of DC Law 23-16, the Fiscal Year 2020 Budget Support Act of 2019), https://code.dccouncil.us/dc/council/code/sections/5-1104.html (accessed February 14, 2021).

[29] Policing Project New York University School of Law, "What Does Police Accountability Look Like?," https://www.policingproject.org/oversight (accessed February 13, 2021).
[30] Walker and Archbold, The New World of Police Accountability, 214.

aspects of MPD. The auditor hired the Bromwich Group to assess MPD's compliance with select provisions of the 2001 memorandum of agreement with the U.S. Department of Justice, which ended in 2008. In 2016, the auditor published *The Durability of Police Reform: The Metropolitan Police Department and Use of Force 2008-2015;* [31] In 2017, the auditor provided an update of the implementation status of that report's recommendations.[32] The auditor also issued reports regarding MPD's monitoring of demonstrations and compliance with First Amendment protections, [33]and on September 15, 2020, announced that it again contracted with the Bromwich Group to review MPD's policies, practices, and operations with respect to certain officer involved fatalities from 2018 to 2020.[34]

Consolidating the auditor's authority over agencies such as MPD, HAPD, and DOC within a single deputy auditor for public safety should, if the deputy auditor is given adequate resources, result in comprehensive external oversight of District law enforcement.

2. Recommendation: The Council and Mayor should expand the authority of and rename the Police Complaints Board, which will continue to oversee the Office of Police Complaints, as the District of Columbia Police Commission ("DCPC").

2(a) Recommendation: The law should require that DCPC review and approve, prior to issuance (except for emergency situations) MPD policies that are not purely administrative. For policies that broadly affect the community, the DCPC should engage the community and police during the development and drafting of new policies or policy revisions, including through use of formal forums and surveys.

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[31] Office of the District of Columbia Auditor, The Durability of Police Reform: The Metropolitan Police Department and Use of Force 2008-2015 (Washington, DC: Office of the District of Columbia Auditor, January 28, 2016), https://dcauditor.org/report/the-durability-of-police-reform-the-metropolitan-police-department-and-use-of-force-2008-2015/ (accessed February 13, 2021).

[32] Office of the District of Columbia Auditor, Implementation of Recommendations for The Durability of Police Reform: the Metropolitan Police Department and Use of Force 2008-2015 (Washington, DC: Office of the District of Columbia Auditor, March 20, 2017), https://dcauditor.org/report/the-durability-of-police-reform-the-metropolitan-police-department-and-use-of-force-2008- 2015/ (accessed February 13, 2021).

[33] See Office of the District of Columbia Auditor, Metropolitan Police Monitor Nearly 2,500 Demonstrations in 2014-2016 and Report No First Amendment Inquiries (Washington, DC: Office of the District of Columbia Auditor, July 3, 2017), https://dcauditor.org/report/metropolitan-police-monitor-nearly-2500-demonstrations-in-2014-2016-and-report-no-first- amendment-inquiries/ (accessed February 13, 2021); Office of the District of Columbia Auditor, The Metropolitan Police Department Complies with Surveillance Portion of First Amendment Law (Washington, DC: Office of the District of Columbia Auditor, January 23, 2019), https://dcauditor.org/wp-content/uploads/2019/01/MPD.Compliance.Report.1.23.19.pdf (accessed February 13, 2021).

[34] Office of the District of Columbia Auditor, Statement by the Office of the District of Columbia Auditor (ODCA) on the ODCA Review of MPD Use of Force in Officer-Involved Fatalities (September 15, 2020), https://dcauditor.org/report/d-c-auditor-statement-on-review-of-officer-involved-fatalities-in-the-district-of-columbia/ (accessed February 28, 2021).

2(b) Recommendation: The law should specify that DCPC have a role in setting, formulating, and/or approving MPD annual goals, and meeting quarterly with the MPD Chief to review MPD's progress in meeting these goals. MPD's achievement of these goals (emphasizing delivery of services rather than number of arrests or summonses) should be tied, at least in part, to the DCPC's assessment of MPD's success.

2(c) Recommendation: The law should specify that DCPC have a role in establishing the process for the Mayor's selection of a new MPD Chief, e.g., by developing a job description, and weighing in on minimum qualifications, whether the Mayor should engage a national search firm, and the DCPC's role in reviewing candidates.

2(d) Recommendation: The law should specify that, in making MPD more transparent, the DCPC must work with MPD to determine what information MPD should post to its website, subject to applicable laws (e.g., policies; detailed data on crime, arrests, citations, use of force, pedestrian and vehicle stops, and officer fatalities and injuries; layered budget information; and applicable union contracts), and that the DCPC may post such information on its website that MPD does not.

2(e) Recommendation: The law should specify that DCPC's composition consist of an odd number of **members who reflect the diversity of the District;** that members be compensated (not 100% volunteer); that individuals working for law enforcement agencies are not eligible; that members should include individuals below the age of 24; and that members should include individuals who have been directly impacted by the District's policing and/or incarceration system.

- **2(e)(i) Recommendation:** In the near-term, the Council and the Mayor should make permanent the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020's exclusion from the Police Complaints Board of individuals employed by law enforcement agencies. Specifically:
    - The new law should make clear that "no current affiliation with any law enforcement agency" means that no PCB member shall be currently employed by a law enforcement agency or law enforcement union.
    - The new law should make clear that individuals formerly employed by law enforcement agencies are not excluded from serving on the PCB.

- **2(e)(ii) Recommendation:** In the near-term, the Council and the Mayor should reconsider the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020's expansion of the Police Complaints Board from five to nine members, based solely on appointment of one member from each of the eight DC wards and one at-large member.

- While increasing the PCB membership from five to nine makes it more likely that the board reflects the diversity of the District, geographic diversity alone will not necessarily result in a board that reflects the District's diversity.

2(f) Recommendation: The Council and Mayor should hold full and robust public hearings on expanding the authority of and renaming the Police Complaints Board, or appoint a single-issue task force devoted to fleshing out the District of Columbia Police Commission's mandate, authority, composition, and its process for selecting members.

Prior to the emergency legislation, the Police Complaint Board consisted of five members appointed by the Mayor, subject to Council confirmation. One of the five members was required to be an active member of MPD. The PCB hires the OPC's executive director and oversees the OPC, serving as the OPC's board of directors. [35] Together with the OPC, the PCB makes recommendations to MPD on an array of issues, largely based on reports the Council has tasked it with preparing, as well as on OPC investigations.[36] PCB members also play a role in the OPC complaint review process. The OPC may dismiss a complaint with the concurrence of one PCB member, if they deem it lacks merit, if the complainant refuses to cooperate with the investigation, or if the complainant refuses to participate in good faith in the mediation process.[37]

MPD must embrace a culture of transparency and accountability, which as the President's Task Force on 21st Century Policing underscored, is essential to building trust and legitimacy in the eyes of the public.

To provide the public with a greater voice in how it's policed, the PCB, re-formulated as the DC Police Commission, would have the authority to review and approve MPD policies, prior to issuance, that are not purely administrative in nature; play a role in selecting the police chief; participate in the process of setting MPD performance goals; and help make MPD more transparent. In its new iteration, the DCPC would continue to oversee the Office of Police Complaints but would take on additional, front-end accountability responsibilities.

As the President's Task Force on 21st Century Policing concluded, the community should be involved in the process of developing and evaluating police department policies and

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[35] Code of the District of Columbia § 5-1105, https://code.dccouncil.us/dc/council/code/sections/5-1105.html (accessed February 26, 2021).
[36] Code of the District of Columbia §§ 5-1104(d) to 5-1104(d-3), https://code.dccouncil.us/dc/council/code/sections/5-1104.html (accessed February 26, 2021). See: Office of Police Complaints, Policy Recommendations https://policecomplaints.dc.gov/page/policy-recommendations (accessed February 26, 2021).
[37] District of Columbia Municipal Regulations, Chapter 6-A21, § 2105, https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/OPC%20 Admin%20Rules.%20Published%2012.15.17.pdf (accessed February 25, 2021).

procedures.[38] Police commissions that "review police department policies and practices to ensure they are consistent with community needs" exist in Detroit, Kansas City, Los Angeles, Milwaukee, Oakland, and San Francisco. Chicago is working to establish one.[39] The Commission, in fact, heard from Mecole Jordan-McBride, who helped lead the Grassroots Alliance for Police Accountability's (GAPA) effort in Chicago to create the Community Commission for Public Safety and Accountability (Ms. JordanMcBride now works as the advocacy director at the NYU Law School Policing Project). In establishing independent front-end external oversight, she emphasized the importance of giving the community a formal voice in making police policies, selecting the police chief, and appointing external oversight agency heads. She also discussed the challenges of uniting the public behind a single plan and obtaining buy-in from city officials.[40]

With respect to the future DCPC's authority, mandate, composition, and membership selection process, we urge the Council to thoroughly consider different options through hearings or a single-issue task force. Some general principles are clear: to ensure the DCPC's independence, current law enforcement employees should not be eligible to serve as members; the DCPC's membership should be larger than the five-member PCB to better reflect the District's diversity (and not just geographic diversity); and its members should be paid, to reflect their experience, time, and commitment.[41]

3. Recommendation: The Council and Mayor should expand the jurisdiction, authority, and resources of theOffice of Police Complaints (OPC).

3(a) Recommendation: The law should require that OPC conduct administrative investigations and make findings on all MPD "serious uses of force," (as currently defined in MPD General Order 901-07, Use of MPD must embrace a culture of transparency and accountability, which as the President's Task Force on 21st Century Policing underscored, is essential to building trust and legitimacy in the eyes of the public.and in-custody deaths, regardless of whether an individual filed a complaint regarding the incident. At a minimum, the law should require that OPC conduct an independent investigation and reach dispositions on all MPD serious uses of

[38] The President's Task Force on 21st Century Policing, Final Report (Washington, DC: United States Department of Justice Office of Community Oriented Policing Services, May 2015), 15 (Action Item 1.5.1), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

[39] Justin Lawrence, "CPAC Plan Would Cut $600 Million from Chicago Police Budget, as Aldermen Debate Civilian Oversight of Cops," Block Club Chicago, January 6, 2021, https://blockclubchicago.org/2021/01/06/cpac-plan-would-cut-600-million-from-chicago-police-budget-as-aldermen-debate-civilian-oversight-of-cops/ (accessed February 26, 2021). The idea for a police commission originated with a recommendation the Chicago Police Accountability Task Force made in 2016. See: Chicago Police Accountability Task Force, Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities They Serve (Chicago, IL: Chicago Police Accountability Task Force, April 2016), 68-69, https://chicagopatf.org/wp- content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf (accessed February 26, 2021).

[40] Mecole Jordan-McBride, New York University School of Law Policing Project advocacy director, meeting with the DC Police Reform Commission, December 17, 2020.

[41] Id.

force when an individual with "personal knowledge" files a complaint regarding the incident or under circumstances delineated in Recommendation 3(b).

- **3(a)(i) Recommendation:** In cases that OPC investigates involving serious uses of force, (as currently defined in MPD General Order 901-07, Use of Force)[42]and in-custody deaths, MPD policy should ensure that the MPD Use of Force Board continues to review and analyze these incidents, but refrain from making final findings on whether officers complied with MPD policies;the OPC will make the final findings on whether officers complied with MPD policies.

- **3(a)(ii) Recommendation:** If the District expands the OPC's jurisdiction to include all MPD **serious uses of force and in-custody deaths,** regardless of whether an individual has filed a complaint regarding the incident, **it should rename the Office of Police Complaints as the Office of Police Accountability.**

- **3(a)(iii) Recommendation:** The law should codify MPD "serious use of force" and "serious injury"(as currently defined in MPD General Order 901-07, Use of Force), to prevent a change in MPD policy from affecting OPC's jurisdiction.

3(b) Recommendation: The law should specify that the OPC must investigate anonymous complaints and complaints that a non-witness files relating to unnecessary force and biased-based policing. In addition, the law should specify that the OPC may investigate anonymous complaints and complaints a non-witness files that fall within the OPC's subject-matter jurisdiction, based upon the following factors: nature or severity of the alleged misconduct, the availability of evidence and/or witnesses, the ability to identify officers and civilians involved, and whether the OPC received other complaints regarding the incident from individuals with personal knowledge.

3(c) Recommendation: The Council and the Mayor should make permanent the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020's extension of OPC's jurisdiction to include"evidence of abuse" or "misuse of police powers," including those that the complainant did not allege in the complaint but that the OPC discovers during its investigation.The law should not limit, through the use of examples, the allegations of "evidence of abuse" or "misuse of police powers" that OPC discovers during its investigation and upon which it can make a finding. The legislative language should be broad enough to allow the OPC to investigate all the potential misconduct it discovers through its investigation, unbound by the complainant's specific allegations, such as the failure to turn on body-worn cameras, false reports, false statements, and destruction or concealment of evidence. The law should specify

[42] MPD GO-RAR-901.07 (Use of Force), § III.8-9, effective November 3, 2017, https://go.mpdconline.com/GO/GO_901_07.pdf (accessed February 14, 2021).

that when, during its investigation, the OPC discovers evidence of abuse or misuse of police powers that the complainant did not allege in the complaint, the OPC may include these allegations within the original case, rather than generating a new complaint or case, thereby increasing complaint or case numbers.

3(d) Recommendation: The Council and the Mayor should give the OPC jurisdiction to investigate special police officers as well as campus and university special police officers.

3(e) Recommendation: The Council and the Mayor should give the OPC the authority and ability to make informed disciplinary recommendations for cases in which complaint examiners sustain one or more allegations. In order to make informed disciplinary recommendations, based upon MPD's Table of Offenses and Penalties Guide, OPC should have access to an officer's training history, history of complaints and internal investigations (open and closed), and entire disciplinary history. If the MPD or HAPD Chief disagrees with OPC's recommendation, the Chief must provide written explanation for the disagreement within 30 days.

3(f) Recommendation: For cases in which complaint examiners sustain one or more allegations and the MPD or HAPD Chief rejects the OPC's disciplinary recommendation, and where the MPD or HAPD and the OPC cannot subsequently agree upon a disciplinary penalty, the Council and the Mayor should give a review panel of three complaint examiners the authority to determine the disciplinary penalty.

3(g) Recommendation: The Council and the Mayor should require the MPD Chief to respond to OPC policy recommendations within 30 days. MPD's response must include: 1) a description of the corrective or other action MPD plans to take; 2) the basis for rejecting the recommendation, in whole or in part; or 3) a request for an extension to provide substantive written responses.

3(h) Recommendation: The Council and the Mayor should ensure that OPC has direct, electronic access to all MPD digital/electronic records, the authority to incorporate these records into its case files, and the authority to utilize these records—including BWC footage—in interviews with civilians and MPD employees, as OPC deems appropriate.

3(i) Recommendation: The Council and the Mayor should ensure that OPC's budget supports the staff required to handle OPC's increased responsibilities; provides for extensive and ongoing training with respect to investigating serious uses of force and in-custody deaths and recommending and reaching disciplinary determinations; and secures the OPC's independence. To ensure this, the District should consider establishing a multi-year budget from a dedicated funding stream or statutorily linking OPC's budget or headcount to MPD's budget or headcount.

3(j) Recommendation: The OPC should develop and enhance its case management system to track and produce (not by hand), data including:

- Cases OPC closed by disposition type, e.g., number of cases OPC closes each year as adjudicated, mediated, policy training referral, rapid resolution referral, complaint withdrawn, dismissed on the merits, and dismissed due to the complainant's failure to cooperate.
- Days it takes to close (from complaint date to closure date) cases by disposition type, and average and/or median number of days it takes to close cases by disposition type.
- Reasons why cases are closed as dismissed on the merits, by category, e.g., unfounded, exonerated, insufficient facts, etc.
- Track cases referred for criminal investigation, dates cases were referred, and dates of USAO decision/declination.

Discussion

The OPC is currently responsible for processing, mediating, and investigating complaints, filed by an individual possessing personal knowledge of the alleged misconduct, against members of MPD and the HAPD involving harassment, unnecessary force, insulting or demeaning language, discriminatory treatment, retaliation for filing a complaint, and failure to wear identifying information or to identify oneself upon request.[43]

The OPC closes cases in one of four ways: 1) referring the subject officer to complete appropriate policy training (known as policy training/rapid resolution referral); 2) mediation; 3) dismissal (on the merits and due to the complainant failing to cooperate); and 4) adjudication (through the use of complaint examiners).[44] One PCB member must concur before the OPC can dismiss a complaint.[45]

When the OPC determines there is reasonable cause to believe that a subject officer engaged in misconduct, it forwards the case to one of a pool of complaint examiners.[46] The PCB must approve complaint examiners that the executive director selects for the pool.[47] The

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[43] Code of the District of Columbia §§ 5-1101 to 5-1115, https://code.dccouncil.us/dc/council/code/titles/5/chapters/11/subchapters/I/ (accessed February 25, 2021). An individual with "personal knowledge" is an alleged victim, any individual with personal knowledge of alleged misconduct, or the parent, legal guardian, or legal representative of either. District of Columbia Municipal Regulations, Chapter 6-A21, § 2105, https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/OPC%20 Admin%20Rules.%20Published%2012.15.17.pdf.

[44] District of Columbia Police Complaints Board-Office of Police Complaints, Annual Report, 18, https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/2020%2 0Annual%20Report_Final.pdf (accessed February 21, 2021).

[45] District of Columbia Municipal Regulations, Chapter 6-A21, § 2110, https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/OPC%20 Admin%20Rules.%20Published%2012.15.17.pdf.

[46] District of Columbia Police Complaints Board-Office of Police Complaints, Annual Report, 19, https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/2020%2 0Annual%20Report_Final.pd (accessed February 26, 2021).

[47] Code of the District of Columbia § 5-1106(c), https://code.dccouncil.us/dc/council/code/sections/5-1106.html (accessed February 26, 2021).

complaint examiner adjudicates the case, through review of the investigative file and/or an evidentiary hearing. In a written decision, the complaint examiner makes findings of fact and determines whether the officer violated department policies. When complaint examiners sustain one or more allegations, the OPC forwards the case to MPD for discipline.[48] The MPD Chief issues a written decision memorializing the department's disciplinary decision and the reasons for it.

If the Chief determines that the complaint examiner's decision "clearly misapprehends the record" and "is not supported by substantial, reliable, and probative evidence in the record," the Chief will return the case to the OPC.[49] In these instances, a panel of three complaint examiners (not including the original complaint examiner) reviews the record and issues a written decision determining whether the original complaint examiner correctly sustained the allegation(s) at issue. If the final review panel affirms one or more sustained findings, the OPC returns the case to MPD for discipline. If the final review panel overturns the original complaint examiner's sustained finding(s), the OPC dismisses the case.[50] DC law does not provide the PCB-OPC with the authority to make disciplinary recommendations or to play a role in the disciplinary process.

OPC Jurisdiction and Authority

According to a June 2020 Pew Research Center American Trends Panel poll, 69% of the public believe police do a "poor" or "fair" job of holding officers accountable when misconduct occurs; and Black people are much more likely than White people and Latinx people to hold this view (86% compared with 65% for both White and Latinx people).[51] The same survey found that 82% of Blacks, 81% of Latinx, and 71% of Whites—75% of the public overall—"strongly" or "somewhat" favor "giving civilian oversight boards power to investigate and discipline officers accused of inappropriate use of force or other misconduct."[52]

Given this widely held view that the police cannot police themselves, the OPC, as an agency independent from MPD, should have sufficient trained and qualified staff to investigate all in-custody deaths, and serious uses of force, regardless of whether a complaint has been filed regarding the incident. Broadening the types of cases for which the Office of Police Complaint is responsible and giving it a role in the disciplinary process should enhance public trust in the administrative investigation and discipline processes.

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[48] Code of the District of Columbia §§ 5-1111(i), https://code.dccouncil.us/dc/council/code/sections/5-1111.html (accessed February 26, 2021).
[49] Code of the District of Columbia §§ 5-1112(c), 5-1112(g)(2), https://code.dccouncil.us/dc/council/code/sections/5-1112.html (accessed February 26, 2021).
[50] Code of the District of Columbia § 5-1112(h), https://code.dccouncil.us/dc/council/code/sections/5-1112.html (accessed February 26, 2021).
[51] Pew Research Center, Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct (July 9, 2020), https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for- misconduct/.
[52] Id.

The Chicago Office of Police Accountability (COPA), a civilian investigative body independent of the Chicago Police Department, possesses the type of jurisdiction the Commission envisions for the OPC.[53]Like the OPC, COPA has jurisdiction to investigate certain types of public complaints, but it can also investigate incidents involving firearm discharges, taser discharges resulting in death or serious bodily injury, and incidents involving the death or serious injury of an individual in police custody or that occurred as a result of police actions, regardless of whether a complaint has been filed.[54] In these cases, the Chicago Police Department may still conduct a review of the use of force incident to address policy, training, tactical, and equipment issues, but its Force Review Board "will not conduct a disciplinary review of any incident investigated by COPA," since COPA is "exclusively responsible for recommending disciplinary action relating to the incident."[55] This process is similar to the one Seattle has adopted.The Seattle Police Department's (SPD) Force Investigation Team conducts investigations of serious uses of force, including shootings, and presents the case to and identifies issues for (without making recommendations to) the SPD's Force Review Board. The SPD Force Review Board does not make final determinations on alleged policy violations that the Seattle Office of Police Accountability (OPA) is investigating, unless requested by the OPA director or board chair. [56]

Under current DC law, the OPC possesses the authority to investigate complaints of serious uses of force.[57] **However, the Commission learned from OPC Executive Director Michael Tobin that OPC does not in fact conduct independent investigations of these complaints.** Due to insufficient resources, OPC closes complaints involving serious uses of force

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[53] If the District adopts this Commission recommendation, it should change the name of the Office of Police Complaints to make it clear that the office's investigations do not stem solely from public complaints.

[54] Municipal Code of Chicago § 2-78-120, https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2443800 (accessed February 14, 2021).

[55] Chicago Police Department GO3-02-08 (Department Review of Use of Force), §§ II and V.D, effective January 27, 2021, http://directives.chicagopolice.org/directives/data/a7a57b9b-15f2592c-33815-f25c-63b922690a1aba22.pdf?hl=true (accessed February 14, 2021).(ft 629)

[56] Seattle Police Department Manual 8.500 (Reviewing Use of Force), § 8.500-POL-4, effective September 15, 2019, https://www.seattle.gov/police-manual/title-8---use-of-force/8500---reviewing-use-of-force#8.500POL4 (accessed February 14, 2021); Seattle Police Department Force Investigation Unit Procedural Manual, at 54-56, effective September 15, 2019, http://www.seattle.gov/Documents/Departments/Police/manual/FIT_Manual_9_15_19.pdf (accessed February 14, 2021); City of Seattle Police Accountability Ordinance 125315, §§ 3.29.100-125 (June 1, 2017), https://www.seattle.gov/Documents/Departments/OPA/Legislation/2017AccountabilityOrdinance_052217.pdf.(ft 630)

[57] MPD policy defines serious use of force as all firearm discharges, with the exception of range and training incidents, and discharges at animals; uses of force resulting in serious physical injury; head strikes with an impact weapon; uses of force resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ; incidents involving MPD canine bites; uses of force involving the use of neck restraints or techniques intended to restrict a subject's ability to breathe; and all other uses of force resulting in death. It defines serious physical injury as "any injury or illness that results in admission to the hospital or that creates a substantial risk of death, serious disfigurement, loss of consciousness, disability, a broken bone, or protracted loss or impairment of the functioning of any body part or organ. MPD GO-RAR-901.07 (Use of Force), § III.8-9, effective November 3, 2017, https://go.mpdconline.com/GO/GO_901_07.pdf (accessed February 14, 2021).(ft 631)

as "referred to the MPD," without opening an investigation, and monitors them through the OPC executive director's role on MPD's Use of Force Review Board.[58] It seems doubtful that when it created the PCB and OPC, the District intended for the PCB-OPC to refer the most serious complaints involving unnecessary force to MPD, without conducting an independent review.

When the District established the OPC, one of its goals was to "establish "an effective, efficient, and fair system of independent review of citizen complaints against police officers."[59] Even if the Council and Mayor decide against expanding OPC's jurisdiction to investigate certain incidents absent a complaint, it should, at a minimum, require the OPC to investigate all complaints involving serious uses of force over which it already has jurisdiction, and give it the resources it needs to do so.

The law also restricts the OPC's jurisdiction to complaints filed by individuals with personal knowledge of the incident (alleged victim or eyewitness), or their legal representative. This restriction unnecessarily prevents the OPC from opening investigations of incidents regarding which it would otherwise have jurisdiction. Though the public may have greater faith in the independent investigations OPC conducts, it is the MPD that accepts all complaints, made in writing or orally (including those made anonymously), and ensures that "every complaint is investigated."[60]We met with representatives from the American Civil Liberties Union of the District of Columbia(ACLU DC) and the Public Defender Service for the District of Columbia (PDS). Both organizations have persuasively argued[61] that OPC should have the ability to accept anonymous complaints and complaints from reporting nonwitnesses, as other independent investigative bodies in New York, San Francisco, and Seattle have.[62] This would, as the

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[58] Michael Tobin, executive director, Office of Police Complaints, meeting with the DC Police Reform Commission, November 23, 2020; Michael Tobin, executive director, Office of Police Complaints, email to the DC Police Reform Commission, January 21, 2021.

[59] Code of the District of Columbia § 5-1102 (emphasis added), https://code.dccouncil.us/dc/council/code/sections/5-1102.html (accessed February 14, 2021). (ft 633)

[60] MPD GO-PER-120.25 (Processing Complaints against Metropolitan Police Department Members), § II, effective October 27, 2017, https://go.mpdconline.com/GO/GO_120_25.pdf (accessed February 14, 2021).(ft 634)

[61] Testimony of Monica Hopkins, executive director, American Civil Liberties Union of the District of Columbia, DC Council Committee on the Judiciary and Public Safety, Hearing on Bill 23-992, the "Comprehensive Policing and Justice Reform Amendment Act of 2020," October 15, 2020, https://www.acludc.org/en/legislation/aclu-dc-testifies-dc-council-committee-comprehensive-police-and-justice-reform-amendment (last accessed February 18, 2021). See also: Testimony of Katerina Semyonova, Special Counsel to the Director on Policy and Legislation, Public Defender Service for the District of Columbia, concerning "The Comprehensive Policing and Justice Amendment Act of 2020," October 15, 2020, 4.(ft 635)

[62] Rules of the New York City Civilian Complaint Review Board, Title 38-A, Subchapter B, § 1-11, https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-78597 (accessed February 14, 2021); San Francisco Office of Police Accountability, Complaints, https://sfgov.org/dpa/complaints (accessed February 14, 2021); Seattle Office of Police Accountability, Complaints, Anonymous Complaint Form, https://www.seattle.gov/opa/complaints/file-a-complaint/anonymous- complaint-form (accessed February 13, 2021).(ft 636)

ACLU-DC executive director testified before the Council, address concerns community members have raised that "fear of retaliation" by MPD officers "keeps them from filing complaints."[63]

As part of the emergency legislation, the Council granted the OPC jurisdiction to investigate evidence of abuse or misuse of police powers that OPC uncovered during its complaint investigation. This makes sense, but that authority should be general, not limited to the examples cited in the emergency legislation; and it should permit the OPC to also investigate allegations like failure to turn on body-worn cameras, false reports, false statements, and destruction or concealment of evidence.[64]

Pursuant to municipal regulations, the District appoints and issues commissions to special police officers[65] and campus and university special police,[66] who wield certain police powers in connection with their employment. To ensure that these special officers comply with District policies and the District revokes and terminates their commissions as necessary, OPC should possess the authority to investigate them.

In addition to expanding the OPC's jurisdiction in all these ways, the OPC should possess statutory authority to recommend discipline for officers proven to have engaged in misconduct and the ability to obtain relevant personnel records to make informed disciplinary recommendations. Where the OPC and MPD cannot agree on discipline, a panel of three OPC complaint examiners should be empowered to make the final disciplinary decision, which MPD would be required to impose. This is consistent with the policy recommendation the PCB-OPC itself issued in 2020.[67] As that recommendation describes, several public agencies in the United States, external to police departments, possess such authority. In Chicago, for example, the COPA possesses the authority to review the "complaint history" of an officer and make a

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[63] Testimony of Monica Hopkins, executive director, American Civil Liberties Union of the District of Columbia, DC Council Committee on the Judiciary and Public Safety, Hearing on Bill 23-992, the "Comprehensive Policing and Justice Reform Amendment Act of 2020," October 15, 2020, https://www.acludc.org/en/legislation/aclu-dc-testifies-dc-council-committee-comprehensive-police-and-justice-reform-amendment (last accessed February 18, 2021). See also: Testimony of Katerina Semyonova, Special Counsel to the Director on Policy and Legislation, Public Defender Service for the District of Columbia, concerning "The Comprehensive Policing and Justice Amendment Act of 2020," October 15, 2020, 4.(ft 637)

[64] The emergency legislation empowers OPC to investigate evidence of abuse or misuse of police powers not alleged by the complainant in the complaint. It cites the following examples: failure to intervene in or report excessive use of force; failure to report to a supervisor another officer's police violations; and failure to report use of force. District of Columbia Act 23-336, Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, Subtitle C, § 105(b), https://code.dccouncil.us/dc/council/acts/23-336.html (accessed February 21, 2021).(ft 638)

[65] See District of Columbia Municipal Regulations, Chapter 6A §§ 1100.1 to 1110.1, https://securityofficerhq.com/files/dc-title- 6a.pdf (accessed March 13, 2021).(ft 639)

[66] See District of Columbia Municipal Regulations, Chapter 6A §§ 1200.1 to 1208.1, https://securityofficerhq.com/files/dc-title- 6a.pdf (accessed March 13, 2021).(ft 640)

[67] See District of Columbia Office of Police Complaints, "Police Complaints Board Releases Report on Discipline of DC Police Officers," press release, October 14, 2020, https://policecomplaints.dc.gov/release/police-complaints-board-releases-report- discipline-dc-police-officers (last accessed February 14, 2021); Michael Tobin, executive director, Office of Police Complaints, meeting with the DC Police Reform Commission, October 29, 2020.(ft 641)

disciplinary recommendation to the Chicago Police Department (CPD) superintendent.[68] If the COPA and the CPD cannot agree on discipline, the Chicago Police Board, an agency independent of the CPD and the COPA, reviews the record and determines whether the superintendent's response does or does not "meet its burden of overcoming the COPA [c]hief [a]dministrator's disciplinary recommendation," and rules either in favor or COPA's disciplinary position or that of the superintendent.[69]The board posts the decision, including the officer's name, on the board's website.[70]

Here in DC, the PCB-OPC possesses the authority to make policy recommendations to MPD and the HAPD.[71] However, as the OPC's executive director, Michael Tobin, told the Commission, the law does not currently obligate either department to respond to PCB-OPC policy recommendations. We agree with Mr. Tobin, this should change.[72] Both departments should be required to respond to OPC's policy recommendations within 30 days, and describe the corrective actions they intend to take or their reasoning for rejecting the recommendations, in whole or in part.

OPC Resources

To effectuate its new jurisdiction and authority, the OPC needs additional resources. Specifically, it needs unfettered access to all MPD digital and electronic records, new staff to assume these responsibilities, and time to hire and train staff. Chicago created COPA to replace its predecessor agency in October 2016; the COPA did not commence operations for 11 months.[73]

When he met with the Commission, OPC Executive Director Michael Tobin said that OPC needed direct access to all computerized MPD records. Although OPC has direct access to MPD body-worn camera (BWC) recordings, Mr.Tobin advised the Commission that the OPC does not play these BWC recordings during interviews with members of the public or officers because it is concerned that doing so will violate MPD policies on releasing BWCrecordings.[74]

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[68] Municipal Code of Chicago §§ 2-78-120(k)-(l) and 2-78-130, https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0- 0-2443800 (accessed February 14, 2021).(ft 642)

[69] Municipal Code of Chicago § 2-78-130, https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2443800 (accessed February 14, 2021); District of Columbia Office of Police Complaints, Policy Recommendations, https://code.dccouncil.us/dc/council/code/sections/5-1104.html (accessed March 1, 2021).(ft 643)

[70] Id.; Chicago Police Board, Police Discipline, https://www.chicago.gov/city/en/depts/cpb/provdrs/police_discipline.html (accessed February 14, 2021).(ft 644)

[71] Code of the District of Columbia § 5-1104(d), https://code.dccouncil.us/dc/council/code/sections/5-1104.html (accessed February 26, 2021).(ft 645)

[72] Michael Tobin, executive director, Office of Police Complaints, meeting with the DC Police Reform Commission, October 29, 2020.(ft 646)

[73] Michael Tobin, executive director, Office of Police Complaints, meeting with the DC Police Reform Commission, October 29, 2020.(ft 647)

[74] Michael Tobin, executive director, Office of Police Complaints, meeting with the DC Police Reform Commission, October 29, 2020; Rochelle Howard, former deputy director, Office of Police Complaints, meeting with the DC

OPC should have unfettered, direct access to all digital or electronic MPD records, possess the capacity to incorporate the records into OPC investigative files, and be able to utilize these records, such as reports and BWC recordings, during interviews OPC conducts. When an incident, in whole or in part, is captured on BWC recordings, investigators' follow-up inquiries should include playing the BWC recording and asking witnesses questions about what it depicts, confirming the identities and actions of individuals recorded, and probing the witness regarding the witness' actions at different points of the encounter.

Aside from greater access to MPD records, the District must increase the OPC's budget so that OPC can fulfill its responsibilities. Data the Commission compiled by hand, through examination of published complaint examiner decisions, reveal delays in the investigations the OPC does conduct, indicative of chronic understaffing. During calendar years 2018, 2019, and 2020, the cases that OPC complaint examiners adjudicated—including all those where the agency sustained allegations of misconduct—took an average of 323, 389, and 384 days to complete, respectively, from the date the complaint was filed to the examiner's decision.[75] As discussed above, the OPC's director conceded the agency does not currently have the resources to investigate complaints of serious use of force, over which it already has jurisdiction. In order to ensure that independent investigative agencies' budgets are adequate, cities such as Chicago, Miami, New York, Oakland, and San Francisco have linked the agencies' staffing or budgets to those of the police departments.[76] The District should implement a similar budgeting mechanism for the OPC or consider establishing a multi-year OPC budget from a dedicated funding stream.

The Commission compiled by hand data regarding completion times for adjudicated cases because the OPC case management system could not produce it. Even a basic case tracking system should be able to generate data on case completion time, by type of case closure. The District should ensure that OPC's resources include an upgrade of its case tracking system.

Police Reform Commission, December 3, 2020; Michael Tobin, executive director, Office of Police Complaints, email to the DC Police Reform Commission, February 26, 2021.

[75] See District of Columbia Office of Police Complaints, Decisions, https://policecomplaints.dc.gov/page/complaint-examiner- decisions (accessed February 14, 2021). The Commission examined each decision to ascertain the complaint date and closure date; the Commission obtained complaint dates not included in some decisions directly from the OPC. Michael Tobin, executive director, Office of Police Complaints, email to the DC Police Reform Commission, January 5, 2021.(ft 649)

[76] See Municipal Code of Chicago, § 2-78-105, https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2443800 (accessed February 14, 2021); City of Miami Code of Ordinances § 11.5-35, https://library.municode.com/fl/miami/codes/code_of_ordinances?nodeId=PTIITHCO_CH11.5CICOINRE (accessed February 14, 2021); New York City Charter Chapter 18-A, § 440(g), https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0- 1641 (accessed February 14, 2021); Oakland City Charter § 604(e)(4), https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=THCHOA (accessed February 14, 2021); San Francisco City Charter § 4.136(c), https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_charter/0-0-0-52612#JD_4.136 (accessed February 14, 2021).(ft 650)

<u>19. Recommendation:</u> The Council should ensure that citizens are able to redress concerns about police misconduct through civil litigation, including:

- Ensuring a private right of action for violations of statutes regulating police conduct.
- Tolling the 6-month notice requirement in DC Code § 12-309 for claimants who are imprisoned or facing criminal charges related to the arrest.
- Ending qualified immunity.
- Decentering Police to Improve Public Safety

Discussion:

- Ensuring a Private Right of Action for Violations of Statutes Regulating Police Conduct

As Chief Justice Marshall observed at the founding of the Republic, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[77] This is a fundamental tenet of the rule of law; without it, individuals do not have the means to protect and enforce their rights, which then become no more than hortatory. Additionally, as the Supreme Court has observed, enabling suits for the violation of rights exerts an important deterrent effect on would-be violators.[78] Without that deterrent, officials who would be in a position to violate the law face no consequences for doing so and are thus less likely to restrain themselves.

Unfortunately, not all DC laws pair remedies with rights. Indeed, some of the most important protections for our most basic rights (such as those of the First Amendment Assemblies Act, or FAAA, which restrict the manner in which law enforcement can police peaceful demonstrations) have been ruled unenforceable because they lack an explicit private cause of action.[79]This is particularly ironic in the case of the FAAA, because the reason why the Council decided against including an express cause of action in the first place was that the DC Office of the Attorney General assured the Council that the Act was already privately enforceable notwithstanding the absence of an express enforcement provision.[80] Therefore, violations and potential violations of the FAAA continue.[81]

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[77] Marbury v. Madison, 5 U.S. 137, 163 (1803)

[78] See, e.g., City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) (plurality opinion); Carlson v. Green, 446 U.S. 14, 21 (1980).

[79] See Tr. of Oral Decision, Horse v. District of Columbia, No. 1:17-cv-01216 (DC Sept. 27, 2019), at 23; Mahoney v. District of Columbia, 662 F. Supp. 2d 74, 94 n.11 (DC 2009).

[80] See: DC Council Comm. on the Judiciary, Report on Bill No. 15-968 at 25 (Dec. 1, 2004) (summarizing testimony to the effect that District statutes can be enforced without an explicit right of action and that a violation would also constitute negligence per se).

[81] See: Dkt. 1, Horse v. District of Columbia, No. 1:17-cv-01216 (DC filed June 21, 2017) (claiming violations of FAAA for unauthorized use of pepper spray, a mass arrest, and failure to issue a dispersal order, among other things); Dkt. 52, Black Lives Matter DC v. Trump, No. 1:20-cv-1469 (DC filed Sept. 3, 2020) (amended complaint alleging unauthorized use of pepper spray);ACLU of DC, Wash. Lawyers' Comm. for Civil Rights & Urban Affairs, and Sidley Austin LLP, Protest During Pandemic 17 (Mar. 2021).

To ensure that the laws passed by the Council are honored, they must be made enforceable.

Tolling the Six-Month Notice Requirement in DC Code § 12-309 for Claimants Who Are Imprisoned or Facing Criminal Charges Related to the Arrest.

The Council should amend DC Code § 12-309 to toll the six-month notice requirement for claimants who are incarcerated or facing criminal charges related to an arrest. Currently, DC law requires individuals filing personal injury or other damages claims against the DC government (including against the Metropolitan Police Department) to "give[] notice in writing" of their claims "within six months after the injury or damage was sustained."[82] Thus, for an individual to hold MPD accountable for police misconduct, they must learn of this specific deadline and file a detailed written statement within six months. **This requirement is difficult enough for the average individual who has experienced traumatic police encounters and lacks legal training; it is practically insurmountable when such a person is incarcerated and accordingly lacks access to the minimal civil legal resources available even to the ordinary person. And for individuals who suffered police misconduct that resulted in pending criminal charges, complying with the six-month deadline requires claimants to risk waiving core constitutional rights.**

Tolling the six-month notice requirement for incarcerated individuals would be in step with other DC law provisions and the practices of other states. DC already recognizes generally that an otherwise-applicable statute of limitations is paused while a person is incarcerated.[83] 786In other words, the clock does not begin running on their claim until post-incarceration. Other states also relax filing deadlines for incarcerated people.[84] The Council should recognize that incarceration poses a serious resource and knowledge constraint impacting an individual's ability to meet a legal notice deadline. Accordingly, the Council should toll the legal notice deadline for the period of incarceration, just like it does for statutes of limitations.

For individuals facing criminal charges related to the underlying police misconduct, **Section 12-309's notice requirements are in tension with their Fifth Amendment privilege against self-incrimination.** Specifically, the statute requires an individual to provide "the approximate time, place, cause, and circumstances of the injury or damage" to preserve their claims against the government for violation of their rights.[85] However, in providing details necessary to give notice and maintain their civil claims, individuals with simultaneous criminal charges may risk waiving their constitutional rights in their ongoing criminal proceedings by discussing facts that relate to both.[86] Accordingly, in the absence of protection, arrested individuals who experienced a constitutional violation may face the choice of losing their civil claim for the violation by exercising their right to remain silent or waiving their Fifth

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[82] DC Code § 12-309(a).
[83] DC Code § 12-302(a)(3).
[84] See: Cal. Civ. Proc. Code § 352.1(a) (California); Wash. Rev. Code § 4.16.190 (Washington state).
[85] DC Code § 12-309(a).
[86] See: Presser v. United States, 284 F.2d 233, 235 (DC Cir. 1960) (individual who testified in congressional hearing and was later subject to criminal indictment for contempt of Congress "waived the Fifth Amendment privilege, which otherwise would have protected him").

Amendment privilege by providing the notice needed to preserve their civil claim. The Council should amend the law to avoid imposing this unfair choice.

Ending Qualified Immunity

Another critical reform to ensure that rights do not lack remedies is to mitigate the effects of the pernicious doctrine of qualified immunity. Under that rule, people whose constitutional rights were violated cannot sue police officers or other government officials for damages unless a specific legal precedent with almost identical facts placed it "beyond debate" that the actions at issue violated the Constitution. In practice, this means that countless violations go entirely unremedied—a fundamental affront to the rule of law. Government officials have been granted immunity for egregious violations, from a school principal who ordered a strip search of a middle-school student in violation of her privacy rights,[87] to President Nixon's attorney general, who authorized warrantless wiretaps in violation of the Fourth Amendment.[88] And, of course, the primary beneficiaries of this get-out-of-court-free card are law enforcement officers—including in cases involving the use of deadly force.[89]Whereas for criminal defendants, who usually do not have legal training, **"ignorance of the law is no excuse," government officials under qualified immunity are held to a lower standard of compliance with the law, even though these officials are the people who have the most reason to know the law because they are responsible for enforcing it.** Most fundamentally, qualified immunity undermines constitutional rights by encouraging officers to disregard those rights. As Supreme Court Justice Sotomayor has observed, qualified immunity "sends an alarming signal to law enforcement officers and the public:" that officers "can shoot first and think later."[90]

One case here in the District that highlights the sweep and power of qualified immunity is Black Lives Matter DC v. Trump,[91]a case seeking redress for officers' attack on civil rights demonstrators in Lafayette Square in June 2020— an attack that included tear gas, rubber bullets, and a baton charge. Defendants in the case include MPD officers, Park Police and federal law enforcement, and former Attorney General Bill Barr. They have all sought qualified immunity for tear gassing peaceful demonstrators who broke no laws and posed no threat. According to the latest filing on behalf of several of the defendants in the case, their conduct cannot be "clearly established" as unconstitutional unless plaintiffs can point to a prior case involving "a presidential appearance, an alleged dispersal order emanating from the Attorney General himself, a city-wide curfew and emergency order, [and] a large and potentially dangerous crowd near the President." It's obvious that the search for an identical case is futile and should be unnecessary, but given how strictly the doctrine has been applied, the defendants' argument might prevail.

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[87] See: Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 379 (2009).
[88] See: Mitchell v. Forsyth, 472 U.S. 511, 535 (1985).
[89] See: e.g., Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam);Plumhoff v. Rickard, 134 S. Ct. 2012, 2020 (2014); Scott v. Harris, 550 U.S. 372, 381 (2007); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (per curiam).
[90] Kisela, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).
[91] No. 1:20-cv-1469 (D.DCDC filed June 4, 2020).

The justifications for the doctrine have been thoroughly debunked. The civil rights statute that the Court found to contain the doctrine, the **Ku Klux Klan Act of 1871 (today known in relevant part as 42 U.S.C. § 1983), includes not a single word about any such protection;** indeed, immunity is antithetical to that law's purpose, which was to protect formerly enslaved individuals from discrimination and officially sanctioned violence in the postwar South. The Supreme Court developed qualified immunity based on its reading of history, but recent scholarship shows that the defense has no basis in the common law.[92] The Supreme Court's most conservative member, Justice Thomas, agrees.[93] The policy justifications for qualified immunity are similarly flawed. The Court claims that the doctrine Decentering Police to Improve Public Safety 188 protects officers from paying large judgments when they make a mistake,[94] and from lawsuits that could distract them from the performance of their duties.[95]But in fact, contrary to the Court's assumption,[96] recent empirical research demonstrates that officers virtually never pay these judgments personally.[97] As to distraction, nearly all the work in these cases is done by government lawyers, not officers themselves; more fundamentally, having to answer for constitutional violations cannot be brushed aside as a "distraction" if the Constitution is to have real meaning.

Although qualified immunity is a doctrine of federal law, the District can take a critical step to blunt its impact**: legislate an independent cause of action for constitutional violations that explicitly excludes the defense of qualified immunity.** Colorado pioneered this approach last year in the wake of nationwide protests over the killing of George Floyd by Minneapolis police in May 2020.[98]**Other states have followed its lead.[99] To deter officer misconduct, to ensure respect for Washingtonians' constitutional rights, and to uphold the rule of law, the District should do likewise.**

DC Justice Lab is a team of law and policy experts researching, organizing, and advocating for large-scale changes to the District's criminal legal system. We develop smarter safety solutions that are evidence-driven, community-rooted, and racially just. We aim to fully transform the District's approach to public safety and make the District a national leader in justice reform. www.dcjusticelab.org .

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[92] See: William Baude, Is Qualified Immunity Unlawful? 106 Calif. L. Rev. 45 (2018)
[93] See: Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of certiorari).
[94] Anderson v. Creighton, 483 U.S. 635, 641 (1987)
[95] Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).
[96] See: Anderson, 483 U.S. at 641 n.3.
[97] See: Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885, 938-40 (2014).
[98] See: Colo. Rev. Stat. Ann. § 13-21-131.
[99] See: Jacob Sullum, "New Mexico Could Be the Third State To Authorize Lawsuits Against Abusive Cops Without Qualified Immunity," Reason, Feb. 19, 2021.

Testimony on Behalf of New America's Open Technology Institute

before the D.C. Council

Joint Hearing of the Committee on the Judiciary and Public Safety

and the Committee of the Whole

By Lauren Sarkesian

Thursday, May 20, 2021

Chairman Allen, Chairman Mendelson, and Councilmembers:

My name is Lauren Sarkesian, and I am a Senior Policy Counsel at New America's Open Technology Institute (OTI). Thank you for the opportunity to testify today.

OTI works to ensure that every community has equitable access to technology and its benefits. This includes working to ensure that government surveillance is subject to robust safeguards that protect rights. OTI is based here in the District, and is a member of the Community Oversight of Surveillance -- DC (COS-DC) coalition. COS-DC is a local coalition of groups working to secure legislation in the District that would provide transparency and accountability for D.C. government use of surveillance technologies.[1]

First, we would like to applaud the efforts that the Council, and the D.C. Police Reform Commission, is undertaking to address police reform in the District. There are many valuable recommendations in the Commission's report that work to reimagine policing, and I look forward to seeing the Council turn them into legislation. I am here today to highlight one recommendation in particular, and urge that the Council work swiftly to adopt it.

Under Section V, Recommendation #30, the Commission recommends that the Council pass the type of legislation that our COS-DC coalition has long sought -- to ensure that decisions about whether District agencies should acquire, use, or share surveillance technologies are made with thoughtful consideration and buy-in from the public and elected lawmakers, and that the operation of the approved technologies is governed by rules that safeguard residents' rights and provide transparency.[2] The Commission further recommended that the legislation should, among other provisions, include the creation of a Surveillance Advisory Group, and establish a private right of action for violation of Council-approved rules for the acquisition for use of any surveillance technology.

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[1] Community Oversight of Surveillance DC, https://takectrldc.org/ (last visited May 15, 2021).

[2] District of Columbia Police Reform Commission, Full Report, *Decentering Police to Improve Public Safety* (April 1, 2021) at p. 125-127, https://dccouncil.us/police-reform-commission-full-report/.

OTI would agree that the recommendations in this section amplify COS-DC's proposed legislation by setting out in detail some of the functions of the Surveillance Technology Advisory Group that we have pushed for within the legislation. In particular, we agree that the Advisory Group should have a majority of members representing equity-focused organizations, and that there should be a private right of action built into the legislation, under which residents can seek redress for violations of the law.

The Commission also noted that the experiences of other cities make clear that there is a need to ensure that the advisory board is adequately resourced to undertake the responsibilities with which it is tasked. We hope this is something the Council will consider as well, as nobody is in a better position to make such a recommendation than the Commission members themselves, who understand what a time commitment this important civic work can be.

Most importantly, as the Commission pointed out, these recommendations emphasize the need to ensure that surveillance technologies, especially those used in policing, do not exacerbate or perpetuate racial inequity. OTI, and our coalition, is encouraged that the Commission understands the importance of reining in police use of surveillance technologies as part of larger police reform efforts. Tech tools are rapidly spreading and increasingly contribute to the disproportionate policing in the United States. Over the past two decades, police departments across the country have been acquiring, deploying, and gaining access to surveillance equipment in secret, without any notice to the public or authorization from local legislatures-- including here in the District.

Studies have shown that technologies, like facial recognition, are biased against women and people of color,[3] and in fact, we now have numerous clear examples of cases in which facial recognition mismatches led to the wrongful arrests of Black men.[4] But even as these powerful technologies improve in terms of accuracy, they pose profound threats. Police surveillance technologies are extremely privacy invasive, as they provide the government an unprecedented ability to monitor local residents over time, and accumulate vast amounts of their personal data. These technologies can infringe upon First Amendment rights and chill speech -- we have seen them widely used at protests, especially last year's Black Lives Matter protests across the country and in the District.[5] Surveillance technologies are also prone to abuse and disproportionately used on

[3] Buolamwini and Gebru. Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification (2018), http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf
[4] Kashmir Hill, *Wrongfully Accused by an Algorithm*, NY Times (Jun. 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html; Kris Holt, *Facial recognition linked to a second wrongful arrest by Detroit police*, Engadget (July 10, 2020), https://www.engadget.com/facialrecognition-false-match-wrongful-arrest-224053761.html.
[5] Rebecca Heilweil, *Members of Congress Want to Know More About Law Enforcement's Surveillance of Protestors,* Vox (Jun. 10, 2020), https://www.vox.com/recode/2020/5/29/21274828/drone-minneapolis-protests-predator-surveillance-police.

communities of color,[6] leading to higher arrest rates in those communities and feeding the cycle of racialized policing.[7]

Nineteen jurisdictions across the country have enacted these "Community Control Over Police Surveillance" (CCOPS) bills over the past few years to provide much needed transparency and accountability for local government surveillance.[8] The District should be next.

We *know* that MPD uses facial recognition technology, cell-site simulators, and automated license plate readers, among other surveillance tools.[9] But we lack complete information about MPD's technologies, and the policies that govern their use.

We heard Professor Christy Lopez testify regarding the "culture of opaqueness in MPD" today -- an issue that Councilmember Silverman also emphasized. This problem is especially true of police technologies, and is exactly what our legislation works to combat, by bringing some much-needed transparency to their use. In fact, in Appendix B of the Commission's Report, where the Commission details its data requests to MPD and whether or not they were fulfilled, we can see that the Commission asked MPD for data regarding which surveillance technologies they use -- a data request that was unfulfilled.[10] Because of the very real threats they pose, surveillance technologies should not be funded, acquired, or used without at least community input and very clear, specific approval by the Council.

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[6] See e.g., Brian Barret, *The Baltimore PD's Race Bias Extends to High-Tech Spying, Too*, Wired (Aug. 16, 2016), https://www.wired.com/2016/08/baltimore-pds-race-bias-extends-high-tech-spying/; Adam Goldman and Matt Apuzzo, *NYPD Defends Tactics over Mosque Spying; Records Reveal New Details on Muslim Surveillance*, Huffington Post (Feb. 25, 2012), http://www.huffingtonpost.com/2012/02/24/nypd-defends-tactics-over_n_1298997.html;
Dave Mass & Jeremy Gillula, *What You Can Learn From Oakland's Raw ALPR Data*, EFF (Jan. 21, 2015), https://www.eff.org/deeplinks/2015/01/what-we-learned-oakland-raw-alpr-data.

[7] *See* Rashida Richardson, Jason Schultz & and Kate Crawford, DIRTY DATA, BAD PREDICTIONS: HOW CIVIL RIGHTS VIOLATIONS IMPACT POLICE DATA, PREDICTIVE POLICING SYSTEMS, AND JUSTICE (Feb. 13, 2019). 94 N.Y.U. L. REV. ONLINE 192 (2019), *available a*t SSRN: https://ssrn.com/abstract=3333423 (discussion of predictive policing technology's threats to rights resulting from the software perpetuating existing and historic racialized policing).

[8] COMMUNITY CONTROL OVER POLICE SURVEILLANCE, ACLU (last visited Oct. 16, 2020), https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance; Mailyn Fidler, *Fourteen Places Have Passed Local Surveillance Laws. Here's How They're Doing*, Lawfare Blog, Sept. 3, 2020, https://www.lawfareblog.com/fourteen-places-have-passed-local-surveillance-laws-heres-how-theyre-doing.

[9] *See e.g.*, Letter from Chief of Police Cathy L. Lanier to Councilmember Charles Allen, (March 2, 2020), https://dccouncil.us/wp-content/uploads/2020/03/JPS-Performance-Oversight-Responses-2020-MPD.pdf (confirming the Metropolitan Police Department's use of facial recognition technology, automatic license plate readers and cell site simulators in response to Committee and questions); *see also*, Lauren Sarkesian and Maria Angel, *Debate on Police Surveillance Technologies in D.C. Is Long Overdue* (Sept. 10, 2020), https://www.newamerica.org/oti/blog/debate-police-surveillance-technologies-dc-long-overdue/.

[10] District of Columbia Police Reform Commission, Full Report, *Decentering Police to Improve Public Safety* (April 1, 2021), Appendix B, at p. 201, https://dccouncil.us/police-reform-commission-full-report/.

This legislation would ensure that tough decisions surrounding police technologies are shared between the government and the community, and would set up clear processes to safeguard residents' rights. These processes, and the transparency they would bring to our policing, could therefore ensure that we think carefully about how we invest in our community's public safety, and could also help to build trust between the community and police— goals we know the Council shares.

So I would like to thank you, Chairman Allen, for your commitment to bringing forth this important legislation, and for your ongoing engagement with the COS-DC coalition. Police surveillance technologies work to *expand* the presence of police in the District, and as we discuss *decentering* police to improve public safety, we think this work is a crucial part of it.

Accordingly, we ask that the Committee move forward this surveillance legislation as soon as possible as part of your comprehensive police reform efforts. Both OTI and our COS-DC coalition stand ready to help in these matters.

Thank you.

Testimony of Virginia A. Spatz

to the DC Council Joint Public Hearing, May 20, 2021
on

The Recommendations of the D.C. Police Reform Commission

B24-0094, The “Bias in Threat Assessments Evaluation Amendment Act of 2021”
B24-017, The “Metropolitan Police Department... Act of 2021”
B24-0112, The “White Supremacy in Policing Prevention Act of 2021”
B24-0213, The “Law Enforcement Vehicular Pursuit Reform Act of 2021”

SHORT VERSION

Thank you for this hearing and the opportunity to testify. I am Virginia Spatz, a long-time DC resident.

I testified last year regarding difficulties in filing a complaint against a special police officer (SPO) in DC. I resubmit that testimony and bring an update. My story is about website minutia and may not seem important. But websites are a crucial portal for public interaction with an agency, especially during pandemic restrictions. And, after nearly a year of changes to the websites of DCRA's Occupational and Professional Licensing Agency (OPLA) and MPD's Special Operations Management Branch (SOMB), the District of Columbia STILL fails to post a complaint procedure for incidents involving SPOs.

The text version of my testimony includes details -- with links and screen shots for documentation -- of the whole timeline of changes. The current situation is as follows:

MPD's SOMB page currently links for special police information to a non-existent Wordpress site that OPLA was previously using instead of a dc.gov site.

There is a new security node on the DCRA website. It is no longer linked to or from the SOMB page, and the non-functional "File a Complaint" links that I detailed in October 2020 are gone. In their place is a form meant for contract disputes.

There is no suggestion of a complaint process on the website or the form. No person or office to contact. No phone number. Just an instruction at the top of the form warning consumers to include copies but not original contracts, certifications, or other legal documents.

If this form is intended to report misconduct or violence on the part of an officer or a special police firm, it is cruelly inappropriate. If this form is intended for contract dispute, perhaps it serves its purpose. In that case, there is STILL no way to report a SPO misconduct.

I urge Council members to look into this situation to determine whether this failure is the result of incompetence or apathy or part of a deliberate attempt at misdirection to avoid complaints about SPOs. Regardless of the cause, the public must have access to a complaint process regarding special police.

DETAILED TESTIMONY

The DC Police Reform Commission includes recommendations on improving transparency and accountability around Special Police Officers. Their April 2021 report references a determination by the Judiciary and Public Safety Committee itself that “investigations into complaints against Special Police Officers are inconsistently conducted and enforced under current regulations that split responsibility between MPD, DCRA, and even the company where the Special Police Officer is employed.” Their report also cites journalism about the current lack of record-keeping when complaints are filed.

> -- See *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission*, p.125
>
> NOTE: Link at footnote 466 no longer works, but there is an archived version of the article: Natalie Delgadillo, “MPD Doesn’t Keep Records of Complaints Against the City’s 7,500 Special Police Officers,” DCist, June 4, 2020. https://web.archive.org/web/20201125214343/https://dcist.com/story/19/06/04/mpd-doesnt-keep-records-of-complaints-against-the-citys-7500-special-police-officers/

I resubmit the portion of my October 2020 testimony regarding difficulties in filing a complaint against a special police officer (SPO) in DC and provide an update. This testimony is primarily focused on the websites of DCRA's Occupational and Professional Licensing Agency (OPLA) and MPD's Special Operations Management Branch (SOMB).

SOMB is found here -- https://mpdc.dc.gov/page/security-officers-management-branch-somb

It contains a link to www.dcopla.**org** which worked last year but now returns "404 Not Found"

Although it is now linked from SOMB, www.dcopla.**com** now redirects to DCRA

https://dcra.dc.gov/professional-licensing

DC OPLA is currently found here -- https://dcra.dc.gov/node/1423896

last year, DC OPLA was using a Wordpress site -- www.DCOPLA.org

the latter is now gone but can be found via Internet Archive here --

https://web.archive.org/web/20201022035840/https://www.dcopla.com/security/

The DCOPLA site offered two "File a Complaint" options, both linking to SOMB's page, which then contained, and still contains, no information about filing a complaint.

<<“File a Complaint” button here goes to SOMB page linked above, where no complaint filing information is found

<<This “File a Complaint” link under “Documents and Forms” goes to the same SOMB page.

Video version on FB and permalink.

Update 10/14/20: status of pages unchanged.

Image is from this blog post -- https://spodatadc.org/2020/06/29/special-police-and-complaints/

TIMELINE

PROLOGUE 2020: NO WAY TO FILE A COMPLAINT
In June 2020, I discovered that neither the webpage for MPD's Special Operations Management Branch (SOMB), which oversees SPOs, nor the Wordpress site then used by DC's Occupational and Professional Licensing Agency (DC OPLA) offered any way to file a complaint against SPOs.

TESTIMONY October 15 (Attachment A)
I testified to the Judiciary and Public Safety Committee about the web problem, along with the disappointing results of my direct queries to SOMB about filing a complaint.

POST-HEARING CHANGE: Wordpress Site Gone (Attachment B)
In late October of 2020, the Wordpress site DC OPLA had been using disappeared. According to WayBack Machine at The Internet Archive, the last time the website was found was October 28, 2020.

UPDATE April 9, 2021: Blog post (Attachment C)
After a delay of some months -- monitoring DC agencies is not my job -- I returned to investigating the SPO complaint filing situation. That's when I discovered that the DC OPLA site hosted by Wordpress was gone, although MPD's SOMB page continues to link to it (as of May 19).

There was, however, a new security node at DCRA -- dcra.dc.gov/security site -- which I found via another route. It is not linked with the SOMB site at this point.

On April 9, there was STILL NO WAY to file a complaint against a special police officer. I posted an update on the SPOdata blog, noting the continued lack of complaint filing options.

LATE APRIL: New Complaint Form (Attachment D)
By the end of the month, there was a new live link on the dcra.dc.gov/security site: Under "Consumer," there is now a link labeled "File a Complaint or Issue" which provides a downloadable PDF form.

Neither the form itself nor the website (or the FAQ document) offer any suggestion of a complaint process. There is no person or office to contact. Not even a phone number. Just a PDF form with an email and a fax number in the bottom left corner (and a 2015 revision date).

Instructions on the form read:

> Please fill out the Complaint form as thoroughly as possible. Additional documentation supporting your complaint should be attached and submitted with this form. Documentation may include copies of contracts, certifications, or other legal documents. Do not submit original documents.

I cannot testify to the efficacy of such a form for a contract dispute. It is clearly inappropriate for any kind of report regarding SPO behavior.

In short: After nearly a year of changes to the websites of OPLA and SOMB, the District of Columbia STILL fails to post a complaint procedure for incidents involving SPOs.

-#-

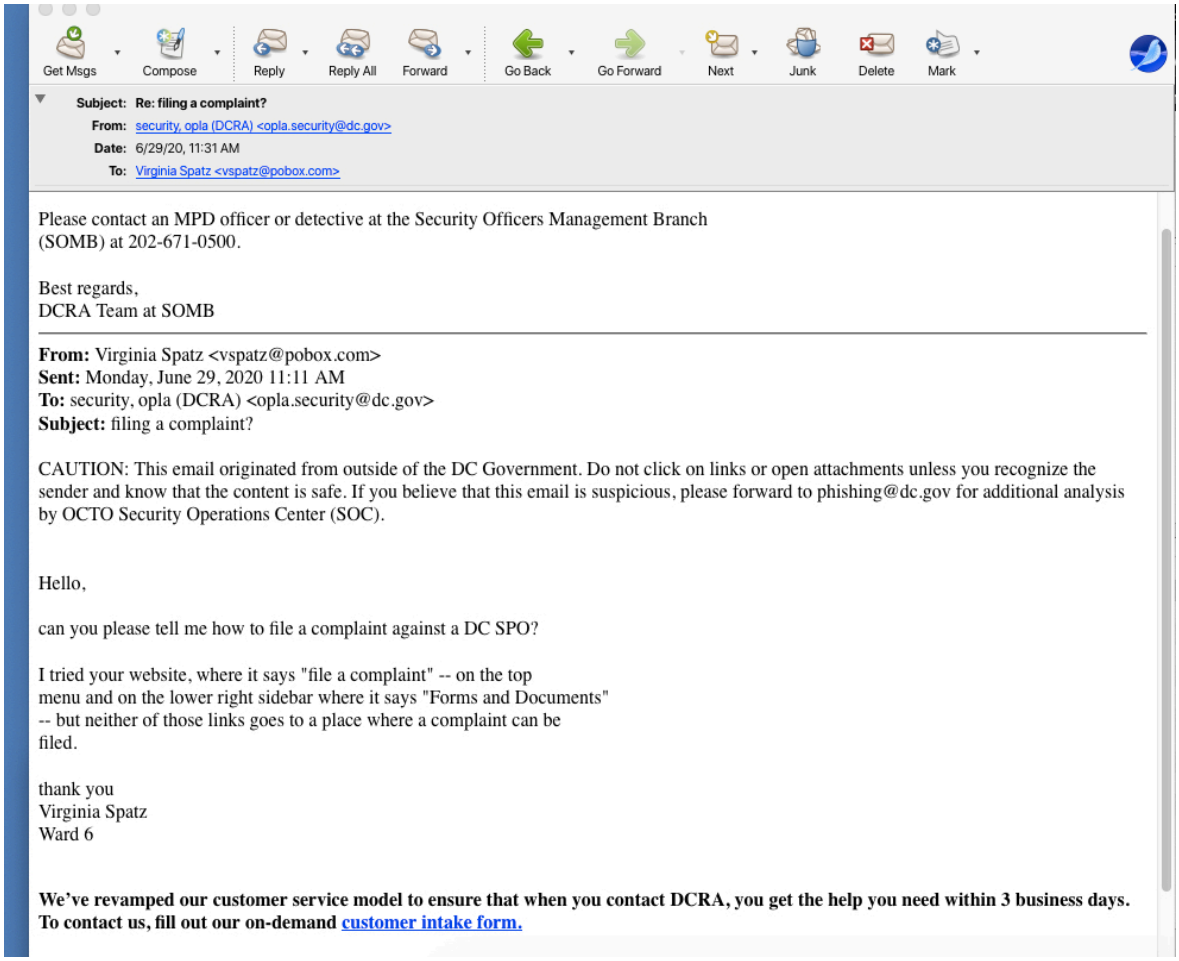
Finally, we need to disarm special police, and it is crucial to address the current dysfunction which makes filing a complaint against a special police officer nearly impossible.

What follows is an explanation of the current complaint-filing situation:

The video at this website shows how the buttons that claim one can "file a complaint" against a Special Police Officer lead to a page with no possibility of fulfilling that action. I made this little video just to show the situation -- https://spodatadc.org/2020/06/29/special-police-and-complaints/ -- that was back in June. I recently checked in October and nothing had changed.

I also inquired of the agencies involved back in June and was given the following answers.

This was the first --



Get Msgs | Compose | Reply | Reply All | Forward | Go Back | Go Forward | Next | Junk | Delete | Mark

Subject: Re: filing a complaint?
From: security, opla (DCRA) <opla.security@dc.gov>
Date: 6/29/20, 11:31 AM
To: Virginia Spatz <vspatz@pobox.com>

Please contact an MPD officer or detective at the Security Officers Management Branch (SOMB) at 202-671-0500.

Best regards,
DCRA Team at SOMB

From: Virginia Spatz <vspatz@pobox.com>
Sent: Monday, June 29, 2020 11:11 AM
To: security, opla (DCRA) <opla.security@dc.gov>
Subject: filing a complaint?

CAUTION: This email originated from outside of the DC Government. Do not click on links or open attachments unless you recognize the sender and know that the content is safe. If you believe that this email is suspicious, please forward to phishing@dc.gov for additional analysis by OCTO Security Operations Center (SOC).

Hello,

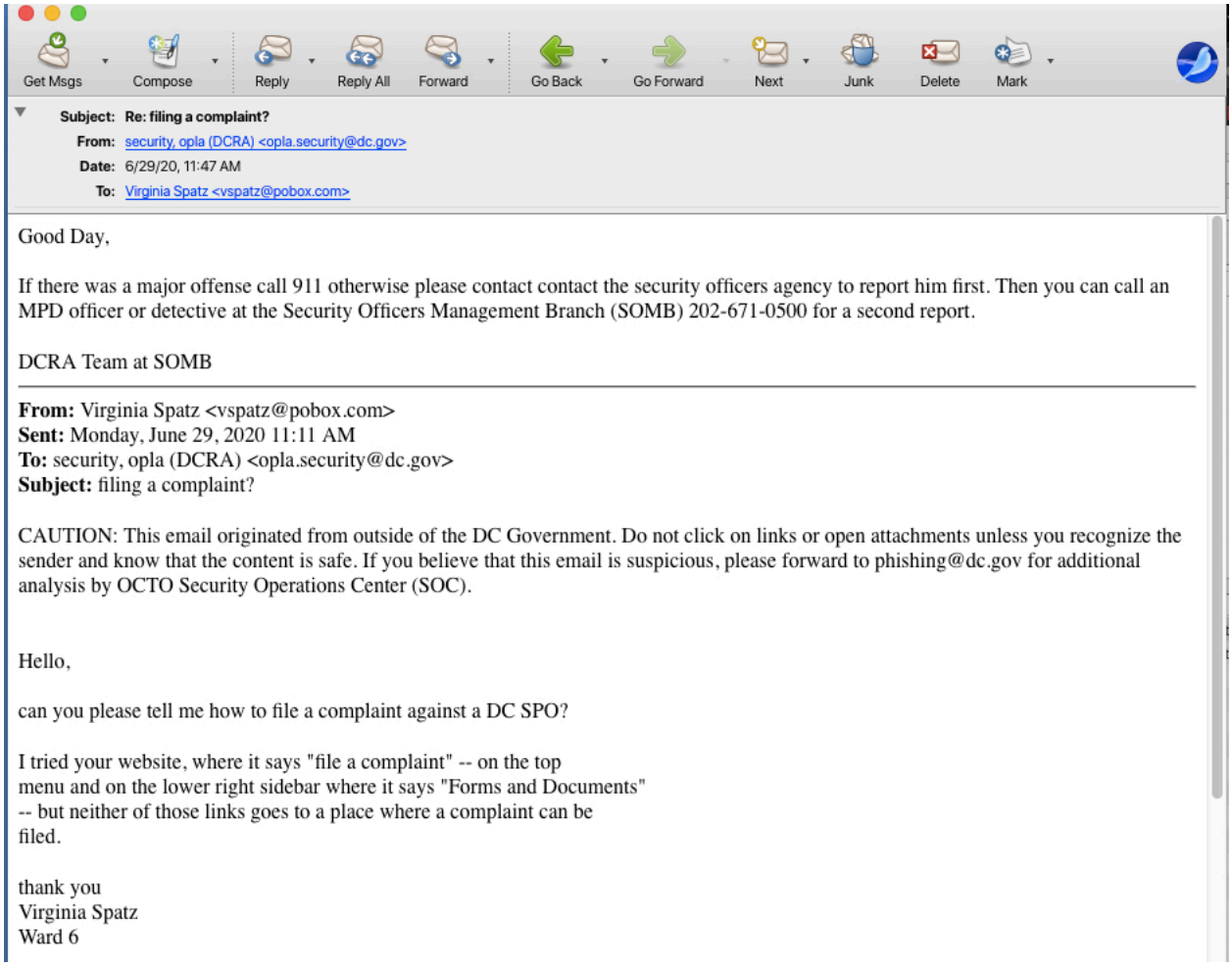
can you please tell me how to file a complaint against a DC SPO?

I tried your website, where it says "file a complaint" -- on the top menu and on the lower right sidebar where it says "Forms and Documents" -- but neither of those links goes to a place where a complaint can be filed.

thank you
Virginia Spatz
Ward 6

We've revamped our customer service model to ensure that when you contact DCRA, you get the help you need within 3 business days. To contact us, fill out our on-demand customer intake form.

About fifteen minutes later, another arrived (next page) --



Get Msgs | Compose | Reply | Reply All | Forward | Go Back | Go Forward | Next | Junk | Delete | Mark

Subject: Re: filing a complaint?
From: security, opla (DCRA) <opla.security@dc.gov>
Date: 6/29/20, 11:47 AM
To: Virginia Spatz <vspatz@pobox.com>

Good Day,

If there was a major offense call 911 otherwise please contact contact the security officers agency to report him first. Then you can call an MPD officer or detective at the Security Officers Management Branch (SOMB) 202-671-0500 for a second report.

DCRA Team at SOMB

From: Virginia Spatz <vspatz@pobox.com>
Sent: Monday, June 29, 2020 11:11 AM
To: security, opla (DCRA) <opla.security@dc.gov>
Subject: filing a complaint?

CAUTION: This email originated from outside of the DC Government. Do not click on links or open attachments unless you recognize the sender and know that the content is safe. If you believe that this email is suspicious, please forward to phishing@dc.gov for additional analysis by OCTO Security Operations Center (SOC).

Hello,

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menu and on the lower right sidebar where it says "Forms and Documents"
-- but neither of those links goes to a place where a complaint can be
filed.

thank you
Virginia Spatz
Ward 6

Neither response addresses the dysfunction of the website or the fact that the general public has no way to know what to do based on what information is provided.

Neither responses addresses what might have been the active trauma of someone who'd been abused by an SPO or witnessed such behavior. As it happens, I was just inquiring as part of a sort of research effort -- and maybe the writer could sense that this was not an emergency or a traumatic situation. But I doubt that. So much is in need of overhaul.

Beverly Smith, mother of Alonzo Smith, who was killed by Special Police Officers in the fall of 2015, and I worked together to try to make another portal for collecting information from those who cannot navigate this craziness and/or would not feel safe to report an SPO to MPD.

The fact that there is no way to file a complaint means there is also slim chance for any kind of accountability.

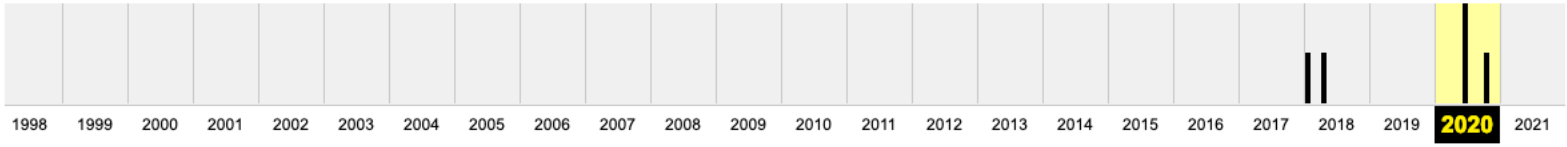
Thank you for the opportunity to testify. I am happy to answer further questions. And I urge the Committee to produce much stronger legislation. Soon.

-#-

Attachment B
for V. Spatz testimony
May 20, 2021

Calendar · Collections beta · Changes beta · Summary · Site Map

Saved **5 times** between January 23, 2018 and October 28, 2020.



<<< DCOPLA.org/ security now returns "404 Not Found!" message. <<<

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Last instance of DCOPLA.org /security was found Oct 28, 2020 >>>

Attachment C

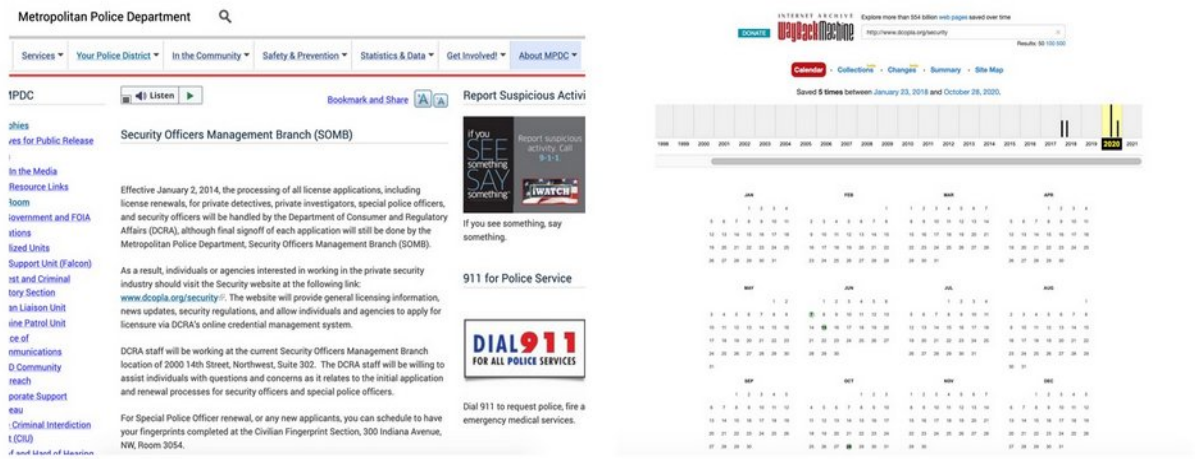
Special Police Complaints: 2021 Update

Content here and at https://spodatadc.org/2021/04/09/special-police-complaints-2021-update/

On October 15, 2020, Beverly Smith and Virginia Spatz testified to the DC Council about the difficulty of filing a complaint against special police officers in DC. (Files below.) Shortly thereafter, the entire "DCOPLA" website, referenced in that testimony, was removed. (Internet Archive shows the referenced content as last seen on October 28, 2020; the site now returns "404 Not Found" error message.)

DC's Security Officers Management Branch STILL LINKS to the non-existent site, however (screen shot below just for the record), and a newer DCRA page for occupational and professional licensing is not linked anywhere on SOMB page.

Neither the SOMB nor the DCRA page now offer any options, however confusing, for filing a complaint.

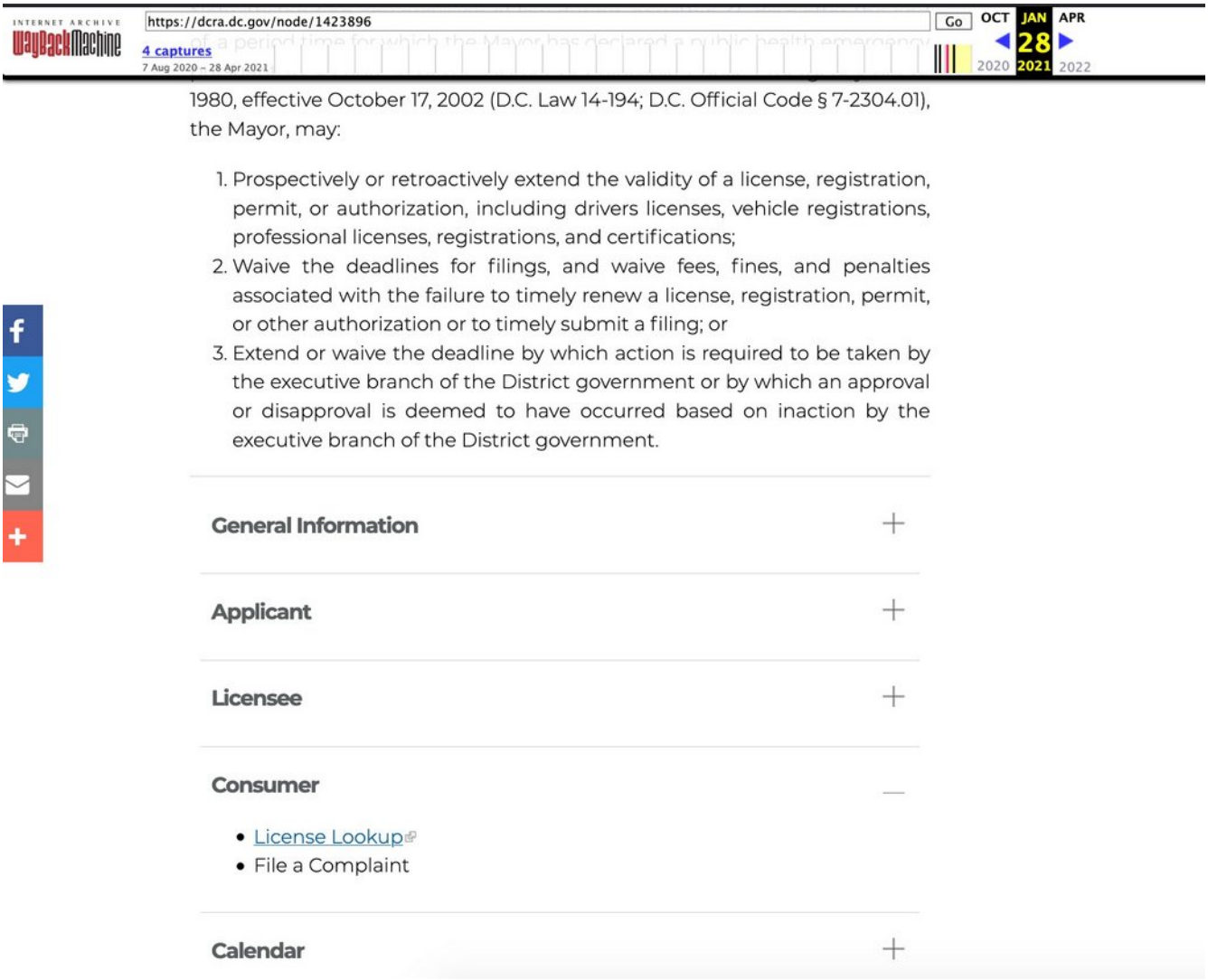


Left: screenshot, 4/9/21, from DC MPD's SOMB showing link to http://www.dcopla.org/security. Right: Wayback Machine screenshot showing last http://www.dcopla.org instance on October 28, 2020.

UPDATE 5/19/21: *As of late April, a link to a PDF complaint form has been added at this link: Look under "Consumer" and click on the hotlink to download a PDF form. This is a form for documenting a contract dispute of some kind. It is NOT SUITABLE for any kind of complaint regarding violence or misuse of power on the part of an SPO.*

NOTE:

Some weeks later, upon revisiting the DC OPLA site and finding the PDF complaint form, I thought perhaps I had missed the complaint form on my April 9 visit. However, this archived version of the page shows that the "Consumer" menu item previously included the words "File a Complaint" without any link.



Attachment D — V Spatz Testimony

Complaint Form

Please fill out the Complaint form as thoroughly as possible. Additional documentation supporting your complaint should be attached and submitted with this form. Documentation may include copies of contracts, certifications, or other legal documents. Do not submit original documents.

Complaint Filed By

Name _____ Company_____

Address _____City_____State_____Zip Code_____

Phone _____(work) _____(Mobile) _____(Home) _____

E-Email _____ Date_____

Complaint Filed Against

Name _____ Company_____

Address _____City_____State_____Zip Code_____

Phone _____(work) _____(Mobile) _____(Home) _____

E-Email _____Date_____

Nature of Complaint

Date(s) of violation occurred_____ Location violation occurred _____

Please describe the complaint below. Attach additional pages with complaint form if needed.

Return completed complaint form to:	**Office Use Only**	
E-Mail dcra.dcraopla@dc.gov **Fax (202)698-4329**	Date Received	Date Completed
Mail Department of Consumer and Regulatory Affairs Occupational and Professional Licensing 1100 4th Street SW Suite 500E Washington DC 20024		

Revised 7/31/15

Testimony of 4D04 Advisory Neighborhood Commissioner Zachary Israel

Council of the District of Columbia

Committee on the Judiciary and Public Safety &

Committee of the Whole

Public Hearing on

The Recommendations of the D.C. Police Reform Commission and Four Other Pieces of Legislation Related to the Metropolitan Police Department

Thursday, May 20, 2021

Dear Chair Allen, Chair Mendelson, and Members of the Council of the District of Columbia:

Thank you for holding this critically important hearing today. My name is Zach Israel and I represent Single Member District 4D04, which includes parts of Petworth and Brightwood Park in Ward 4.

I strongly support Ward 4 Councilmember Janeese Lewis George's **Law Enforcement Vehicular Pursuit Reform Act of 2021**, which would prohibit MPD officers from engaging in vehicular pursuits, unless the officer reasonably believes that the fleeing suspect has committed or has attempted to commit a crime of violence and that the pursuit is necessary to prevent an imminent death or serious bodily injury and is not likely to put others in danger. Had this bill been enacted and in effect back in late October 2020, when Metropolitan Police Department (MPD) officers pursued Karon Hylton-Brown through my SMD while he was driving a moped on the sidewalk, he very well may still be alive and with us today. Karon's killing was a tragedy which could have been avoided had MPD not escalated its actions into a full-scale pursuit.

This issue connects with one of the D.C. Police Reform Commission's recommendations, specifically the recommendation to transfer authority to enforce traffic violations that do not imminently threaten public safety from MPD to the Department of Transportation. I strongly urge the Council to adopt this recommendation so that we avoid situations in the future similar to what happened to Karon Hylton-Brown. Additionally, the Council should:

- Require DDOT to hire and train qualified employees to properly enforce traffic and vehicle regulations;
- Prohibit traffic stops—whether by DDOT or MPD—based solely on the alleged violation of vehicle operation infractions that are not an immediate threat to public safety; and
- Require either repeal or revision of traffic and vehicle regulations whose violation does not threaten public safety.

While I broadly support many of the recommendations offered by the D.C. Police Reform Commission, I would like to note one more that I believe the DC Council should enact via legislation as soon as possible.

- The recommendation stating that "In cases involving potential criminal charges against an officer, the Council and the Mayor should give the Office of Police Complaints (OPC)—and MPD should revise its rules to give itself—authority, as appropriate, to interview the subject officer(s) and/or complete administrative investigations, even if a prosecutorial decision is pending. […] Specifically, in cases involving conduct that may be criminal in nature that the OPC is obligated to refer to the U.S. Attorney's office, the Council and Mayor should revise the DC Code and require that the OPC process the complaint and complete all possible investigative steps while potential criminal charges are being considered; once the prosecutor has issued a delineation letter, the OPC should then promptly interview subject officers."

Nearly seven months after Karon Hylton-Brown's death in late October 2020, MPD has refused to provide any updates regarding the incident nor any potential charges or punishments against the officers involved. At every ANC meeting I have attended as a Commissioner thus far this year, we have asked the MPD reps for additional status updates on this matter and have been told nothing. This is completely unacceptable and Karon's family deserves better. If we truly want to bring about justice in this circumstance, the DC Council must enact this recommendation as expeditiously as possible.

Lastly, I would like to note that I also support, and encourage the Council to pass, the other three bills discussed during today's hearing:

- **The White Supremacy in Policing Prevention Act of 2021**
- **The Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search – No Jump-Out Searches Act of 2021**; and
- **The Bias in Threat Assessments Evaluation Amendment Act of 2021**

Thank you and I would be happy to answer any questions you may have.

Written Testimony of Keith Neely
Attorney
Institute for Justice
May 20, 2021

Committee on the Judiciary & Public Safety
and
Committee of the Whole
Joint Hearing on the Recommendations of the D.C. Police Reform Commission

My name is Keith Neely, and I am an attorney at the Institute for Justice. IJ is a nonprofit law firm that works all over the country and here in the District of Columbia to defend individual rights.

Thank you for the opportunity to testify regarding the findings and recommendations of the Police Reform Commission.

My testimony today will focus on the Commission's recommendation to provide a remedy for police misconduct through civil litigation by ending the doctrine of qualified immunity. Ending qualified immunity is an important solution not just for police misconduct, but for government misconduct generally.

In support of this recommendation and as an exhibit to my testimony, I include model legislation designed to end qualified immunity in the District of Columbia for all government workers. This model legislation was produced with input from the ACLU of D.C. and the D.C. Justice Lab. It ends qualified immunity by:

1. Barring the defense of qualified immunity;
2. Creating a new cause of action in the District of Columbia for violations of a person's constitutional rights;
3. Holding the government employer liable *instead of* the individual officer;[1] and
4. Empowering the government employer to fire the bad-acting officer, notwithstanding any administrative termination proceedings to which the officer may otherwise be entitled.

By holding the D.C. government responsible for the constitutional violations of its employees, it renumerates victims of government misconduct. Victims and their families currently bear the costs of constitutional violations when they do not have a remedy to be made whole.

[1] Ending qualified immunity through the imposition of municipal liability is the same approach taken recently by the State of New Mexico and New York City.

This model also offers a fiscally responsible way for the District of Columbia to end qualified immunity. By empowering the D.C. government to fire the bad-acting employees, it reduces costs by eliminating the repeat offenders that cause the majority of constitutional violations. And it creates the financial incentives for government agencies to adopt better hiring, training, and supervising policies, which would only decrease these costs further.

In conjunction with the thoughtful legislation recently proposed by Councilmembers George, Nadeau, and White, this model provides a strong starting point for discussions on how to turn the Commission's recommendations on qualified immunity into functioning legislation.

_____

Councilmember [NAME]

A BILL

_____

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

_____

To amend the District of Columbia Code to enact a statute to ensure that government workers are held civilly liable for violating the civil rights of Washingtonians by prohibiting qualified immunity.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the “Ending Qualified Immunity Act of 2021.”

Sec. 2: Definitions.

In this section, the term:

(1) "Government" means all governmental entities of the District of Columbia.

(2) "Government employee" means an individual employed or contracted by the government of the District of Columbia.

Sec. 3: Responsibility of the government employer.

(1) The government is legally responsible for a wrongful act of its government employee if such act occurs when that government employee is acting under color of law.

(2) This chapter abrogates governmental immunity, qualified immunity, sovereign immunity and official immunity without regard to whether the government employee acted pursuant to a policy or custom of the government.

(3) Nothing in this section shall be construed to abrogate judicial or legislative immunity at any level of government of the District of Columbia.

Sec. 4: Cause of Action

(1) An individual may seek legal, equitable, or other relief in an appropriate court for an injury caused by an act or omission of a government employee under color of

law in violation of a right under the laws or constitution of the District of Columbia or the United States.

(2) The proper defendant in an action under this section is the District of Columbia and not an individual government employee.

(3) A government employee shall not be found financially liable under this chapter for a violation of a right under the laws or constitution of the District of Columbia or the United States.

(4) The government employer shall notify promptly the government employee who is the subject of an action under this chapter. The government employee may intervene in the action to defend his employment, as a third-party defendant, pursuant to the District of Columbia's rules of civil procedures and court rules.

(5) The plaintiff bears the burden of proving a violation of a right under the laws or constitution of the District of Columbia or the United States by a preponderance of the evidence.

Sec. 5: Judicial process.

A court shall not deny a claim based on the invocation of a government employee's immunity including that:

(1) The rights, privileges, or immunities secured by the laws or constitution of the District of Columbia or the United States were not clearly established at the time of their deprivation by the government employee, or that the state of the law was otherwise such that the government employee could not reasonably or otherwise have been expected to know whether the government employee's conduct was lawful; or

(2) The government employee acted in good faith or that the government employee believed, reasonably or otherwise, that the government employee's conduct was lawful at the time it was committed.

Sec. 6: Attorney fees.

(1) In any proceeding in which a plaintiff's claim prevails, the government shall be liable for reasonable attorney fees and other litigation costs.

(2) Reasonable attorney fees include those incurred on an hourly or contingency basis, or by an attorney providing legal services on a pro bono basis.

(3) The court shall recognize that a plaintiff's claim prevails if the plaintiff obtains any relief the plaintiff seeks in its complaint, whether the relief is obtained via judgment, settlement or the government's voluntary change in behavior.

Sec. 7: Termination of contract, agreement or employment.

(1) Notwithstanding any other law, the District of Columbia shall not enter into any contract or agreement that restricts its ability to terminate such contract, or to terminate the employment of or take any other adverse action with respect to a government employee, if a court finds, in an action brought under this chapter, that the employee violated a plaintiff's right under the laws or constitution of the United States or the laws of the District of Columbia.

(2) The government's termination of a contract, agreement or employment with a government employee shall not affect the government's liability under this chapter.

Sec. 8: Statute of limitations.

(1) A claim made under this chapter shall be commenced no later than three years from the date a claim can be brought for the deprivation of a right under the laws or constitution of the District of Columbia or the United States.

Sec. 9: Public information.

(1) All documents, including complaints, judgments, settlements, and consent decrees, are subject to public disclosure via the District of Columbia Freedom of Information Act, D.C. Code 5-231, et seq., except that any social security numbers, dates of

birth, information about a person's bank account, home addresses, or names of minor children shall be redacted from any such disclosure.

Sec. 10: Section 12-309 of the District of Columbia Official Code is amended as follows:

(a) Subsection (a) is amended by striking the phrase "Except as provided in subsection (b) of this section" and inserting the phrase "Except as provided in subsection (c) of this section" in its place.

(b) A new subsection (b) is added to read as follows:

"(b) The notice requirement provided for by this section shall be tolled for claimants who are incarcerated or facing criminal charges relating to an arrest, provided that the incarceration or criminal charges involve material facts relevant to the action."

(c) Existing subsection (b) is redesignated as subsection (c).

Sec. 11: Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 12: Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the district of Columbia Register.

Submission of Chanel Cornett
Legal and Policy Officer, Fair Trials Americas*
***Titles and organizational affiliation for identification purposes only.**

Committee On The Judiciary And Public Safety Joint Public Hearing On The Recommendations Of The D.C. Police Reform Commission, B24-0094, The "Bias In Threat Assessments Evaluation Amendment Act Of 2021," B24-0107, The "Metropolitan Police Department Requirement Of Superior Officer Present At Unoccupied Vehicle Search – No Jumpout Searches Act Of 2021," B24-0112, The "White Supremacy In Policing Prevention Act Of 2021," and B24-0213, The "Law Enforcement Vehicular Pursuit Reform Act Of 2021"

Tuesday, June 1, 2021

This submission follows oral testimony provided to the Council on May 20.

About Fair Trials: Fair Trials is an international criminal justice reform organization with offices in London, Brussels, and Washington DC. Fair Trials works to improve rights protection in criminal legal systems around the world with reference to international standards and comparative best practice. For the past 20 years, Fair Trials has worked in Europe and globally to develop and implement improved procedural rights standards, including the right to counsel in police custody, improved notification of rights for people in custody (orally and in writing), improved access to disclosure of evidence prior to interrogation, and increased safeguards for children in conflict with the law. Through its cross-regional learning program, "the Translatlantic Bridge," Fair Trials is seeking to support US jurisdictions looking to improve protections for people in custody by providing them with information and expertise from international jurisdictions where right to counsel in custody is well established.

Introduction: On April 1, 2021, the DC Police Reform Commission released a 259 page report detailing recommendations to improve or find alternatives to policing in Washington D.C. One of the recommendations in Section 6 of their report includes guaranteeing juveniles and adults right to counsel in police custody prior to questioning by police:

> "2(c) Recommendation: The Council should work with the Public Defender Service for the District of Columbia and the MPD to institute legal counsel in police stations. Both youth and adults should be guaranteed legal counsel upon their arrest, prior to any questioning by the police. Public defenders or private counsel should be allowed access to police stations 24 hours a day to communicate with and otherwise represent their clients and to sit in on interviews between police and individuals suspected of a crime."

Pursuant to this recommendation, Fair Trials has drafted model legislation that would afford adults and juveniles the right to counsel within 2 hours after arrival at a police precinct and guarantee attorneys 24 hour entry into the precincts to carry out consultation in a confidential setting and provide legal assistance during interrogations and officer led questioning. Our drafted legislation also includes two other measures to ensure comprehensive implementation and enforcement of the right to counsel, such as: prohibiting police officers from beginning interrogation or questioning until counsel has been consulted, if such person wishes to invoke their right to consult counsel; and ensuring incriminating statements elicited in violation of

such person's right to counsel may not be used against them in criminal proceedings. We believe the Commissions' recommendations, along with our proposed codification of their recommendations, will ensure that the current privilege to be guided by an attorney upon arrest (for those who can afford and demand private counsel) becomes a right for everyone, and will provide oversight and protection against harmful policing practices in the District, which is the ultimate purpose of the Commission that the Council established.

Fair Trials is in the early stages of a project, together with the Urban Institute and the University of Chicago, to conduct implementation studies of existing right to counsel in police custody laws, provide technical support for implementation and legislative drafting, create data collection programs to determine their quantitative impact, and coordinate a national coalition of right to counsel practitioners and stakeholders. Moreover, we are engaged in ongoing conversations with multiple service providers, including DC law school clinics. the Superior Court Trial Attorneys Association, and the Public Defender Service for the District of Columbia, regarding their offices' capacity to implement and to effectively provide counsel in police stations. Our work will enable the District to learn from the experiences of other jurisdictions and provide the District with tools to successfully implement community oversight, via the right to counsel, over police in our city.

The District also possesses the infrastructure and is especially poised to become a leader on this issue nationally. There exists a wealth of indigent defense practitioners via The Public Defender Service for the District of Columbia, which is nationally renowned as a model for indigent defense, numerous highly ranked law schools with indigent defense clinics, and a robust Criminal Justice Act, or panel attorney program. The District is recognized as one of the most policed cities in the nation and must rise to the occasion of also being recognized as a city that provides its citizens with the most protection against abuse.

The following submission includes: proposed statute language and ideal elements; comparative legislation from Illinois, Maryland, California, and Europe regarding right to counsel in police stations; and issues resulting from implementation, and comments on how the legislation could be improved.

I. Proposed DC Statute and Ideal Elements

Below is a proposed statute for a DC right to counsel in police stations program. The statute affords persons suspected of a criminal offense the right to consult with counsel prior to interrogation or interview. The onus is placed on police officers to provide this right, rather than on the arrested person, due to the imbalance of power and information between police and people in custody. The proposed statute also affords attorneys 24-hour entry to provide consultation services and represent their clients during interrogations or questioning. Finally, an enforcement mechanism is included should violations of this right occur.

Proposed Statute:

A. Upon arrest, and prior to any interrogation or questioning, an officer must provide persons suspected of a criminal offense the right to consult with an attorney within 2 hours after arrival at the police precinct in person, alone and in private, for as many times and for such period as desired.

B. Attorneys must be allowed 24-hour entry into District of Columbia operated police precincts in order to carry out consultation and assistance described in Section A, and must be provided with the means by which to consult with arrested people in a confidential setting.

C. When arrested people invoke the right defined in Section A, interrogation or questioning may not start until they have consulted with counsel.

D. Incriminating statements elicited in violation of Section A may not be used against persons suspected of a criminal offense in criminal proceedings relating to the purpose of such interrogation, interview, or questioning.

Ideal Elements:

Ideally, we would propose a statute with detailed guidance for police and defense counsel that seeks to prevent many of the challenges with implementation we have seen in other jurisdictions. Therefore, we lay out our ideal elements of the law and its implementation, but propose only short and broad legislative language that we hope will provide ample space to implement robustly and with full consultation from all stakeholders. An ideal statute would:

- Define how the police should inform defendants of their rights, using plain and accessible language the defendant understands, orally and in writing, if need be with the help of an interpreter.
- Define the content of the information provided by the police regarding the right to consult counsel.
- Define how counsels are contacted, by the police and/or by defendants and via what technology. .
- Outline the conditions of consultations, including the respect for confidentiality of communications between arrested people and lawyers.
- Anticipate any budgetary needs the program may require.
- Specify the time afforded to defendants to consult with their lawyers and the time period in which counsel must be contacted and attend the station.
- Specify that it applies to all criminal offenses, including misdemeanors.
- Specify that a suspect may always revoke their waiver before or during questioning and that questioning must immediately stop and may only resume after the person have consulted with counsel.
- Specify which attorneys would provide counsel in police stations, such as the Public Defender Service for the District of Columbia, law school clinics, CJA/Panel attorneys, or pro bono attorneys.

II. Comparative Statutes, Implementation Issues, and Comments

The District has the opportunity to join and take part in leading the growing movement toward greater involvement of counsel in police custody around the country. It would also be part of a larger international movement, joining every country in the European Union which, because of Fair Trials' advocacy, have increased safeguards for individuals and recognized the central role that legal counsel plays in protecting citizens from state violence in custody.

Across the country other jurisdictions are increasingly adopting legislation guaranteeing access to counsel in police custody. In the context of juveniles, California began

implementation of a similar bill in January, SB 203[1] and Maryland's Juvenile Interrogation Protection Act[2] is progressing through both chambers of the Maryland Legislature. Moreover, the state of Illinois passed right to counsel legislation for all arrested people, adults and children, 2017 and recently strengthened it through amendment in order to confront the persistent problem of Chicago police failing or refusing to provide arrested people with legally-mandated phone calls to counsel.[3] Further advocacy for the right to counsel in police stations has begun in the states of Washington and New York and other states are becoming interested in granting these safeguards to their residents.

Below are right to counsel statutes in other domestic and international jurisdictions. Also included are comments regarding how the statutes could be improved and implementation issues that were highlighted in litigation. Fair Trials drew upon the drafting and experiences of these jurisdictions in drafting the proposed DC right to counsel in police stations statute.

1. Illinois

Section 725 ILCS 5/103-4 - Right to consult with attorney
Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. When any such person is about to be moved beyond the limits of this State under any pretense whatever the person to be moved shall be entitled to a reasonable delay for the purpose of obtaining counsel and of availing himself of the laws of this State for the security of personal liberty.

https://ilga.gov/legislation/ilcs/documents/072500050K103-4.htm

Comments:

- "Any person.... shall.. be allowed to consult..." usage of the word "shall" instead of "must" could be interpreted to mean that this privilege is optional and police have discretion to grant this privilege. Additionally, the usage of "shall be allowed" places the burden on the client to mention this right, rather than placing a duty on the officer to provide the client this right. Better language would include the word "must" and place the onus on the officer to provide the client the right to consult with an attorney. i.e. "any person... must be provided the right to consult with any licensed attorney..."
- "For such period each time as is reasonable.." is not good language because "reasonable" is vague and it enables officers to determine what is "reasonable."
- The statute is vague about at what time consultation with an attorney is allowed. For example, is consultation allowed prior to interrogation, interview, or questioning (which would be the purpose of early access to counsel) or is this a general allowance of consultation with an attorney at any time?

[1] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB203, explained at page 7

[2] https://mgaleg.maryland.gov/2021RS/bills/hb/hb0315t.pdf, explained at page 7

[3] https://www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=1966&ChapterID=54&SeqStart=3100000&SeqEnd=4200000, explained at page 6

Section 725 ILCS 5/103-3 - Right to communicate with attorney and family; transfers
(a) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner. Such communication shall be permitted within a reasonable time after arrival at the first place of custody.

https://ilga.gov/legislation/ilcs/documents/072500050K103-3.htm

Comments:

- "shall have the right" places the onus on the client to exercise this right, rather than placing a duty on the police to provide the client this right. Better language would be "persons... arrested must be provided the right to communicate with an attorney..."
- "reasonable number of telephone calls" the usage of "reasonable" is vague and enables the officer to decide what is reasonable. The statute should identify how many calls are allowed.
- "shall be permitted within a reasonable time after arrival" the usage of "reasonable is vague and enables officers to determine what a reasonable time after arrival is. The statute should identify exactly how long after arrival a call must be provided.
- "Persons who are arrested" statute is limited to those who are arrested, this means that those who are subject to interview, interrogation, or questioning and have not been arrested are not covered under this statute.

Implementation Issues with Both Illinois Statutes:
In litigation against the City of Chicago, claimants alleged that the Chicago Police Department instituted policies to deny arrestees their right to counsel, in violation of the aforementioned statutes (Section 725 ILCS 5/103-3 and Section 725 ILCS 5/103-4):

> "These policies include: refusing to allow people in CPD custody access to a phone for extended periods of time or at all; refusing to inform attorneys where their clients are being held in custody when directly asked for location information; refusing to allow attorneys physical access to police stations where their clients are being held; conditioning telephone access on a client's waiver of state law and their constitutional rights; and refusing to display the COOK COUNTY PUBLIC DEFENDER's Police Station Representation Unit (PSRU) hotline number in CPD stations so that detainees do not know how to get in touch with an attorney."

The DC statute can mitigate these issues by: placing the onus on the officer to provide access to counsel rather than on the defendant to request access to counsel; including a provision that grants attorneys entry to police stations 24 hours a day; including a provision that prevents the right to counsel from being conditioned on a waiver of other rights; and including a provision that requires the precinct to display the contact information of a Public Defender Service hotline.

Updated Section 725 ILCS 5/103-3 (Effective July 1, 2021)
(a-5) Persons who are in police custody have the right to communicate free of charge with an attorney of their choice and members of their family as soon as possible upon being taken into police custody, but no later than three hours after arrival at the first place of custody. Persons in police custody must be given:

(1) access to use a telephone via a land line or cellular phone to make three phone calls; and
(2) the ability to retrieve phone numbers contained in his or her contact list on his or her cellular phone prior to the phone being placed into inventory.

(a-10) In accordance with Section 103-7, at every facility where a person is in police custody a sign containing, at minimum, the following information in bold block type must be posted in a conspicuous place:
(1) a short statement notifying persons who are in police custody of their right to have access to a phone within three hours after being taken into police custody; and
(2) persons who are in police custody have the right to make three phone calls within three hours after being taken into custody, at no charge.

(a-15) In addition to the information listed in subsection (a-10), if the place of custody is located in a jurisdiction where the court has appointed the public defender or other attorney to represent persons who are in police custody, the telephone number to the public defender or appointed attorney's office must also be displayed. The telephone call to the public defender or other attorney must not be monitored, eavesdropped upon, or recorded.

(c) In the event a person who is in police custody is transferred to a new place of custody, his or her right to make telephone calls under this Section within three hours after arrival is renewed.

(d) In this Section "custody" means the restriction of a person's freedom of movement by a law enforcement officer's exercise of his or her lawful authority.

(e) The three hours requirement shall not apply while the person in police custody is asleep, unconscious, or otherwise incapacitated.

(f) Nothing in this Section shall interfere with a person's rights or override procedures required in the Bill of Rights of the Illinois and US Constitutions, including but not limited to Fourth Amendment search and seizure rights, Fifth Amendment due process rights and rights to be free from self-incrimination and Sixth Amendment right to counsel.

https://www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=1966&ChapterID=54&SeqStart=3100000&SeqEnd=4200000

2. Maryland

HB 315/SB 136
(B) A law enforcement officer may not conduct a custodial interrogation of a child until:
(1) The child has consulted with an attorney who is:
(I) retained by the parent, guardian, or custodian of the child; or
(II) provided by the office of the public defender; and
(2) The law enforcement officer has notified, or caused to be notified, made an effort reasonably calculated to give actual notice to the parent, guardian, or custodian of the child in a manner reasonably calculated to provide actual notice that the child will be interrogated.

(C) A consultation with an attorney under this section:

(1) Shall be confidential:
(I) conducted in a manner consistent with the Maryland rules of professional conduct; and
(II) confidential; and
(2) May be:
(I) in person; or
(II) by telephone or video conference.

(E) The requirement of consultation with an attorney under this section:
(1) may not be waived; and
(2) applies regardless of whether the child is proceeded against as a child under this subtitle or is charged as an adult.

https://mgaleg.maryland.gov/2021RS/bills/hb/hb0315t.pdf

Comments:

- The statute is limited to custodial interrogations, but there are scenarios where an officer could have contact with a juvenile and even elicit an incriminating statement that are not formally custodial interrogations. To make this statute better, ideally the language would state: "a law enforcement officer may not conduct any interview, questioning, or interrogation of a child until..."
- The term "child" should be defined, as some statutes relating to "children" only apply to juveniles under the age of 16.
- There is concern that the consultation will only occur via telephone since it requires less resources as opposed to in person, which is preferred. The statute could be improved by limiting the consultation to in person.

3. California

SB 203 California

625.6. (a) Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB203

Comments:

- The statute is limited to custodial interrogations, but there are scenarios in which an officer could have contact with a juvenile and even elicit an incriminating statement that are not technically custodial interrogations. To improve this statute, ideally the language would state: "prior to any interview, questioning, or interrogation..."
- Use of he term "shall" is less definitive than it our suggested phrasing, "must."
- There is concern that, if consultations are explicitly permitted to be conducted by telephone, that in-person consultations will infrequently occur in favor of phone consultations. Research from the UK and Europe has demonstrated that telephone legal advice for arrested people in custody is not sufficient to protect their rights

and should be used only in emergency situations or at the request of the arrested person.[4]

4. Europe

England and Wales Statute (Police and Criminal Evidence Act "PACE")
6 Right to legal advice

6.1 … all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available.

6.3 A poster advertising the right to legal advice must be prominently displayed in the charging area of every police station.

6.4 No police officer should, at any time, do or say anything with the intention of dissuading any person who is entitled to legal advice in accordance with this Code, whether or not they have been arrested and are detained, from obtaining legal advice.

6.5 … Whenever legal advice is requested, … the custody officer must act without delay to secure the provision of such advice. If the detainee has the right to speak to a solicitor in person but declines to exercise the right the officer should point out that the right includes the right to speak with a solicitor on the telephone. If the detainee continues to waive this right, or a detainee whose right to free legal advice is limited to telephone advice rom the Criminal Defense Service (CDS) Direct (see Note 6B) fdeclines to exercise that right, the officer should ask them why and any reasons should be recorded on the custody record or the interview record as appropriate...

6.6 A detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice unless:
(b) an officer of superintendent rank or above has reasonable grounds for believing that:
(i)the consequent delay might:
- lead to interference with, or harm to, evidence connected with an offense;
- lead to interference with, or physical harm to, other people;
- lead to serious loss of, or damage to, property;
- lead to alerting other people suspected of having committed an offense but not yet arrested for it;
- hinder the recovery of property obtained in consequence of the commission of an offense.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710129/2018_CodeC-Revised_Final-APS__18-05-23_WebCovers.pdf

European Union Directives
The right of access to a lawyer in criminal proceedings

[4]https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defense practically and effectively.

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

4. Member States shall endeavor to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings. Article 4 Confidentiality Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0048&from=EN

III. Conclusion

The intended impact of lawyers in police custody is to influence systematic change to a number of criminal justice outcomes, beyond the simple protection of the right to silence, and accrue broad benefits to the justice system by:

- Challenging unlawful and abusive arrests, including those that do not lead to criminal charges, discouraging police from unnecessary street contact.
- Reducing prosecutions and jail admissions by encouraging police and prosecutors to drop and divert more cases.
- Identifying the vulnerabilities of arrested people and promoting diversion and treatment opportunities.
- Identifying incidence and patterns of police misconduct and ill treatment of arrested people.
- Improving communication channels and trust between police, the community (including victims and witnesses), defenders and prosecutors.
- Capacitating defense lawyers to prepare more comprehensively for arraignment, pre-trial detention and plea negotiations – reducing wait times and administrative hurdles.
- And Improving access to medical care and other essential needs of detained people

The right to counsel in police stations has the potential to disrupt the machinery of criminalization, mass incarceration, and police control. The police in the District must no longer be permitted to operate in the shadows, and implementing the right to counsel for all adults and children in police custody is a key element of their reform.

Fair Trials Americas stands ready to work with the Council and all relevant service providers and stakeholders to assist in the development and implementation in law and practice of this important recommendation of the Police Reform Commission.

Testimony by Ariel Levinson-Waldman of Tzedek DC to the Judiciary & Public Safety & Committee of the Whole Regarding the Recommendations of the D.C. Police Reform Commission

May 20, 2021

Chairpersons Mendelson and Allen, Councilmembers, and staff: Thank you for holding this hearing today on the critically important issues addressed by the D.C. Police Reform Commission.

I'm Ariel Levinson-Waldman, Founding Director of Tzedek DC. Proudly headquartered at the UDC David A. Clarke School of Law, Tzedek DC's mission is to safeguard the legal rights and financial health of DC residents with lower incomes facing debt-related-problems. 90+ percent of Tzedek DC's clients are African-American DC residents, 60 percent are women, and 25+ percent are disabled.

I'm here to address one of the many issues highlighted in the Commission Report: the impact of parking and minor traffic infraction tickets on DC residents who are in or on the brink of poverty. The Commission report notes one "key question" concerning "the financial impact of fines for minor violations on District residents—particularly poorer residents who often cannot afford to pay and who, under current District law, are prohibited from renewing their driver's licenses (essential for so many daily activities, including transportation to work) for traffic debts of over $100." The law referenced by the Commission's report is DC's so-called Clean Hands Law, which punishes DC residents for unpaid fines or fees of over $100 by withholding driver's licenses from them, with no inquiry as to their ability to pay.

On April 26, a few weeks after the Commission issued its report, Tzedek DC and a pro bono team from the Venable law firm issued a different, related report. Our report, joined by a coalition of 30+ other civil rights, faith-based, consumer protection and justice advocacy organizations, addresses the specific question the Commission's report raises about the Clean Hands Law.

Titled Driving DC to Opportunity, the report shows how DC is the only jurisdiction in the region that punishes residents with unpaid fines and fees by disqualifying them from renewing their driver's license, and, with states having passed recent reforms, is now joined by only two states in the country that cling to this practice. The report highlights the life stories and struggles of District

residents unable to drive lawfully as a result of the Clean Hands Law. It details how DC's application of that law to driver's licenses converges with structural racism to disproportionately harm Black DC residents, in in at least three ways.

First, Black drivers receive a disproportionate share of the traffic tickets issued in DC—65% of the tickets issued to adults during traffic stops —while making up only 43% of DC's adult population.

Second, despite being more likely to face fines and fees, Black DC residents are, on average, much less likely than white DC residents to have the financial resources to pay them. As the Urban Institute has documented, the statistically median Black household in DC has net assets of $3,500, less than two percent of the $284,000 median number for white DC households.

Third, MPD data shows that Black DC residents are **19 times** more likely than white residents to be arrested for driving without a valid license—exposing Black DC residents to incarceration risks at a disturbingly disproportionate rate. Under DC law, driving without a valid license is a criminal misdemeanor punishable by up to a year in jail and fine of up to $2,500. Since the Clean Hands Law deprives DC residents of their licenses based on debt to the government alone, without permitting any inquiry into one's ability to pay, the law disproportionately exposes DC residents who need to drive—to get to work, to buy groceries, to access childcare, to go to the doctor—to the risk of criminal prosecution and jail. Worse still, driving without a license is the most common reason why DC residents recently released from jail and prison are re-incarcerated.

In a section about "Decriminalizing Poverty," the Commission's Report calls for a "far less punitive approach to low level offenses that are driven primarily by structural racism, intergenerational poverty, and a deficit of resources." The Clean Hands law punishes poverty in precisely the way the Commission Report tells us needs to be changed.

But there is good news. While reviewing the constellation of complex and important issues and recommendations raised in the Commission Report, the Council is already moving to make a simple, positive change in the Clean Hands Law.

In the last several weeks, two important bills have been introduced in this Council that address the problem of the Clean Hands Law's application to driver's licenses. The first bill, The DC Driving to Opportunity Amendment Act of 2021, was co-

introduced by a majority of the Council and would remove the issuance and renewal of driver's licenses from the current list of punishments in the Clean Hands Law. The second bill, The Clean Hands Certification Equity Amendment Act of 2021, was introduced by Councilmember McDuffie. It also would, among other things, remove the issuance and renewal of driver's licenses (as well as identification cards) from the scope of the Clean Hands Law. If enacted and funded, either bill will represent a major step forward.

Both bills have been referred to the Economic Development Committee. We look forward to working with Councilmember McDuffie as Chair of that Committee, and with all of you on these issues.

Thank you.

DC Health Matters Collaborative

Bread for the City | Children's National | Community of Hope
Howard University Hospital | HSC Health Care System
Mary's Center | Sibley Memorial Hospital | Unity Health Care
DC Behavioral Health Association
DC Hospital Association | DC Primary Care Association

Testimony of the DC Health Matters Collaborative
to the Committee on the Judiciary and Public Safety
and the Committee of the Whole on
the Recommendations of the D.C. Police Reform Commission

Thursday, May 20, 2021

My name is Amber Rieke. I am the Director of External Affairs for the DC Health Matters Collaborative. Thank you for the opportunity to testify today, with special thanks to the members of the Police Reform Commission for their important work. I want to speak specifically today to their first recommendation related to behavioral health crisis response, and the evolution of the system at hand.

About DC Health Matters Collaborative
Launched in 2012, the DC Health Matters Collaborative is a partnership of hospitals and federally qualified health centers (FQHCs) that combine efforts to assess and address community needs in the District of Columbia. We work together to achieve our stated vision: one healthy and thriving capital city that holds the same promise for all residents regardless of where they live.

Collaborative membership includes four non-profit DC hospitals (Children's National Hospital, The HSC Health Care System, Howard University Hospital, and Sibley Memorial Hospital); four community health centers (Bread for the City, Community of Hope, Mary's Center, and Unity Health Care); and three associations (DC Behavioral Health Association, DC Hospital Association and DC Primary Care Association).

Based on our 2016 and 2019 needs assessment findings, the Collaborative is organized around four key priorities: Mental Health, Care Coordination, Health Literacy, and Place-Based Care.

One of the Collaborative's central projects is working together to improve access to and equity within behavioral health care in D.C. Over the past year we have been looking at the crisis response system in the District. We conducted interviews with our behavioral health professionals - psychiatrists, social workers, nurses, peer support workers – and asked whether what we get now as a first response, is working**.** And what we found is that the status quo is not keeping everyone safe, was in many cases creating *more* trauma and chaos. We released a white

paper summarizing our findings and recommendations this month: "Re-Routing Behavioral Health Crisis Calls from Law Enforcement to the Health System."

Mental Health Crises in the Community

About 20% Americans have a mental health condition, generally less than half of people are receiving treatment. Only 42% of District residents with these conditions are receiving treatment, and we know mental health indicators have worsened amidst the pandemic. In some cases, mental health concerns become an emergency or a crisis. That may look like erratic behavior, threats of suicide, public intoxication, hallucinations. Currently, calls to 911 for urgent help will dispatch MPD.

This is extremely dangerous – not to mention costly and disruptive. Some research suggests that people with severe mental illness are 16 times more likely to be killed during an encounter with police. As we know, this compounds with real disparities in policing and arrest by race. In Washington, D.C. Black people are more policed; they are arrested by MPD at a per-capita rate seven times higher – and killed at a rate 13 times higher – than white people. This makes crisis calls inherently more dangerous for Black individuals and contributing to fear in calling for police help.

Fundamentally, with the exception of instances of violence, these calls could be better handled by an unarmed social workers or other behavioral health professionals, to de-escalate in the moment and then work to connect the people to services and resources for the long run.

The National Alliance on Mental Illness (NAMI) notes an effective crisis response system is available 24 hours a day, with walk-in and mobile crisis services. Similarly, the Justice Collaborative Institute notes that a model crisis response system is separate from law enforcement and includes on-site, on-demand and preventative services. U.S. Substance Abuse and Mental Health Services Administration (SAMHSA) observes that crisis services must be available to anyone, anywhere, and anytime (and best practices for a child and adolescent crisis system should be available 24 hours a day to all children, regardless of payer). Overall, a comprehensive crisis response system should include screening and assessment, mobile crisis response and stabilization, residential crisis services, psychiatric consultation, referrals and warm hand-offs to home- and community-based services, and ongoing care coordination.

Instead, what we have now, as one D.C. social worker described, is "hit or miss." The decision to call 911 is based on how quickly they need someone related to risk of violence to self or others, but, they added: "We feel conflicted, especially when someone may be dangerous, [if the person in crisis] is a Black man who is more likely to be injured by police. We know they need help, but we know that our decision to call MPD could lead to him being harmed."

Several providers described experiences of calling 911 for urgent intervention – when someone is trying to walk into traffic, for example – with FEMS and MPD vehicles responding to the same scene in short succession. Multiple police, fire truck and/or ambulances all come at the same time with sirens activated, which may escalate matters when the opposite approach is needed. "That's a lot of lights and uniforms and can be overwhelming." One provider noted that "sirens and badges – in the context of systemic oppression – are symbolic in themselves and can be traumatizing."

First-hand accounts also revealed chaotic or unhelpful communication between entities. Lines of authority or responsibility may exist – for example, which team should transport or call the hospital – but such guidance often appears to be unknown or ignored. The person in crisis is often handcuffed, which seems unnecessary and harmful to many clinicians.

One experienced clinician summarized: "In general, police are called to respond to many kinds of situations that they don't have training, knowledge or background to handle – they don't infuse health into situations that are already escalated and in crisis." She described MPD as "not super empathetic or sympathetic." She recalled times she would have to call 911 to get transport to a hospital for a patient with her at the clinic, only to have MPD or FEMS "try to barge into the exam room." Clinicians feel like it is out of their hands, even in their own facility. "It's a circus. Meanwhile you're trying to create a safe environment for the patient."

Dispatching Behavioral Health Professionals Rather than Police Through 911

As the Police Reform Commission Report states in the first recommendation: "Crises should be met with specialized intervention and skillful de-escalation rather than forced compliance and arrest."

Models limiting harm and trauma already exist across the U.S. to answer calls through the 911 with trained medics, social workers, or experienced crisis workers. We summarized examples in our white paper from Oregon, Colorado, Florida, California, New Mexico, and Washington State, who are beginning to reimagine their policing and crisis response systems.

We are glad to learn of the pilot through Office of Unified Communications and Department of Behavioral Health (DBH) to dispatch professionals instead of police. Within the District's crisis response system, there are a several important public programs: the ACCESS Helpline and Community Response Teams (CRT), and Child and Adolescent Mobile Psychiatric Service (ChAMPS) for crisis response to youth. It is a great improvement if calls to 911 can call on these essential resources, and deploy skilled professionals with health care tools. However, it is not

clear from the pilot whether dispatchers would connect to CRT directly, or create an intermediary step through the ACCESS Helpline.

I also would like to hear whether the kinds of events imagined for alternatives to police will include substance use issues - for example, someone actively using drugs in public, someone displaying disorientation or intoxicated behaviors, etc. We know substance abuse often co-occurs with a mental health issue.

We agree with the Commission co-chairs from their testimony that this pilot should not foreclose the implementation of their recommendations for legislative action. There are several reasons for this, from capacity to evaluation.

Build Workforce and Infrastructure Capacity to Meet Demand

Simply changing the first responder is not the end of the story. There is a lot of infrastructure and practice that will need to improve: we need more mental health professionals in our workforce to meet the demand, we need more kinds of settings to escort people to – for respite, or detox, or a bridge between crisis and ongoing treatment.

We are concerned that a pilot without this capacity dooms it to fail, which would leave us back where we started. This pilot might be a good opportunity to include additional agencies, such as DC Health and the Health Licensing Boards, and even Department of Employment Services. After the year that the health system has had, it would be a good opportunity for some general health care workforce strategic assessment and planning.

As Anthony Hall, director of the Department of Behavioral Health's Community Response Team (CRT), told the Commission - his team is usually successful in responding on the scene without MPD support with individual counseling and de-escalation techniques. Most of our interviews with mental health professionals truly appreciated CRT's model and skills.

However, while they may need the skills CRT can bring to an incident, if they need response sooner than 30-45 minutes, they call 911 for the police. CRT themselves told the Commission that at its current operational capacity, the CRT cannot provide a timely emergency response.

We also need more robust training for first responders and 911 dispatchers related to behavioral health, de-escalation, and mental health first aid. Will a dispatcher to be equipped to stay on the phone with me and help stabilize a situation until help arrives, in the same way as a medical emergency?

From the Commission report: "Because patrol officers are likely to encounter individuals in crisis and may need to engage the person until a specialized responder arrives, every MPD officer must complete 40 hours of crisis intervention training (CIT). To supplement this, the Council should provide special funding to DBH to lead additional crisis intervention training that is open to the public and required for all MPD members."

Reform of the FD-12 Authority and Implementation

Further, about 20% of CRT's calls require involuntary treatment or execution of an FD-12 for transport to hospital for evaluation and involuntary commitment. If we use this number only to extrapolate the volume a pilot might show, there should be urgent attention to another issue the Commission report raises: the legal authority and implementation of FD-12s.

As the report states: "The Council should amend DC Code Sec. 21-521 which governs involuntary commitment (FD-12), making it truly a last resort undertaken only by behavioral healthcare professionals and in ways that avoid further traumatizing people… Initiation of the FD-12 process to hospitalize an individual against their will is a treatment option that should only be pursued under limited circumstances and when there is not a viable, safe, less restrictive alternative. When circumstances require involuntary commitment of a person, steps must be taken to protect that person from further physical or psychological trauma. Tasking agents of the criminal justice system—MPD officers—with enforcing involuntary commitment unnecessarily exacerbates the trauma of this experience for individuals in crisis, and misuses MPD time and resources. This is especially true when the officers facilitating involuntary hospitalization do not have crisis intervention training or real-time guidance from behavioral healthcare professionals."

Currently, an FD-12 is executed by an officer, or an "officer agent," a physician, psychologist, or certain mental health provider type who is trained and certified by DBH. This process was frequently cited in our conversations with providers, including major gaps in regulations that lead to poor outcomes. They perceived that the execution of the FD-12 can causes trauma or damage to the patient-provider relationship, especially if it does not ultimately result in meaningful care.

The restrictive criteria for what kind of professional can write or carry out an FD-12 feels arbitrary or problematic to providers we interviewed. Providers frustrated with current "officer agent" parameters wondered "why can't anyone with a license to give medical care or write prescription be eligible to execute an FD-12?" For example, a psychiatric nurse practicing at a federally qualified health center – arguably the exact kind of provider you'd want to walk someone through this life event – has to call MPD or CRT to execute an order for her own patient sitting in her own exam room.

Beyond the definitional barriers, DBH trainings to become an officer agent are infrequent and very limited in size. I want to emphasize that the training is essential, as it involves essential issues of civil liberties. The training should be more inclusive and accessible. We might have the right professionals responding to 911 calls, but they need to be able to perform the full spectrum of care if the goal is to keep MPD out of these interactions.

Finally, a major limitation in the current system is that one may not be able to be held or evaluated at the hospital after an FD-12 if they are actively intoxicated on substances. Behavioral health providers point out that when someone has a mental health condition and they are also on substances, it creates a grey area wherein mental dysregulation may be difficult to evaluate. One provider reflected on instances when she has wanted to write an FD-12 for someone, but the fact that they were also intoxicated was a deterrent. They may opt to call CRT instead, with the aforementioned wait times. There is a reported need for alternatives to FD-12s in these instances, such as medically managed withdrawal programs, detox or sobering centers, or protective custody, in D.C.

Assessment and Evaluation of System Changes

Further, we vigorously affirm their recommendation for an assessment of the views of the community and professionals in the first of several methodical steps to scaling up current programs. "The Council must ensure that the voices of DC's most impacted residents are invited, elevated, and honored in this assessment." We also agree that there should be feedback from or consultation with the individuals and community served, and all professionals involved in the process, to determine the future course of the system.

Whether through the pilot or future legislation, we see the need for a public hearing, or a community advisory group to be consulted from start to finish. The Commission calls on the Council "to establish a task force or coalition of community-based providers and public officials to assess the adequacy of preventative community behavioral health and wellness programs on an annual basis."

The report suggests an evaluation of very important data to assess success, including average response time; resolution of crisis teams' interventions; any refusals from either program to respond and the reasons; incidence of injury to the person in need or crisis team members; and incidents that required MPD support, and source of referral (911, MPD, person in crisis, family member, or observer).

We might add to the pieces for oversight and evaluation:

- "Average wait times" ***plus*** details related to contributing factors, for example whether the wait times were because of staffing, traffic or parking issues, geographic distance, etc;

- Ward and/or Zip code of call location, which would be informative for staging and staffing decisions for future work.

Meeting Mental Health Needs with Care and Treatment, Before and After Crisis

What is really essential – for this issue and for preventing people from being in crisis to begin with – is expanding the infrastructure to appropriately care for people in crisis in D.C., including more beds in health care settings and more people in the workforce. To this end, we agree with the Commission's second recommendation: With funding from the Council, and support of the Mayor, the Department of Behavioral Health (DBH) must increase investments in evidence-based, culturally competent behavioral health and wellness services to meet the current and anticipated needs of all District residents.

On the topic of treatment options, we also affirm the Commission's suggestion that "The District must simultaneously expand voluntary inpatient treatment options... The District must build a campaign around future efforts to expand community mental health services in order for these efforts to prevail."

Finally, the proposed changes "require a robust campaign to educate the DC public on recognizing the signs of a behavioral health crisis; recognizing behaviors related to a developmental disability; and the appropriate agencies and numbers to secure help for people with developmental disabilities and people experiencing behavioral health crises… The more we can empower DC residents to correctly use 911, the sooner appropriate crisis responses can be dispatched to the scene."

Conclusion

Working together, health providers, community members, and the District can re-imagine crisis response with the goal of a safer, more health-centered, and better coordinated care for people with mental illness, addiction, trauma, distress, or crisis. We appreciate and support the discussion and recommendations of the Police Reform Commission for these reforms.

In our white paper, we detail more of our own research and recommendations. We will continue to look at what is working, what is missing, and what, in an ideal world, our crisis response system should look like. We are eager for the opportunity to create this dialogue with policymakers and partners in the health system.

I'm available to answer any questions you may have. I can be reached at arieke@dchealthmatters.org. Thank you.

Testimony of Christopher C. Hull, Ph.D.
Before the Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
Committee of the Whole Joint Public Hearing on
The Recommendations of the D.C. Police Reform Commission
Thursday, May 20, 2021, 9:30 a.m. – 6:00 p.m.

Chairman Allen, Chairman Mendelson, Members of the Council, Ladies and Gentlemen, thank you so much for the opportunity to make suggestions based on the Recommendations of the D.C. Police Reform Commission, as well as the legislation you are considering here today. I am grateful for the opportunity.

My name is Chris Hull, and I'm a Senior Fellow with Americans for Intelligence Reform, a non-profit organization that focuses on the proper assessment of threats facing our nation, and your family and mine. I am also a longtime District resident.

Please allow me to make recommendations with respect to three of the bills the Council is considering today.

1. Bias in Threat Assessments Evaluation Amendment Act of 2021

As you know, this bill requires the Attorney General of the District of Columbia to conduct a study to determine whether the Metropolitan Police Department engaged in biased policing when conducting threat assessments of assemblies within the District of Columbia.

My concern is that in the bill, protected classes include race, color, religion, sex, national origin, or gender, but did not include political affiliation.

The DC Human Rights Act (DCHRA) provides that a person may not be discriminated against based on the individual's actual or perceived "political affiliation."

The question is whether the Metropolitan Police Department (MPD) evaluated assemblies over the covered period based in part based on the politics of those who took part in them.

In order to properly investigate the MPD response, Americans for Intelligence Reform recommends that the Council add "political affiliation" to the protected classes listed on lines 66-67.

2. Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search – No Jump-Out Searches Act of 2021

The bill appears to address a problem that no longer exists. As early as 2013, then-MPD Chief Cathy Lanier called such claims "fantasy." As early as 2015, MPD said it hasn't used this policing tactic for at least 15 years, and even then, it was employed only for high-risk arrests. She charged that activists were likely referring to vice units, responsible for covert drug busts. According to Chief Lanier, "An 11-year-old telling a story, and then the ACLU retelling that story, is not a fact."

But even if MPD does engage in jump-out policing, this bill appears to have no effect whatsoever on restricting such a practice. Instead, the bill prohibits MPD from conducting searches of unoccupied vehicles unless an array or requirements are met.

What is the real concern here? It appears that the true goal of the legislation is to stop MPD from ever searching empty vehicles. And why? Because MPD might find contraband of one kind or another there.

Why would we not want MPD to find contraband? In the case of drugs, it may be that some do not believe that drug possession should be illegal in the first place. Given that the number in Washington who died of drug overdoses rose from 213 in 2018, to 281 to 2019, to 349 in 2020 – a nearly 40% increase over that time period – that seems like a terrible policy position. Regardless, it has literally nothing to do with jump-out policing.

In the case of firearms, it may be that some do not want individuals charged over concerns about mass incarceration. The problem with this in turn is that 2019 saw the highest homicide rate in the District in more than a decade, 2020 was worse, and homicides are up 35% in 2021 compared to this time last year.

Finally, lines 18-20 and 45-46 of the bill explicitly state that the owner of the vehicle shall have the right to sue the individual officers not adhering to this law in their individual capacity.

This is going to worsen the problem of police quitting. Last year, the D.C. Police Union President revealed that 70% of police officers in Washington were considering quitting.

Since the DC Council bill last year intended to reform District policing went into effect, at least 313 officers have retired or resigned.

Police Chief Robert Contee said that's a concern:

> I would strongly say that it's something that we need to continue to not just watch, but it's something that eventually we must act on in terms of making sure that our force is at the strength

where it needs to be. Every year, we lose officers to resignation, retirement, termination, even, we lose officers to that, certainly, we want to make sure that our officers who are out here doing the job that they are properly supported with the resources that they need.

This bill moves in the opposite direction, while at the same time directly harming public safety.

3. Law Enforcement Vehicular Pursuit Reform Act of 2021

The bill is intended prohibit District of Columbia law enforcement officers from engaging in vehicular pursuits, unless the officer reasonably believes that the fleeing suspect has committed or has attempted to commit a crime of violence and that the pursuit is necessary to prevent an imminent death or serious bodily injury and is not likely to put others in danger.

That description, however, leaves out the fact that the bill bans under any circumstances a whole array of vehicle pursuit tactics intended to bring pursuits to an end and save lives.

Let's be clear: Under this bill, if officers reasonably believe that the fleeing suspect has committed or has attempted to commit a crime of violence, and that the pursuit is necessary to prevent an imminent death or serious bodily injury, they *still* cannot engage in any of these vehicle pursuit tactics.

In those circumstances, this bill *increases* the risk to the public, in order to *decrease* the risk to someone an officer reasonably believes is a violent criminal or is about to cause death or serious injury.

Moreover, the list of requirements for police to engage in vehicle pursuit is so onerous as to effectively ban such pursuit even without use of aggressive vehicle pursuit tactics.

For instance, Line 98 of the bill asks "Whether the law enforcement officer engaged in de-escalation measures." How can an officer reasonably engage in de-escalation measures when a suspected murderer passes him in a vehicle at high speed? Do we really want to prohibit a pursuit in such a case?

Similarly, Lines 99-100 of the bill encourage fact-gathers investigating vehicle pursuit to evaluate "any conduct by the law enforcement officer increased the risk of harm." *Any* conduct that increases the risk of harm includes beginning the pursuit in the first place.

Now, I know that this bill is intended to respond to the tragic deaths of individuals like Anthony Louis and Karon Hylton. As a result, there's no question in my mind but that its authors have the best of intentions.

We all know, however, what the road to Hell is paved with.

The truth is that there is a danger from vehicle pursuits – but there is also a danger to the public – to your children – of *not* engaging in vehicle pursuits when they are appropriate.

In conclusion, Chairman Allen, Chairman Mendelson, Members of the Council, Ladies and Gentlemen, I very much appreciate your giving me and the rest of the public the opportunity to review these policies and provide our thoughts. I would be delighted to work with you in any way that would be of service to you. Thank you.

Advisory Neighborhood Commission 3D
Government of the District of Columbia

May 5, 2021

Mayor Muriel Bowser
Council Member Charles Allen
Chairman Phil Mendelson

RE: Police Reform Commission's Report

Dear Mayor Bowser and Council Members:

At the duly-noticed regular meeting of Advisory Neighborhood Commission 3D on May 5th, the Commission authorized the submission of these comments on the Police Reform Commission's April 1st Report.

We represent residents living in the Foxhall Village, Palisades, Spring Valley, Wesley Heights, and American University neighborhoods of Northwest Washington, D.C. Our experiences with the Metropolitan Police Department are obviously different from the experiences of many of our fellow residents across the District and therefore we have opted to comment only on two Police Reform Commission recommendations that clearly impact our jurisdiction directly and substantially —namely, the response to mental health crises and enforcement of traffic infractions. We believe that the Council and Executive should listen to the voices of community organizations and individuals most affected by practices of the Metropolitan Police Department addressed by the other recommendations in the Commission's Report.

With regard to responding to mental health crises, we agree with the Commission that it would be good to divert the responsibility for responding to mental health crises to non-MPD staff specially trained to intervene in such cases. However, there seems to be a strong consensus that the available organizations in DC with such specially-trained professionals are not prepared organizationally or staffing-wise to assume 24/7 responsibilities at this time. The Council and Executive should take action now to assist these organizations in becoming equipped to handle these responsibilities in the future. Furthermore, we endorse the concept, reportedly being pursued by the Executive, to conduct some pilot operations to experiment with how to train and deploy these professionals in a safe and effective manner. We believe that once the details of these plans are carefully worked out, the deployment of mental health professionals across the District for rapid response would help keep individuals who are experiencing mental health crises safer. Therefore, we hope that the District can move forward purposefully and proactively to implement this recommendation.

With regard to enforcement of traffic infractions, we believe the use of unarmed staff of the District Department of Transportation to enforce those traffic violations that do not imminently threaten public safety[1], as the Report recommends, would be effective in reducing the potential for violent outcomes in these situations. However, if such unarmed staff of the

[1] Examples given by the Commission of regulations whose enforcement should be transferred from MPD to DDOT include Window Tint Prohibition, General Mechanical Issues, Driving with improper fenders/bumpers, and Excessive smoke, etc. (Page 102)

District Department of Transportation are used to enforce these minor traffic offenses, then we believe that the District should develop means by which the enforcement can take place without executing a physical stop of the vehicle. This could assume the form of taking a photograph or video of the offending conduct or condition as well as a photograph of the license plate and then mailing the notice of infraction to the registered address of the owner of the vehicle to be enforced in the same method as a parking ticket. We also suggest that the notice of infraction should include information about how to correct the infraction. If the vehicle's owner presents proof to the District Department of Transportation within thirty days that the physical condition of the vehicle that led to the infraction has been corrected (such as the replacement of a broken tail light), the notice of infraction should be vacated and dismissed.

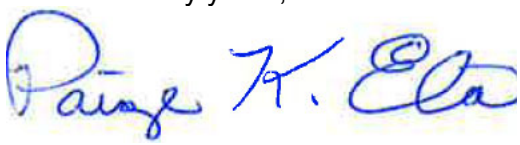
We have reservations, however, about the District's taking the further step recommended by the Commission, of stopping the enforcement of a number of offenses completely[2]. Each of these offenses needs to be carefully evaluated on a one-by-one basis before deciding that the safety of all residents would be well served by discontinuance of such enforcement.

Finally, while we believe that the implementation of many of the Commission's recommendations will eventually result in the need for fewer resources assigned to the MPD, we believe it would be a mistake to fund these new initiatives now at the expense of the current staffing of MPD. We believe that reductions in funding should be determined through a careful analysis of the Police Department's needs rather than as a quid-pro-quo reduction to fund additional social services now. The Commission's report makes it abundantly clear that the District needs more resources devoted to social services, such as mental health, over and above what funds might later be determined to be in excess in the MPD once these functions have been successfully transferred to other organizations.

We hope that you find these recommendations helpful as you decide how to respond to the Police Reform Commission's report.

Chuck Elkins and Ben Bergmann, Commissioners for ANC3D Single Member Districts 01 and 08, are hereby authorized to serve as the Commission's representative in all matters relating to this resolution, including by testifying before any hearing on this issue.

Sincerely yours,



Paige Ela, Chair

cc: Other District Council Members
Chief of Police

[2] Examples given by the Commission of regulations whose enforcement should be discontinued include improper bicycle safety equipment, light violations, operating unregistered, and improper riding. (Page 102)

Greetings,

My name is Armand Cuevas, ward 1 Resident and teacher in a Ward 5 school with students from almost all other wards. I'm emailing today to ask for the broad ask of Defund MPD. However, specifically speaking, there was a report released by the Police Reform Commission in April 2021 and while I have yet to read all of it, I have gone through the sections for schools and trusting and investing in communities.

For schools, as a teacher myself, I've witnessed tons of fight and broken up several of them myself. Sometimes, the security guard was there to help but most of the time, it was other staff who stopped the fight. One time, I was able to de-escalate a situation that didn't have any fight or physical altercation, just heated exchanges of words. The situation was de-escalated, but as soon as police came into the room, my student was then re-energized and became aggressive again. We do not need police in schools. We do not need security guards. Their mere presence makes students feel unsafe, or feel like they themselves are dangerous. Instead, these uniforms can be exchanged for school apparel and our security guards can be properly trained in mental health, de-escalation, and furthermore be included in school culture and become truly integrated into the school. When that happens, instead of being reactive, they can be proactive in creating safe spaces, building relationships between students and adults, and repairing relationships between students. Lastly, mental health needs to be funded heavily as well given the comedown from the ongoing mental health crisis from the ongoing COVID-19 pandemic. Replace police/security guards in our schools with behavior technicians, culture and climate workers, and mental health professionals.

Lastly, we need to trust and invest in our communities more. Police are far removed compared to neighborhood activists and organizers, local church and business leaders, school leaders, violence interruptors, and so on. Police should not be doing stop and frisk. Armed police should not be pulling over people for traffic violations. Stop and frisk needs to stop point blank. Traffic violations can be shifted to DDOT as studies have shown armed police just escalate traffic stops, sometimes into fatal scenarios. Police should not be handling mental health emergencies or homelessness issues. That should be left to mental health professionals and homelessness advocates

Defund the police and REINVEST in our communities.

--
Armand Cuevas
Dunbar High School
9th Grade Academy | Algebra 1
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DC Council Committee on the Judiciary and Public Safety and Committee of the Whole
Joint Public Hearing on the Recommendations of the D.C. Police Reform Commission

May 20, 2021
Co-Authored by Olivia Blythe and Nada Elbasha

Abolish the Mandatory Domestic Violence Arrest Law

DC Justice Lab recommends repealing the mandatory domestic violence arrest law for Washington, D.C. (D.C. Code § 16-1031), in accordance with the D.C. Police Reform Commission's recommendation (at page 45 of *Decentering Police to Improve Public Safety*). We propose this recommendation to center the voices of survivors who have stated that this law harms them more than it protects them. Truly believing survivors means trusting their choice of navigating their relationship during some of its most dangerous moments. Mandatory arrests strip survivors of their expertise and agency over the relationship. Abolishing the mandatory arrest law empowers survivors to make autonomous choices about their safety and prioritizes how a survivor would like to handle their family dynamics.

Olivia and Nada are abolitionist intersectional feminists and professional advocates working with those impacted by acute and historical trauma, interpersonal violence, and state sanctioned violence. Olivia and Nada have spent 5 years each in the domestic and intimate partner violence services field and have worked with survivors of multiple marginalizations and from various populations. Their work solidifies the illegitimacy of the carceral response to domestic and intimate partner violence. Olivia and Nada use their expertise to cultivate a radical restructuring of advocacy and prevention which renders carceral measures obsolete.

Having trained agencies working within carceral systems on intimate partner violence prevention and response, Olivia has witnessed firsthand that additional education with a focus on trauma-informed response is not an effective method of harm reduction nor is it a way to achieve justice. Olivia's experience has confirmed that the carceral system and its "first responders" cannot be reformed into a trauma informed option for survivors and their community.

Nada has developed expertise through spending time with individuals who - from being stuck in the carceral system; rejected by social support; or fed the fallacy that domestic violence advocacy services are legitimate means of disrupting harm - were forced to

develop unsustainable coping mechanisms and forced into social ostracization. Nada has also observed the healing trajectory of survivors supported by advocacy models which de-emphasize carceral measures, and is thus able to juxtapose the perpetual harms of conflating safety with reliance on the state.

Mandatory arrests do not deter or stop intimate partner violence. Experts in the field of domestic and intimate partner violence intervention know that shame and punishment do not deter power based violence. What we see from the mandatory arrest law is that it encourages abusers to lie and coerce officers in an attempt to escape accountability and remove ownership of the harm that they cause.

DC Justice Lab proposes not only abolishing this law, but examining law enforcement's response to survivors of domestic violence. Survivors are being killed or assaulted by the officers who are called to assist them on the scene. The Interrupting Criminalization report has gathered data on this stating, "Two thirds of survivors and service providers said police use force against survivors sometimes or often during DV calls, particularly against Black survivors. More than half reported anti- Black, anti-immigrant, anti-Muslim, and anti-LGBTQ attitudes among responding officers" (Interrupting Criminalization, 2020).

For example, Melissa Ventura was killed by Arizona police after calling them for assistance when being assaulted by her partner in her home. When survivors call for the violence to be interrupted, they are met with more violence or are even killed.
In DC, survivors have shared with advocates that those of them who have called the police, or have had the police called on them, experienced more violence and abuse at the hands of the police than they do in their romantic relationships. Community members often call the police on survivors, without the survivor's consent, in an attempt to help but are unaware of the dangerous impacts the mandatory arrest law has on survivors.

We are not alone in asking for this; The DC Coalition Against Domestic Violence and, most importantly, survivors in D.C are advocating for the removal of this violent law.

DC should match its standard with one of its neighboring states who has already abolished this law. Maryland does not require an officer to make an arrest in ever domestic violence case (Md. Code, Crim. Proc. § 2-204). This standardization could ease the navigation of criminal and civil systems in DC.

Mandatory Arrest Laws are Racist and Homophobic

The most marginalized have faced the brunt of this policy, which disproportionately punishes and harms queer, trans, Black, and brown survivors. “Women of color frequently have negative, abusive and even deadly experiences with police officers who are called to respond to intimate partner violence.” (Goodmark, L. 2018).

BIPOC and LGBTQIA survivors have shared that officers do not know who to arrest because of their ignorance to non heteronormative relationship dynamics and their unwillingness to examine their bias, arrogance, and lack of introspection. This ignorance prohibits officers from determining a primary aggressor, often resulting in an arrest of both people. Our recommendation does not propose training police, but rather advocates for the safety and autonomy of BIPOC and LGBTQIA during the arrest process. When survivors are arrested, the subsequent record of denoting them as the person who caused harm impacts their ability to secure housing, food, employment, and advocacy services - making it impossible to leave a violent relationship.

By mandating arrests as a response to violent relationships, The District and MPD are enabling the cycle of abuse by in turn creating ineligibility for resources that are crucial for safety.

Interrupting Criminalization cites the ACLU in their October 2020 report, Defund and DVAM, “The vast majority (89%) of survivors and service providers surveyed in one study indicated that police contact results in contact with the family regulation system (“child welfare”); 61% stated it can cause survivors to face criminal charges that could lead to deportation, and 70% reported that contact with the police “sometimes” or “often” results in the loss of housing, employment, or welfare benefits.”

Mandatory arrests not only divert important discourse away from the root causes of intimate partner violence, the mandate also empower abusers - who will not and cannot be held accountable by a system that was created for and by them - to maintain control over the relationship. This law is a false solution and in actuality causes escalated violence in relationships and in communities.

Mandatory arrests increase lethality of violence

Mandatory arrests and law enforcement involvement increase the lethality of the violence in a relationship and further isolate the survivor from community support. We see folks who cause harm engaging in behavior that is increasingly violent following the first arrest, further proving that arrests are ineffective at deterring violence. Alternatively, arrests add to an abuser’s arsenal of isolation and intimidation tactics. Escalation could

look like an abuser, whose pattern initially consisted of threats and breaking items in the home, to strangling their partner after they are arrested. Further, survivors have shared that their partners are not fearful of the mandatory arrest law and that the arrests are ineffective. Their partners often return to the home or relationship to resume the pattern of power and control.

Survivors have repeatedly shared that they are “looking for options other than punishment for the abuser, options that were not necessarily focused on separation from the abuser” (Interrupting Criminalization, 2020).

Survivors additionally state that arrests are often more traumatizing than the violence in their relationship. Arrests can also be traumatizing to other members of the family; survivors have reported watching officers coerce their children into telling them about what has occurred, only for the children to then watch those same officers arrest their parents.

There is little to no evidence that criminalization deters domestic or intimate partner violence or changes the behavior of the person who causes harm. Survivors know that when the criminal process begins they become a witness to the violence they have intimately experienced, highlighting the need to center their voices in our advocacy.

Therefore, DC Justice Lab recommends the immediate repeal of the mandatory arrest law.

Sources:

Responses from the Field: Sexual Assault, Domestic Violence, and Policing,October 2015, available at: https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf

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Written Testimony in Support of the DC Police Reform Commission's Recommendation for Expansion of the Exclusionary Rule

DC Council Committee on the Judiciary and Public Safety and
Committee of the Whole
Joint Public Hearing on the Recommendations of the D.C. Police Reform Commission

May 20, 2021
by Elizabeth Harris

The DC Justice Lab respectfully submits this testimony to express our support for the DC Police Reform Commission's recommendation[1] to expand the exclusionary rule in accordance with the protections guaranteed by the Fourth and Fourteenth Amendments of the U.S. Constitution and by the District of Columbia Human Rights Act. Expansion of the exclusionary rule will address the inherent bias in Metropolitan Police Department (MPD) practices and the racial profiling and over-policing of Black residents, which will, in turn, promote and protect the constitutional rights of D.C. residents.

MPD officers stop and search Black citizens at a much higher rate than white citizens, indicating there is a serious problem in how MPD polices the city.[2] According to a recent MPD report, between July 22, 2019 and December 31, 2019, 72% of MPD's citizen stops involved Black people,[3] despite the fact that only 46% of the city's population is Black.[4] Furthermore, according to the MPD Report, 86% of people who were stopped but were not subject to a "warning, ticket, or arrest" were Black and 91% of the people searched during these types of stops were Black.[5] MPD's Narcotics and Special Investigations Division (NSID) made similar findings in a report they published in 2020, that is, Black people were stopped and searched for drugs with much higher frequency than their white counterparts.[6] These statistics clearly indicate that MPD is over-policing people of color and suggest that the department is racially profiling.

The over-policing of Black residents stems from bias, a prejudicial belief that Black residents are more likely to be engaged in illegal activity. This bias can be *conscious*, meaning

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[1] D.C. Police Reform Commission, *Decentering Police to Improve Public Safety* (April 1, 2021) (available at bit.ly/dcpolicereform) at page 185; *see also id.* at 100 (discussing *United States v. Whren*).

[2] ACLU-DC & ACLU ANALYTICS*, Racial Disparities in stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, 2 (Jun. 2020)
https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (". . . .MPD's stop practices unfairly over police the Black community, and that these practices require serious scrutiny and structural change.").

[3] METROPOLITAN POLICE DEPARTMENT, STOP DATA REPORT, 13 (Feb. 2020)
https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Report.pdf.

[4] *2020 Demographics*, D.C. Health Matters, Jan. 2020, https://www.dchealthmatters.org/demographicdata.

[5] *See supra* note 1.

[4] NATIONAL POLICE FOUNDATION, METROPOLITAN POLICE DEPARTMENT NARCOTICS AND SPECIALIZED INVESTIGATION DIVISION, 8 (Sep. 2020)
https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/National%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf.

deliberate and based on animus towards a specific group;[7] *implicit*, meaning an unthinking, but still impermissible negative association;[8] *authoritarian*, meaning over-policing of neighborhoods that the officer, informed by bias, believes need more protection or guidance;[9] *structural*, meaning poverty is penalized or used as a basis for discrimination;[10] or *inductive*, meaning an officer makes overgeneralizations about a certain group and acts on these beliefs.[11] It is important to identify the various forms of bias that consciously and unconsciously inform the actions of officers and police departments, often expressed through racial profiling, to underscore the need for enhanced constructional protections. This, combined with the over-policing statistics mentioned above, makes it clear that an expanded exclusionary rule is necessary to combat racial profiling perpetuated by MPD.

Expanding the exclusionary rule would help protect people, particularly people of color, from the equal protection violations that result from over-policing compelled by racial profiling. While the U.S. Supreme Court has not decided exactly how the exclusionary rule should apply to racial profiling, some lower courts, including in Texas[12], New Jersey[13] and the Sixth Circuit,[14] have held that the exclusionary rule should be applied to evidence obtained through racial profiling. In adopting the Police Reform Commission's recommendation, Washington, D.C. would join these other jurisdictions that have taken necessary steps to ensure all citizens receive equal protection under the laws and are not discriminated against on the basis of race, ethnicity, or socioeconomic status. This is a right guaranteed by the U.S. Constitution[15] and by the Code of the District of Columbia.[16] Given the rampant racial profiling and over-policing, it is hard to see how this fundamental right can be upheld and protected without expanding the exclusionary rule. We therefore urge you to adopt the Commission's recommendation and expand the exclusionary rule.

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[7] *See* Associated Press, *Embattled Town of Beloit Police Chief Resigns*, MILWAUKEE J. SENTINEL, Jan. 18, 2011, http://archive.jsonline.com/news/wisconsin/114148969.html (describing a case of conscious bias in the Milwaukee Police Department).

[8] Anthony G. Greenwald and Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, CALIF. L. REV. 94 (July 2016).

[9] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 371 (1987) (discussing the differences in police interactions with Black and white populations, especially in context of the legacies of slavery).

[10] Jessica Brand, How Fines and Fees Criminalize Poverty: Explained, THE APPEAL, July 16, 2018, https://theappeal.org/fines-and-fees-explained-bf4e05d188bf/ (explaining how fines and fees from anything from unpaid traffic tickets to court fees can have disastrous effects on the poor, especially poor people of color.)

[11] Lawrence Rosenthal, Gang Loitering and Race, 91 J. CRIM. L. & CRIMINOLOGY 99, 100 (2000).

[12] *Pruneda v. State*, 104 S.W.3d 302 (Tex. App., 2003).

[13] *State v. Lee*, 190 N.J. 270, 277, 920 A.2d 80, 84 (2007).

[14] *United States v. Navarro-Camacho*, 186 F.3d 701, 711 (6th Cir. 1999).

[15] U.S. Const. amend. XIV, § 1

[16] D.C. Code Ann. § 2-1402.01 ("[e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.")

NAACP National Association For The Advancement Of Colored People
Washington, DC Branch
1000 U Street, NW • Suite 100 • Washington, DC 20001

NAACP DC Branch Testimony

Council of the District of Columbia
Judiciary and Public Safety and the Committee of the Whole

Friday, May 28, 2021

B24-112, the "White Supremacy In Policing Prevention Act of 2021"

Chairman Allen and members of the Committee on the Judiciary and Public Safety, thank you for holding this hearing today to consider the "White Supremacy In Policing Prevention Act of 2021." My name is Akosua Ali and I am the President of the NAACP Washington, DC Branch. The NAACP DC Branch strongly supports and urges your prompt enactment of the ***"White Supremacy In Policing Prevention Act of 2021."***

For 112 years, the NAACP has championed the fight for racial justice as the nation's oldest and largest civil rights organization. White supremacy is the single most existential threat to our democracy. It undermines the safety, security and progress of all Americans. White supremacy is the conscious or unconscious belief in the inherent inferiority of some and the superiority of white people, white beliefs and/or white values. The ingenuity of white supremacy is that it doesn't require a white person to implement or uphold white supremist ideologies. White supremacy is not limited or restricted to white people or an individual person, but the ideals are embedded into the fabric, history and systems of this country.

The ingenuity of white supremacy is that it doesn't require a white person to implement or uphold white supremist ideologies. White supremacy is not limited or restricted to white people or an individual white person. During slavery, black slavecatchers worked to police and oppress black slaves. During Jim Crow, some blacks and whites embraced white supremist ideologies of white superiority and black inferiority evident through opposition to the fight for civil rights. White supremacists are of all races, ages and ethnicities, they may ride bicycles or drive pick-up trucks, they may drink flavored water or drink beer, they may call themselves vegans or be meat eaters, they may smile and call me a friend, while upholding white supremist ideologies or systems designed to rob us of our inalienable right to live. Today, white supremacy is not limited to overt racist yelling slurs or wearing t-shirts, but the true threat of white supremacy is embedded in the criminal justice system, healthcare systems, education systems and policing in this county. We all have a critical role to play because implicit bias fuels white supremacy in our Government, corporations and within our homes.

Today's domestic terrorists do not always use a gun or bomb, instead, they work within our systems to deny your application for a license, permit or grant. Today's white supremacists are concealed weapons, often sitting behind desks and making decisions that severely disrupt and may end your life. In the last 18 months alone, white supremacy has led to a disproportionate amount of COVID-19 cases for African Americans and countless murders at the hands of the police.

Since the beginning of Black history in this country, we have experienced negative relations between black communities and policing enforcement entities. Beginning with slavery to Jim Crow through racial profiling by police, the murder of George Floyd and today's movement to protect Black lives through demanding a racial awakening for justice in communities across the

nation, there has been deep rooted hostility, abuse and mistrust. There have been more than 1,000 instances of police brutality at Black protests since the murder of George Floyd. However, our Government and intelligence communities failed to deploy adequate police or troops to the violent riot led by white supremacists, neo-Confederates and extremists in the U.S. Capitol on Jan. 6 resulting in the death of police. Police brutality is not limited to White police officers brutalizing black people. White supremacist ideologies can influence subconscious and implicit biases across all races, it is extremely dangerous when those biases impact policing.

While this legislation is directing the D.C. Auditor to assess white supremacy and other hate groups within MPD, this is only a start. The NAACP DC Branch believes white supremacy, racism and bigotry have no place in law enforcement or any government agency. Racists, bigots or people of any race that harbor white supremacist ideologies cannot be allowed to protect or defend our communities. On behalf of the Washington, DC Branch of the NAACP, we strongly urge you to enact the "White Supremacy In Policing Prevention Act of 2021." Thank you!

Respectfully Submitted,

Akosua Ali
President
NAACP DC Branch

Testimony of Shayna Druckman

Student in the DC Community

Judiciary & Public Safety & Committee of the Whole Public Hearing

May 20, 2021

Good afternoon Chairman Allen, Committee members and staff. Thank you for hearing my testimony at the Judiciary & Public Safety & Committee of the Whole Public Hearing. My name is Shayna Druckman. I am a student at George Washington University working on a course project related to protecting youth who are taken into police custody.

I am testifying because young people in the District of Columbia and across the US are vulnerable to self incrimination due to a lack of legal representation when taken into custody and questioned by the police. Most juveniles are not developmentally ready to have a full understanding of their Miranda Rights especially when in the pressured-filled environment of a police station. According to data from the National Registry of Exonerations at the University of Michigan, youth of ages 14 and 15 who were later exonerated, falsely confessed in 57 percent of cases. Further, a study by University of Nevada Law, found that lower IQ corresponds with lower comprehension and suggestibility, both of which are risk factors for false confessions and miscarriages of justice.

This semester, I worked with classmates to compile research on this topic. One of my peers conducted interviews with youth and adults in the DMV area who had various experiences with the juvenile justice system. Though their stories were different, many interviewees expressed false confidence in their understanding of their Miranda Rights at the time of their respective interactions with police. In hindsight, many admitted to not fully understanding their rights and often being held without the chance to consult anyone who might be able to help them.

In the UK, young and vulnerable individuals may request the presence of an appropriate adult, who accompanies them through questioning and pre-trial detention serving as a safeguard for their well-being and rights. Appropriate adults cannot provide legal counsel, but they are accompanied by lawyers who can provide this guidance. A member of my team had direct experience as an appropriate adult in the UK where she resides. She expressed concern that such a basic safeguard was not present in the US juvenile system as it provided a necessary check on police power.

States like California and New York have taken steps to implement juvenile custody reform and cities like Chicago have even attempted to provide station house counsel for detainees, but all efforts have been limited in scope and practical application. DC has the opportunity to make this shift in the law and serve as a model for other states to follow. The organization, Fair Trials, released a report last year detailing the possibilities within station house counsel like redirection of youth from the justice system to restorative programs and expansion of access to essential resources. This is a step in the right direction for addressing root causes of crime and police interactions.

I encourage the DC council to adopt Recommendation 2 (a), (b), and (c) of section VI of the Police Reform Commission's 2021 report. This reform would change the way Miranda Rights are applied to children when brought into police custody. It would amend the "Interacting with Juveniles" General Order and the Council should amend DC Code § 16–2304 to adjust the language to make Miranda Rights easier to understand when read to a young person. It would also require the presence of legal counsel during pretrial interrogation. Recommendation 2(b) would amend DC Code § 16-2316, making all statements made by youth prior to a knowing waiver of Miranda Rights when accompanied by a legal professional, inadmissible in court. Finally, the reform would ensure access to legal counsel for *all* detainees through a partnership between the Public Defenders Service and Metropolitan Police Department. I believe these measures would protect youth from self-incrimination and other avenues into the justice system, while instead prioritizing restoration.

This concludes my testimony. Thank you for your consideration.

Committee on the Judiciary & Public Safety and Committee of the Whole
Re: Police Reform Commission Report; B24-094, the "Bias in Threat Assessments Evaluation Amendment Act of 2021;" B24-0107, the "Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search – No Jump-Out Searches Act of 2021;" B24-0112, the "White Supremacy in Policing Prevention Act of 2021;" and B24-0213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021."
Written Testimony of Kristin Eliason, *NVRDC's Director of Legal & Strategic Advocacy*
Hearing Date: May 20, 2021
Written Testimony Submitted: May 28, 2021

Thank you Chairman Allen, Chairman Mendelson, committee members, and staff for your continued commitment to the safety of DC residents. Founded in 2012, the Network for Victim Recovery of DC (NVRDC) has provided holistic services, including free legal representation, advocacy, and case management, for over 5,000 crime victims. Many of our clients choose to participate in or engage with the criminal legal system, from reporting to police to providing victim impact statements at a defendant's sentencing. To ensure those survivors have a trusted support system, NVRDC maintains a necessary partnership with policing agencies in the District. Additionally, many of our clients are afraid to engage with the criminal legal system or do not wish to engage with it. We feel it is not only important to ensure effective, just, and accountable policing for those survivors who choose or must engage with the current criminal legal system, but to find and invest in alternatives to our criminal legal system and long-term solutions and alternatives to the ways in which our society responds to crime and addresses the underlying reasons for crime.

Police Reform Commission Report

As stated above, NVRDC currently has partnerships with law enforcement operating within the District; however, our work over the past 9 years supporting thousands of people who have experienced crime, conducting community outreach, and learning from community-based organizations and advocates, underscores that as a community we must begin to look beyond the current systems in place for responding to crime. Moving toward alternatives to policing is a crucial step in creating a community that is both free from the harms that policing fails to solve and the harms caused by over-policing. The Police Reform Commission's Report "Decentering Police to Improve Public Safety" ("Report") offers community-based alternatives to avoid over reliance on police for emergency response. As the Report details, the Metropolitan Police Department (MPD) history of over-policing historically and continually disparately impacts the District's Black residents, and fails to make DC a safer place.[1] NVRDC supports the Report's overall goal to approach public safety from a new perspective and create new emergency responses

[1] Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission at 9-11 (April 1, 2021).

that do not needlessly criminalize and harm members of our community in crisis.

As an organization that serves crime victims, NVRDC believes they should not have to choose between accessing safety and interacting with law enforcement. People who experience crime often call 911 because they want to be safe, not because they want the police or criminal legal system involved. Calling 911 often pushes crime victims into engaging with entities and systems they may fear, do not trust, and that are not safe for them. The countless examples of Black and brown people who have been murdered or harmed by police responding to 911 emergency calls for safety and the cooperation between police and federal immigration authorities are two of many examples why victims in our community may not want to call 911. The lack of nonpolice emergency response options prevents crime victims from accessing critical resources following their victimization. To truly support the District's residents who experience crime, there must be safe, trained, nonpolice responses to emergencies.

We want to highlight that it is not enough to create emergency responses that involve specialized nonpolice personnel (e.g. behavioral health professionals and domestic violence counselors)—we must also shift the current policing philosophy that underpins crisis response. The goal should not be to replace one responder with another that acts in the same manner. A nonpolice response must be trauma-informed, culturally humilitive, and competently trained to respond appropriately in a way that does not re-traumatize survivors or force them into government and legal systems. Furthermore, we must be responsive to the underlying causes of violence, such as creating social structures that offer stable, affordable, and sustainable housing, and employment and educational opportunities.

NVRDC also supports the Commission's recommendations that address some of the circumstances that may lead to crime. It is critical to fund and expand community-based social services to support District residents experiencing crisis, including those with mental health conditions, substance use disorders, and those experiencing housing or financial instability. A punitive, carceral response to these systemic issues has not helped solve them, nor has it helped drastically reduce crime. Crime victims are not a monolith--their desires, goals, and needs vary. When developing alternatives to policing and the criminal legal system, it is important crime victims are involved in those conversations. While some victims still desire a punitive, carceral response to crime, it is often because there are currently few alternatives to the criminal legal system.

NVRDC joined the DC Coalition Against Domestic Violence's ("DCCADV") position statement from January 2021 on police response and domestic violence,[2] and NVRDC fully supports DCCADV's May 2021 response to the Report[3]. In particular, NVRDC wishes to highlight DCCADV's discussion of the need for increased funding for alternatives to police, such as

[2] The Intersection of Police Response and Domestic Violence in DC (January 22, 2021).
[3] A Survivor Centered Approach: Response to the Recommendations of the Police Reform Commission (May 4, 2021).

domestic violence advocates,[4] to ensure programs can actually fulfill a first responder role. The District must invest in sustainable resources. We cannot ask advocates to do the work with less funding than police historically have received and continue to receive. Nonpolice response programs need enough funding to pay their responders a livable wage and to ensure a commitment to robust, thorough training. Paying first responders a livable wage with benefits will decrease turnover and allow responders to engage in this work for a longer time, thereby creating consistency and building trust within the community.

Additionally, NVRDC wishes to emphasize DCCADV's recommendation that DC must have BIPOC-led restorative justice programs that are survivor-centered, community-based, and wholly unaffiliated with the criminal legal system. Not only is this critical for domestic violence survivors, as DCCADV discusses, but also for victims of any kind of crime. As an organization providing crisis counseling and intervention, case management, advocacy, and legal assistance to victims of crime, we know that they deserve options beyond engaging the criminal legal system. It is insufficient to employ nonpolice responses to crisis, if there are not also community-based programs that promote healing and accountability in the wake of such crises. Such programs should include restorative justice options and processes for communities experiencing violence--with community circles that involve communities, victims, and those who have caused harm.

B24-94 "Bias in Threat Assessments Evaluation Amendment Act of 2021" and B24-112 "White Supremacy in Policing Prevention Act of 2021"

Bill 24-0094 "Bias in Threat Assessments Evaluation Amendment Act of 2021" ("B24-94") and Bill 24-0112 "White Supremacy in Policing Prevention Act of 2021" both require studies to understand the extent of bias and white supremacist support among MPD actions and personnel.

NVRDC supports both bills and their efforts to gain more information and understanding of how to prevent and respond to bias and hate, especially in the criminal legal system. However, there need to be concrete steps for how the information gathered in these studies are used. For example, Bill 24-0094 states that the Office of the Attorney General will conduct a study to understand if MPD engaged in biased policing and, if so, make recommendations on how to prevent future bias in threat assessments. We believe the bill must go a step further and create a mechanism for those recommendations to be reviewed and implemented. It is not enough to acknowledge that a problem exists and suggest recommendations. For these studies to be truly useful in protecting District residents from harm from police, then there must be concrete action taken based on the results of these studies to bring about change within MPD.

B24-107 "Metropolitan Police Department Requirement Of Superior Officer Present At Unoccupied Vehicle Search – No Jumpout Searches Act of 2021"

[4] As NVRDC discussed in its testimony for B24-75, Expanding Supports for Crime Victims Amendment Act of 2021, NVRDC believes there must be victim support roles in community response to all kinds of crime, not solely domestic violence..

NVRDC supports Bill 24-0107 and its effort to create accountability around searches of unoccupied vehicles. This bill prohibits officers from conducting searches of unoccupied vehicles unless a superior officer is present, body-worn camera is on, and the superior officer gives verbal authorization for a search. The bill further would allow a vehicle owner to sue a police officer for failing to follow these requirements. NVRDC particularly supports this provision; as many testified at the May 20, 2021 hearing, having an enforcement and accountability mechanism is crucial in addressing the harms caused by police in our community.

B24-213 "Law Enforcement Vehicular Pursuit Reform Act of 2021"

NVRDC believes Bill 24-0213 is a positive step in ending dangerous, unwarranted police action in the form of unnecessary vehicle chases and unsafe pursuit tactics. This bill recognizes that police engage in harmful behavior that runs counter to principles of public safety. We encourage the Council to adopt a private right of action as part of this Bill as is in Bill 24-0107.[5] If an officer engages in an unnecessary pursuit of a vehicle in a non-emergent situation, and that pursuit results in harm to third parties or to the individual being pursued, there must be an instrument to hold the officer accountable. Those who are injured and the family members of those who die from these dangerous and unlawful police practices should have the ability to sue an officer who disobeys the law. It is not enough to pass laws purporting to reform police action with no ability to ensure that officers follow those laws.

Conclusion

Thank you Chariman Mendelson, Councilmember Allen, and committee members for your work to ensure effective, just, and accountable policing for survivors who engage with the criminal legal system, but also your work in finding alternatives to that system and long-terms solutions and alternatives to how the District responds to crime and creates public safety. NVRDC enthusiastically supports the Police Reform Commission's recommendations to decenter police in public safety, and shift resources to nonpolice responses. NVRDC believes that the four bills discussed in this testimony are positive steps towards holding police accountable. However, these types of laws are only a small step; accountability is not enough. We must end our police-centric approach to public safety, and invest in resources that prevent violence and that respond to crises with specialized knowledge and care. This is why NVRDC also provided oral and written testimony supporting B24-0075, "the Expanding Supports for Crime Victims' Amendment Act of 2021," in which NVRDC discussed the importance of having trained crime victim advocates for survivors of all kinds of crime. Finally, we understand this shift will not happen immediately and for reform in the short-term, we urge the Council to ensure that funding allocated to policing in the District be both transparent and informed by the community and include community-based priorities. Thank you again, I am happy to respond to your questions.

[5] In addition to supporting accountability through injunctive relief put forth in Bill 24-0107, NVRDC testified in its oral and written testimony regarding Bill 24-0075 that we strongly support injunctive relief as a mechanism for holding government actors accountable when they violate the rights of crime victims.

To: Committee on the Judiciary and Public Safety, Council of the District of Columbia

From: Yasmin Vafa and Rebecca Burney

Re: Rights4Girls Comments on the Recommendations of the D.C. Police Reform Commission

Date: May 28, 2021

Rights4Girls is a human rights organization dedicated to defending the rights of marginalized young women and girls in the U.S. Based in Washington, D.C., we work at the intersection of racial justice, juvenile justice, and violence against women and girls at the federal, state, and local levels, and engage in youth development, coalition-building, public awareness campaigns, research, and training and technical assistance. Over the past several years, we have been actively involved in the passage of multiple federal laws aimed at reforming systems to improve our response to marginalized girls and providing increased funding and services to survivors of sexual violence and exploitation. We have also worked at the national and local levels to shed light on the widespread criminalization of girls of color through the publication of reports like *The Sexual Abuse to Prison Pipeline: The Girls' Story* and *Beyond the Walls: A Look Inside D.C.'s Juvenile Justice System*.

We are committed to promoting youth engagement and advocacy through our series of youth workshops and sit on a number of local coalitions including the Youth Justice Project coalition, the D.C. Coalition to End Sexual Violence, and we co-lead the D.C. Girls Coalition with our partners at Black Swan Academy. In addition, in 2011, we co-founded the Girls at the Margin National Alliance—a coalition of over 200 national, state, and local organizations working across systems and disciplines to center the voices and experiences of marginalized young women and girls in policy conversations at the local, state, and federal levels.

In 2018, we published a report in partnership with the Georgetown Juvenile Justice Initiative entitled, *Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System*, that discusses the gendered pathways leading D.C. girls into the juvenile justice system and highlights the disproportionate impact our policies have on girls of color in the District. Some of the major findings in that report were: i) Girls' arrests in D.C. have increased 87% over the past decade; ii) 97% of girls committed to the Department of Youth Rehabilitative Services (DYRS) custody are Black; iii) 86% of arrests of girls in D.C. are for non-violent, non-weapons offenses; and iv) 60% of girls arrested in D.C. are under age 15.[1]

[1] Yasmin Vafa, Eduardo Ferrer, et. al, Beyond the Walls: A Look at Girls in D.C.'s Juvenile Justice System, Rights4Girls & Georgetown Law Juvenile Justice Initiative (2018).

In the report, *Decentering Police to Improve Public Safety: A Report of the D.C. Police Reform Commission*, the D.C. Police Reform Commission ("Commission") put forward a number of policy recommendations that center the voices of communities most impacted by policing in the District and allow us to reimagine what public safety should look like. Rights4Girls had the opportunity to engage with the Commission around issues of gender-based violence and the policing of girls in D.C., and we support many of their final recommendations. Today, we submit this testimony to highlight a few of the specific reforms that we think are most vital for girls in the District.

1. Crisis intervention and services for survivors of sex trafficking must be expanded. Police should be a gateway to services rather than a pathway to jail for those in the sex trade.

The sexual exploitation of youth is a major problem in the District of Columbia and it has only been exacerbated by the COVID-19 pandemic. We urge the Council to take immediate steps to ensure that survivors are provided with resources and supports. This includes scaling up funding to the Office of Victim Services and Justice Grants in order to expand community-based, 24-hour crisis responders with links to emergency shelter—with funds being prioritized for experienced and survivor-led service providers such as Courtney's House. These investments must also include changes to the 911 system and include special training for dispatchers as well as protocols for deploying specialized community-based crisis responders. We strongly support the Commission's recommendations to invest in resources for trafficking survivors and ensure that police who come in contact with survivors are diverting them to appropriate services rather than criminalizing their behaviors.

Trafficking is a major pathway into the juvenile justice system for girls and police often facilitate their journey to jail. In spite of the fact that the District has a "safe harbor" law that protects minors from being arrested for prostitution, youth are often arrested for behaviors stemming from their exploitation. We agree with the Commission that the overcriminalization of these survivors for status offenses and normal adolescent responses to trauma must end. The Metropolitan Police Department (MPD) and external oversight bodies must hold police officers accountable for fulfilling their duty to refer trafficked youth to service providers. Arrests should be a genuine last resort. In addition, given the continuum between child sex trafficking and adult prostitution, the Council should amend this portion of the law (D.C. Code Sec. 22-2701(d)) to require police officers to refer a person of any age to services if they disclose that they are a victim of sex trafficking or that they seek support to safely exit the sex trade. Sexual exploitation does not end on a person's 18th birthday and many adults in the sex trade first entered the sex trade as minors. Unfortunately, police officers are rarely sympathetic to adult survivors.

When asked about their experiences with MPD officers, one youth said that she "hasn't had any positive experiences since she turned 18." Another young girl described an instance where MPD officers handled her so aggressively at school that they dislocated her shoulder. Youth report that MPD are rarely sympathetic to those over 18 who are engaged in the sex trade even if they are being exploited. As one young woman said, police are "not understanding that

trauma makes youth not trusting or reluctant to cooperate." All of the youth we spoke with described numerous negative experiences with police ranging from harassment to physical assault, and felt that police should be required to have regular trainings to help address this behavior.

The number one point that trafficking survivors have expressed to us is that the police need culturally competent, survivor-led trainings about the signs and underlying dynamics of sex trafficking, as well as training to address the racism, sexism, and implicit bias in the police department. Trafficked youth and especially girls have told us that police often do not understand the dynamics and trauma associated with trafficking and especially familial trafficking. The interactions between the MPD officers and trafficking survivors also demonstrate how vulnerable young people are often subjected to appalling, dehumanizing, and sometimes exploitative treatment by police officers due to stigma and victim blaming of those in the sex trade.

Sadly, this is a common trend throughout the country. A recent Nevada study on the interactions between police and commercially sexually exploited youth found that most of the survivors were arrested and transported to juvenile detention for processing rather than given services afforded to victims of a crime.[2] Numerous young people in the study experienced violence and threats from arresting officers and results of the study suggest that an officer's perception of the youth influenced how they were treated, with those who did not fit the narrative of a "perfect victim" experiencing far more negative police interactions.[3]

2. The Council must re-establish Police Free Schools because the presence of police officers in schools makes youth feel unsafe and hinders both learning and positive youth development.

We support the Commission and youth leaders across the city who have called for Police Free Schools and believe that we need to move away from a culture that criminalizes youth of color for normal adolescent behavior and shift to a culture that promotes accountability, safety and youth agency. Girls are often overlooked in critical conversations around the school-to-prison pipeline and the racial achievement gap in education. However, girls of color suffer from many of the same problems as boys of color and struggle with sexism, systemic poverty, racial bias, gender violence, and trauma. In particular, Black girls[4] are increasingly being referred to the juvenile justice system as a result of school discipline policies that criminalize them for normal adolescent behavior, for expressing themselves, or for minor misbehaviors that could be addressed within the school system and without a police response.

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[2] Alexa Bejinariu , M. Alexis Kennedy & Andrea N. Cimino, *"They said they were going to help us get through this ...": documenting interactions between police and commercially sexually exploited youth*, Journal of Crime and Justice (2020), p.12.

[3] *Id*.

[4] According to the 2018-2019 report on school discipline by OSSE, among those who were expelled, Black/African-American students make up 95 percent of the population even though they are only 67 percent of the entire student population. Thus, it is essential to look at the racial dynamics in D.C. and the impact disciplinary procedures have on Black girls. *State of Discipline: 2018-2019 School Year*, D.C. Office of the State Superintendent of Education, p. 1.

Girls of color and especially Black girls are often disciplined for dress code[5] or behavior violations that result from implicit and explicit gender bias on the part of teachers, administrators, and school resource officers.[6] They are also affected by additional factors such as sexual harassment and violence at or on the way to or from school, pregnancy, caretaking responsibilities, and undiagnosed learning disabilities that all contribute to truancy and school pushout.[7] Because schools can act as an important protective buffer for youth, exclusionary discipline renders girls especially vulnerable to abuse, sexual exploitation, and juvenile justice involvement.[8] Studies have shown that police in schools do not make Black youth feel safer[9] and the District must invest in creating school environments where students feel comfortable and supported.

Police officers are not equipped to handle trauma experienced by youth in D.C. and their involvement in altercations and routine disciplinary measures often escalate the situation. Youth need more counselors and social workers in schools who can help them work through any challenges they may be experiencing, not more police. Investments in socio-emotional supports and mental health are particularly important as youth begin to re-enter schools after a year filled with trauma due to COVID-19.

3. The city should adopt a developmentally appropriate approach to the policing of youth by decriminalizing status offenses, implementing more robust protections when applying *Miranda* rights to children, and training officers on adolescent brain development and how youth responses are impacted by racial bias and trauma.

We have worked extensively with girls of color in the District to help elevate their experiences and make sure that their needs are represented in policy decisions, while also providing the tools necessary for them to be their own advocates for change. One of the major concerns youth express is that police officers do not treat them with respect or understand that they are children. Among youth of color, there is often anger and frustration that behaviors that they are criminalized for are often considered "normal adolescent behavior" for their white peers. In D.C., our research found that Black girls are arrested at rates 30 times that of white girls and white boys.[10]

Both nationally and locally, girls are overwhelmingly involved in the juvenile justice system through non-violent and misdemeanor offenses.[11] Those arrests make up 86% of girls in the D.C.

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[5] *Dress Coded: Black girls, bodies, and bias in D.C. schools*, National Women's Law Center (2018).
[6] Monique Morris, *Pushout: The Criminalization of Black Girls in Schools* (The New Press, 2015), pp. 120-32.
[7] *Id*. at 49; Karen Schulman, Kayla Patrick, & Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls with Disabilities*, National Women's Law Center (2017), p. 1; Kelli Garcia & Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls who are Pregnant or Parenting*, National Women's Law Center (2017), p. 1.
[8] Morris, *supra* note 6, at 101; Francine T. Sherman & Annie Balck, *Gender Injustice: System Level Juvenile Justice Reform for Girls* (2015), p. 16; Kimberlé Crenshaw, Priscilla Ocen & Jyoti Nanda, *Black Girls Matter: Pushed Out, Overpoliced, and Underprotected*, African American Policy Forum and Center for Intersectionality and Social Policy Studies (2014), pp. 10, 24.
[9] Claire Bryan, *Police don't make most black students feel safer, survey shows*, Chalkbeat (Jun. 8, 2020).
[10] Vafa, *supra* note 1.
[11] *Id.*

juvenile justice system.[12] Girls are far more likely than boys to be arrested for status offenses such as truancy, curfew violations, and running away.[13] Often, these behaviors are in response to traumatic experiences, home instability, or feeling unsafe at school. Many of these issues derive from sexual exploitation or abuse.[14] In one study, three fourths of justice-involved girls reported that their first experience of abuse was at age 13,[15] making it unsurprising though alarming that arrests of 13 to 15-year-olds is a primary driver of girls into D.C.'s juvenile justice system.[16]

Girls are disproportionately arrested and detained for status offenses. Whereas girls only account for 15% of the juvenile detention population, they are 36% of youth detained for status offenses.[17] Truancy and running away are the two most common status offenses for which girls are arrested and both are often tied to experiences of violence. Research has shown that running away is a common response to escaping an abusive home or foster care placement, a natural response to trauma, or the result of trouble identifying safe adults.[18] Truancy is often due to girls' experiences of sexual violence, unidentified learning disabilities, pregnancy or parenting concerns, trouble with peers, and mental health challenges. Unfortunately, both truancy and running away make girls vulnerable to exploitation. Thus, it is imperative that the District respond to these behaviors with compassion, support, and resources and not involve the juvenile justice system.

Status offenses are only considered a law violation because of a youth's status as a minor and fail to consider normal adolescent responses to trauma and gender-based violence. Of all the recommendations put forth by the Commission, the decriminalization of persons in need of supervision (PINS) offenses and reinvestment in supportive services for youth will have the greatest impact on girls who come in contact with the juvenile justice system. We strongly encourage the Council to adopt the policies put forth by the Commission and the District of Columbia Juvenile Justice Advisory Group (JJAG).

Youth interrogations by police is another area in which the District has failed to account for the impact that systemic racism, trauma, and limited cognitive development has on young people. It is well documented that children cannot meaningfully understand their *Miranda* rights because their cognitive abilities are still developing. One study found that only 20% of youth adequately understood their *Miranda* rights and empirical evidence shows that sufficiently comprehending *Miranda* requires at least a tenth-grade reading level.[19] Anecdotally, we have had conversations with several youth who did not understand that police could use their statements against them even though they did not have an attorney or parent present. Thus, we support the Commission's recommendation to adopt more robust protections and procedures when applying *Miranda* rights

[12] *Id.* at 27.
[13] *Id*. at 7.
[14] Malika Saada Saar, Rebecca Epstein, et. al, *The Sexual Abuse to Prison Pipeline: The Girls' Story*, Rights4Girls, Georgetown Law Center on Poverty and Inequality, & Ms. Foundation (2015), p. 12.
[15] *Id*. at 7.
[16] Vafa, *supra* note 1, at 31.
[17] Rights4Girls, *The Sexual Abuse to Prison Pipeline* factsheet (2020).
[18] Vafa, *supra* note 1, at 8.
[19] Katrina Jackson & Alexis Mayer, *Demanding a More Mature Miranda for Kids*, D.C. Justice Lab & Georgetown Juvenile Justice Initiative (2020), p.1.

to youth. Police must use developmentally appropriate language when reading a child their *Miranda* rights and youth must have an attorney present in order to waive their rights.

The inability of children to fully comprehend their *Miranda* rights has disastrous consequences and often leads to wrongful convictions and severe dispositions. Nationally, children account for only 8.5% of arrests but account for nearly one-third of false confessions.[20] In D.C., where Black youth are disproportionately stopped, searched, and arrested by police, our current *Miranda* policy has racial justice implications as well. Decades of racialized policing, contemporary media coverage of police brutality against Black people, and personal experiences of police harassment and violence, shapes the views that Black youth have towards police. As a result, this "distrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of *Miranda* waivers."[21] Youth may waive *Miranda* simply to get out of the interrogation room or to end interactions with a police officer. Thus, *Miranda* warnings alone are not effective in limiting the coerciveness of a police interrogation.

Girls in particular would benefit from additional *Miranda* protections due to the excessive amount of trauma most have experienced prior to arrest and interrogation. Girls involved in the juvenile justice system experience adverse childhood experiences or ACEs at incredibly high rates. Further, system-involved girls experience more of these issues than their male counterparts with 45% of girls experiencing five or more ACEs.[22] Black girls, who represented 97% of newly committed youth to DYRS between 2007 and 2015, reported the highest rates of single and multiple ACEs.[23] Seventy-three percent of girls who end up in courts have histories of physical or sexual violence.[24] Girls in the juvenile justice system are more than four times more likely than boys to have been sexually abused.[25] Research has shown that when a child faces repetitive trauma and toxic stress, their brain develops behaviors necessary for survival. Over time, these behaviors biologically alter the brain and the parts controlling fear and anxiety grow while the parts controlling logic and critical thinking shrink.[26] Trauma not only makes youth more susceptible to health problems such as asthma, but it impairs cognitive development and the capacity to fully understand one's *Miranda* rights. Additionally, the coercive and aggressive nature of police interrogations can be triggering for girls who have experienced significant trauma or suffer from Post-Traumatic Stress Disorder (PTSD).

While there are limited studies on how girls are impacted by police interrogations and the likelihood of waiving *Miranda*, most of the research found no differences between males and females' understanding and/or appreciation of their *Miranda* rights.[27] However, justice personnel

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[20] *Id*.
[21] *Id*. at 2.
[22] Vafa, *supra* note 1, at 35.
[23] *Id*. at 36.
[24] Francine T. Sherman, *Pathways to Juvenile Justice Reform: Detention Reform and Girls Challenges and Solutions,* Annie E. Casey Foundation (2005).
[25] Saar, *supra* note 14, at 8.
[26] Nadine Burke Harris, *The Deepest Well: Healing the Long-term Effects of Childhood Adversity,* (Houghton Mifflin Harcourt Publishing Company, 2018); Deborah Lee Oh, et. al., *Systematic review of pediatric health outcomes associated with childhood adversity*, BMC Pediatrics (2018) 18:83.
[27] Barry C. Feld, *Questioning Gender: Police Interrogation of Delinquent Girls*, 49 WAKE FOREST L. REV.

describe significant gender differences while in the interrogation room. In one Minnesota study, police often described girls as "more likely to talk, less likely to invoke their rights."[28] One officer even stated that, "I don't think I've ever had a female refuse to talk to me. They always want to say something, even if it's a denial."[29] Police officers often ascribe negative attributes to girls in the juvenile justice system and view them as emotional, confrontational, manipulative, and verbally aggressive.[30] Trafficking survivors also report that officers refer to them using offensive language and racial slurs. Given the hostility girls in the justice system face, it is not surprising that they often have a greater likelihood to talk due to the presence of an authority figure and the power dynamics at play. These coercive factors make them less likely to invoke their *Miranda* rights as they try to cooperate with police officers.[31]

Given the tremendous amount of trauma that girls who are interacting with MPD have experienced, it is not surprising that police officers are ill-equipped to handle their significant mental health needs and would benefit from additional training. We support the Commission's recommendation that police officers should be trained on how to refer youth to appropriate resources as well as adolescent brain development and best practices for police engagement with youth. In order for MPD to fully support policies that decriminalize status offenses and change *Miranda* protections and procedures, officers must understand the science and reasoning behind these reforms.

At Rights4Girls, we believe it is imperative to address the specific needs of girls and survivors in the community who often come in contact with the MPD in order to best support them. As the Council makes difficult decisions about which of the Commission's recommendations should be legislated first, we encourage you to center the voices of youth in the District who have repeatedly said that police make them feel unsafe and want to be treated with the same respect and dignity as their white peers. Increased resources and supports for survivors of sexual exploitation and trafficking, eliminating police officers in schools, and requiring MPD to respond to youth in a developmentally appropriate manner are small but critical steps that the Council can take towards the goal of making the District safe for everyone.

We thank the Committee on the Judiciary and Public Safety for its commitment to supporting our city's most vulnerable youth and we look forward to continuing to work with the Committee to serve D.C.'s girls. Should members of the Committee have any questions regarding this testimony, please contact Yasmin Vafa, Executive Director, Rights4Girls at yasmin@rights4girls.org.

105(2014), p. 1087.
[28] *Id*. at 1100.
[29] *Id*. at 1095.
[30] *Id*. at 1104.
[31] *Id*. at 1100.

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Bread for the City
Written Testimony Submission

Hearing on Recommendations of the D.C. Police Reform Commission, and Bills B24-0094, B24-0107, B24-0112, and B21-0213

Joint Public Hearing of the Committee on the Judiciary & Public Safety
and the Committee on the Whole
May 20, 2021

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Bread for the City supports the Commission's general recommendations of both divesting from and decentering the MPD while simultaneously committing to a substantial investment in community infrastructure. We must both de-center the institution of policing *and* invest in community-centric programming to address public safety. When coupled together, these primary components of the Commission's recommendations begin to imagine a District where all residents can thrive.

The District must create and expand community-based services and resources in manner that meets community needs

Perhaps most relevant to our work as a direct services organization, Bread for the City ("BFC") can attest to the lack of a sufficient social safety net within the District. We are a private non-profit organization that works on behalf of and alongside D.C. residents living on low-incomes, predominately people of color. For the past 47 years, we've provided direct services by offering food, medical, legal, and social services to roughly 32,000 District residents. Rooted in our holistic, community-based view of public safety, we also serve our clients by helping them create an advocacy platform that fosters their ability to use their voices to demand a community that eliminates disparities in housing, healthcare, and the host of other socioeconomic disparities that people of color disproportionately experience.

Put simply, we at BFC know our communities are safest when their needs are met and they are allowed to thrive. Therefore, we highly endorse the Commission's recommendation that we build a broader set of public safety programs. As the Commission aptly states, a strong public safety net necessitates "culturally competent and easily accessible mental healthcare; treatment for

people struggling with substance use disorders; stable and affordable housing; and new models of community support and restorative justice."[1] By making significant contributions to our social service infrastructures – ones that are intentionally trauma-informed, anti-racist, and community-competent – we can meet the needs of the community with care instead of criminalization.

"Smarter and more effective policing"[2] is *not* a goal that we are willing to pursue

We were glad to see that the Commission was able to provide a set of many community-centric aspirations despite the dissenting opinions, like those of Commissioner Bennett. Beginning on pg. 190 of the "DC Police Reform Commission Report," Mr. Bennett states that he disagrees with several of the Commission's recommendations including the decrease to MPD's headcount and budget, capping unbudgeted police overtime pay, repealing the statutorily mandated minimum number of MPD personnel, and eliminating qualified immunity for police officers in civil litigation.[3]

BFC will not support any process for reforming the MPD that fails to *significantly* decrease MPD's headcount and budget. As we attested to last June, MPD has continued the legacy of traumatizing Black and brown people, administering racial segregation, upholding white supremacy, and enforcing the cruel economic order that deprives poor and working-class people of the livelihoods they deserve. The time for funneling more and more of our money into the hands of the MPD – whether it be for recruiting and hiring more police, training police, or providing police with equipment like body cameras – is over. The police have demonstrated over and over that they are neither effective at implementing public safety for all nor are they willing to be held accountable to the public they allegedly protects. In light of this legacy, it is time to put matters of public safety into the public's hands.

Both BFC and the public at large have made it clear that we want to see less time and resources spent tending to the harm, trauma, and loss caused by the police. We want to spend more time and resources implementing programs that support Black, brown, and poor residents of D.C. in ways that will allow them to heal and flourish in their community. Many of the recommendations by the Commission support these dual goals, specifically by drastically cutting the budget of the MPD and intentionally reallocating those funds to community-based programming.

[1] District of Columbia Police Reform Commission, *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission* at 52 (April 1, 2021), available at https://dccouncil.us/police-reform-commission-full-report/ [hereinafter "DC Police Reform Commission Report"].
[2] *Id.,* at 190.
[3] *Id.,* at 190-192.

The Washington
LEGAL CLINIC
for the Homeless
A Voice for Housing and Justice

D.C. Council Committee on Judiciary and Public Safety- Police Reform Commission Report Recommendations Hearing-May 20, 2021

Testimony of Brittany K. Ruffin, Affordable Housing Advocacy Attorney, The Washington Legal Clinic for the Homeless

Good afternoon, Councilmembers. I am Brittany K. Ruffin, Affordable Housing Advocacy Attorney at the Washington Legal Clinic for the Homeless. Since 1987, the WLCH has envisioned and worked towards a just and inclusive community for all residents of the District of Columbia—where housing is a human right and where every individual and family has equal access to the resources they need to thrive. Unfortunately, our vision is still that—a vision. Currently, there is no right to housing; and it is hard for the vast majority of our vulnerable residents to focus on thriving when basic survival has become such a challenge.

We commend the thoughtfulness and intention of the *DC Police Reform Commission Report* to address many community issues and concerns by focusing on ways to decenter policing while improving public safety. We applaud the inclusion of the content in "Section Two: Strengthening the Safety Net and Decriminalizing Poverty" and the contemplation of what *actually* makes people safe. Too often, there is an absence of consideration for fundamental human needs in discussions around public health and safety. Access to food, water, shelter, and other fundamental physiological human needs should be the primary step in addressing community safety. Unfortunately, too many DC residents, largely Black and brown, are forced to navigate their survival with a lack of those basic resources. The fact that those same marginalized communities are also the most surveilled and policed is no coincidence. DC must broaden its definition of safety and begin to address its failure to meet the underlying needs of its residents. Housing is safety. Health is safety. Food is safety. Without universal access to those things as a right, not a luxury, there is no public safety. Specifically, this testimony will emphasize our unwavering support for recommendations that: prioritize and increase funding to address DC's affordable housing and homelessness crises, minimize displacement by placing guardrails on DC's development plans, and decriminalize and legalize conduct of survival relating to poverty.

The District of Columbia continues to have an affordable housing crisis that threatens thousands of its residents. In particular, there is a dearth of deeply affordable housing in DC—the category that is

needed the most. Despite this fact, deeply affordable housing for those at 0-30% AMI continues to be the most underproduced in DC. The pandemic and its resulting state of economic instability for so many has only exacerbated the need for more deeply affordable housing creation.

DHCD is the agency that controls and administers the Housing Production Trust Fund. The Housing Production Trust Fund is *the* fundamental source for creating and preserving affordable housing in D.C. Despite a statutory requirement that 50% of the HPTF be allocated to build and preserve housing that is affordable to households at up to 30% AMI, DHCD fails to meet the allocation. When a significant pot of money meant for housing creation for the lowest-income residents is constantly allowed to be unused and disregarded *despite* statutory prioritization and without consequence, DC govt has to reevaluate its purported commitment to deeply affordable housing and its residents who struggle the most to live here. DC Council must assert greater oversight over HPTF project selection and funding, ensuring that the HPTF money is being allocated as intended.

The pandemic has emphasized existing community needs and racial disparities. In DC, the majority of COVID-19 deaths thus far have been of Black residents. Eighty-eight percent (88%) of those experiencing homelessness in DC are Black—a pre-pandemic statistic. More than 20,000 Black residents were displaced from DC between 2000 and 2013. Undoubtedly, many more have been displaced in this last decade as housing affordability in the city continues to decrease. Currently, Black residents account for nine out of ten of the extremely low-income households (0-30% AMI) in D.C. Those same households are severely rent-burdened, spending over half of their income on housing. The median Black household in DC has an income at the 40%AMI. The data is clear that not prioritizing deeply affordable permanent housing creation and failing to place guardrails on DC's luxury and business development will mean further displacement and trauma for Black DC residents.

As mentioned in the Police Reform Commission Report, differing definitions of homelessness make it hard to know the true population of those experiencing homelessness in DC. Hundreds of individuals and families are undercounted by not including those who are not on the street or receiving services through DC shelters. One can simply look at the discrepancy between the Point-In-Time count and the number of students that DCPS reports as experiencing homelessness. If DC refuses to acknowledge the true need of housing and services for those experiencing homelessness, the need can never be met. While it is clear that DC is not meeting the actual needs of all who are experiencing homelessness. DC, however, does not lack adequate resources to meet the housing needs. DC lacks political will and a real commitment to address such inequities.

DC must pair an acknowledgment of the failure to meet resident needs with necessary legislative changes that allow people to attempt to meet their own survival needs without punishment. Temporary abode, public space, and panhandling offenses should be repealed. People who are lacking basic necessities and striving to feed themselves and families should not face a risk of incarceration for doing so. While decriminalization is a better option than categorizing survival behaviors as crimes, legalization should be the preferred option. DC should not be creating punishments and illegalizing conduct related to basic survival and attainment of human needs. There is no legitimate purpose for levying a fine against an already under-resourced individual. A fine only serves as confirmation of a continued lack of concern and acknowledgment for the reality of the struggles that so many DC residents face. People with no permanent housing that are sleeping outside and/or living in encampments should not be penalized for desiring a place to rest and locating one. Instead of simply

contemplating which crimes of poverty should be decriminalized, the goal of the Council should be to eliminate unnecessary contact with law enforcement altogether through a rejection of the reliance on enforcement as an answer to the city's inability to meet the most fundamental needs of its residents. Minimizing harm and trauma while investing resources to meet the permanent housing needs of DC's most vulnerable residents should be the ultimate goal.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser

Public Roundtable on

The Recommendations of the Police Reform Commission
B24-94, the "Bias in Threat Assessments Evaluation Amendment Act of 2021"
B24-107, the "Metropolitan Police Department Requirement of Superior Officer Present At Unoccupied Vehicle Search – No Jumpout Searches Act of 2021"
B24-112, the "White Supremacy in Policing Prevention Act of 2021"
B24-213, the "Law Enforcement Vehicular Pursuit Reform Act of 2021"

Testimony of
Chris Geldart
Acting Deputy Mayor for Public Safety and Justice

Before the
Committee of the Whole
Chairperson Phil Mendelson
and
Committee on the Judiciary and Public Safety
Charles Allen, Chairperson
Council of the District of Columbia

May 20, 2021
9:30 AM

Good morning, Chairman Mendelson, Chairperson Allen, members and staff of the Committees, and everyone watching the hearing virtually. I am Chris Geldart, Acting Deputy Mayor for Public Safety and Justice. I appreciate the opportunity to testify before the Committees today regarding the recommendations of the Police Reform Commission and the four proposed bills.

In July 2020, the Council enacted legislation that established a 20-person Police Reform Commission. Its mission was to examine and provide recommendations on the following issues related to policing: the role of sworn and special police officers in District schools; alternatives to police responses to incidents, such as community-based, behavioral health, or social services co-responders; police discipline; the integration of conflict resolution strategies and restorative justice practices into policing; and the provisions of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020.

In April 2021, the Commission issued a report with almost 300 recommendations on a wide variety of issues, including substantial operating changes related to District agencies, the Council, and the judicial system. Generally speaking, the far-reaching recommendations can be broken out into three categories:

1. ***Recommendations the Administration generally supports and is already moving towards implementing.*** For example, as Mayor Muriel Bowser announced on May 17, the District is launching a pilot program with the Department of Behavioral Health, Metropolitan Police Department, and the Office of Unified Communications to shift 911 calls for emergency mental health services from an automatic police dispatch to a dispatch protocol that includes a mental health crisis response team.

2. ***Recommendations that require substantially more community or stakeholder engagement.*** The Commission made a wide variety of recommendations on schools, ranging from investments in plants to Safe Passage programs. However, all of this was done without meaningful feedback from school principals, educators, or staff. My office has worked with the Deputy Mayor for Education to conduct a survey of DCPS principals and gauge their thoughts on the Commission's proposal to eliminate MPD's School Safety Division, a unit that does important work to support and protect District students and schools. I should note that the Commission took the drastic position that this should be done during the current fiscal year which, for the viewers at home, means by September 30, 2021. To be clear, this outreach to school principals, educators, Parent-Teacher Associations, and parents is the bare minimum of work that should have been done before making such an extreme recommendation.

3. ***Recommendations that are unreasonable and unsupportable.*** The Commission recommended the city reduce its police force by <u>at least</u> the rate of attrition for the next five years. MPD's police force is currently around 3,600 officers – that is the lowest level in more than 20 years. If the Council adopted the Commission's police reduction proposal, the District would have less than 2,000 police officers by 2026. While this proposal is supported by those who want to abolish the police department, it is extremist, irresponsible, and lacking, as a whole, community support.

We believe it is imperative that Councilmembers – and the public – carefully review all the Commission's recommendations and understand their implications. It is also critical that to ensure the legitimacy of policy decisions that will have major impacts on our residents' safety, these recommendations are fully communicated to the public. While a single hearing on the issue is a good start, it requires much more intensive outreach to the communities most impacted by the decisions. As part of that commitment to transparency and engagement, we will be publicly releasing the results of our DCPS principals' survey once they're compiled.

* * *

I will briefly address the four bills before the Committees today.

Bias in Threat Assessments Evaluation Amendment Act

This bill requires the Office of the Attorney General (OAG) to conduct a study to determine if MPD has engaged in biased policing in threat assessments of First Amendment assemblies between 2017 and January 2021. The bill includes a detailed analysis of MPD's response to each assembly; a determination of biased policing based on race, color, religion, sex, national origin, or gender; and recommendations based on those findings.

Although I defer to Attorney General Racine on the operational impacts on his office to implement this legislation, as an initial matter, it will be an exhaustive task. Over the past four years, MPD has facilitated more than 4,200 First Amendment assemblies. The vast majority of these demonstrations were facilitated safely and peacefully for all those involved. They represent the normal situation for any First Amendment gathering: People of all backgrounds and opinions come to the District, make their voices heard, and go home safely.

We understand the terrible events of January 6, 2021 invite many questions. Indeed, Chief Robert Contee has already testified before Congress three times this year to address questions related to the insurrection at the Capitol. And although there is discussion about the U.S. Capitol Police not having been prepared for the event, it is well acknowledged that the District and MPD assumed a posture of maximum preparedness for the week of January 3rd. It is critical to understand that under federal law, MPD is prohibited from entering the Capitol complex or its grounds to patrol, make arrests, or serve warrants without the consent or request of the Capitol Police Board. (2 U.S. Code § 1961). Therefore defending the Capitol was not part of our planning. On the morning of January 6, MPD was prepared to support its federal partners on DC streets during a First Amendment assembly that was held primarily on federal land, and to safeguard the city if the participants became violent after dark, while continuing to patrol and respond to calls for service throughout city neighborhoods.

In preparation for the anticipated demonstrations and the possibility of violence on city streets, MPD was fully deployed on 12-hour shifts the week of January 3rd, with days-off and leave canceled. Our federal partners each had their primary areas of responsibility: the U.S. Secret Service was focused on the security of the former President and the White House area, U.S. Park Police was focused on the Ellipse and the National Mall, and the U.S. Capitol Police had responsibility for the Capitol, including both the building and grounds.

At Mayor Bowser's request, and in advance of the scheduled demonstrations, mutual aid was requested from several area police departments, including Arlington County Police Department, Prince George's County Police Department, and Montgomery County Police Department for January 5 and 6. Additionally, MPD had discussions with the Maryland State Police and Virginia State Police on their ability to provide assistance on January 5 and 6, if needed. More than 300 members of the DC National Guard were deployed on District streets providing traffic control and other services to allow MPD to support the First Amendment assembly and continue to provide services to DC neighborhoods.

I want to reiterate that while we do not oppose an independent review of MPD practices that may lead to positive change, neither this past year nor prior history indicates disparate preparation for First Amendment assemblies. Although ill-informed media coverage has attempted to contrast responses to the January 6th Insurrection and the few riots declared last summer, this coverage paints all the events and the many responding law enforcement agencies with too broad a brush. MPD had far more resources available in response to the January 6 Insurrection than to the events of last summer. I believe this bill would unnecessarily divert scarce public safety resources away from the critical work that MPD and the OAG are doing every day to keep the city safe.

MPD Requirement of Superior Officer Present at Unoccupied Vehicle Search

This bill requires MPD adhere to certain requirements when conducting searches of unoccupied vehicles. In order to search an unoccupied vehicle, a superior officer must be present, all officers present have their body-worn cameras (BWC) on, the reason for the search must be recorded on the BWC, a report must be prepared about the results of the search, and the owner of the vehicle must be notified of the reason for the search, and would have the right to sue the officer in their individual capacity for any violation of this law.

Chief Contee has spoken at length with Councilmember Trayon White, who proposed this legislation, and has heard his concerns and those of other community members. In response, he has been reviewing and revising MPD's strategies related to illegal guns and gun violence. Chief Contee has shifted resources to focus on an intelligence-based policing approach to identify, interdict, and interrupt violent offenders within the District. The goal is to build strong criminal cases on violent offenders to ensure those repeat offenders cannot continue to endanger our communities. Officers working on these issues have already begun receiving enhanced training.

To address the specifics of the bill, MPD policy already requires that all officers equipped with body-worn cameras activate their BWC when conducting a vehicle search. The unoccupied search, however, could apply in a variety of circumstances, for example, when MPD impounds a vehicle and hold it for a search warrant. It is unclear if the bill would apply in that setting. Certainly, once a judge issues approval for a search, the approval of a superior officer would be redundant. This requirement is also going to be increasingly challenging given reductions in police staffing. It would instead make sense to require pre-approval from a supervisor or watch commander, but not that they must be present at the search.

The proposal also requires *all officers* present during a search have their BWCs activated. However, some MPD officers who do not regularly engage the public, such as detectives, are not equipped with BWCs. Department directives do already stipulate that *all BWC-equipped officers* activate their BWCs for searches of person or property, including vehicle searches. Since more than 3,200 members have BWCs, it would seem sufficient to require that at least one member be equipped and all BWC-equipped officers activate it.

The bill also proposes that the vehicle owner have the right to sue individual officers not adhering to this law in their individual capacity. First, a piecemeal approach to officer liability – or the liability of any government worker – is not good policy or practice. Second, officers are not operating in their individual capacity, but rather as agents of the District of Columbia. As such, they are subject to internal investigation and progressive disciplinary action for violations of policy, and the Department will hold them accountable.

White Supremacy in Policing Prevention Act of 2021

This bill requires the Office of District of Columbia Auditor (ODCA) to conduct an assessment of ties between MPD and white supremacist or other hate groups. It also requires ODCA to recommend reforms to MPD policy, practice, and personnel to better detect and prevent ties to hate groups.

Chief Contee is at the forefront of working to address this issue head on. MPD has commissioned the Police Executive Research Forum, a respected independent organization, to conduct a yearlong organizational health assessment to review MPD's policies and practices related to diversity, inclusion, and equity in multiple areas, including race, gender, and sexual orientation, in functional domains such as recruiting and training, supervision, promotional processes, EEO processes, and internal investigations. External to the agency, the review will focus on the delivery of police services and ensuring unbiased policing efforts. The review will include a specific focus on extremism, hate speech, and white supremacy – assessing processes and practices to eliminate the impacts of each within the Department.

This bill requires ODCA to review things like the social media or gatherings of officers, while also respecting their First Amendment rights, which is challenging. Many others are looking at this issue and have not yet found a way to balance this mandate for current employees. One critical challenge is that while the bill defines hate groups and white supremacy, the US government does not have a list identifying domestic hate groups or white supremacist groups. It would be very helpful to hear the Auditor's thoughts on how its office would balance the First Amendment issues that are inherent in this legislation.

While we share a common goal of ensuring extremism has no cover in MPD, we believe it is premature and unnecessary to legislate this process at this time.

Law Enforcement Vehicular Pursuit Reform Act

This bill would prohibit law enforcement officers from engaging in vehicular pursuits of an individual operating a motor vehicle, unless the officer reasonably believes that:

- The fleeing suspect has committed or attempted to commit a crime of violence;
- The pursuit is necessary to prevent an imminent death or serious bodily injury; and
- The pursuit is not likely to put others in danger of death or serious bodily injury.

The bill also prohibits MPD from engaging in conduct like caravanning, paralleling, ramming, and discharging a firearm from a moving vehicle.

While the bill largely mirrors current MPD policy, I need to flag three elements in this bill that would hinder public safety goals.

First, the outright ban on discharging a firearm at or from a moving vehicle is too restrictive. MPD's policy prohibits officers from firing their guns either at or from a moving vehicle unless it is being used to conduct a vehicle ramming attack. This is a situation where a perpetrator deliberately rams, or attempts to ram, a vehicle at a crowd of people with the intent to inflict fatal injuries. We saw this situation happen on April 2, 2021, when U.S. Capitol Police Officer William Evans was killed after a man intentionally drove his vehicle into a security barricade. In New York City in October 2017, a man in a rented truck drove onto the Hudson River Park bicycle path, running over cyclists and runners, killing eight people and injuring 11 others. Additionally, on August 12, 2017, Heather Heyer was killed in Charlottesville, Virginia after a driver intentionally drove into a crowd of peaceful demonstrators. This exception to MPD's policy is unfortunately necessary in those instances when an officer is facing a terrorist using a vehicle to try to kill pedestrians and the officer may have no other tool at their disposal than their gun to stop the violent act. Similarly, tactics such as roadblocks and ramming may be necessary to stop a terrorist attack. Second, the bill's prohibition on caravanning, the practice of more than two law enforcement vehicles following each other "in relative single file," is important in some cases to prevent endangering opposing traffic flow. Finally, the prohibition on paralleling may need further clarification so as not implicate the practice of monitoring and responding to potential bailout situations where suspects have abandoned and run from a vehicle.

While these tactics are not used frequently, certain circumstances merit their use to protect the public. I ask the Council to not move forward with these prohibitions and give careful consideration of MPD's current policy, which is already very restrictive.

* * *

In closing, I appreciate this opportunity to discuss public safety in our city. I look forward to continuing to work with our communities and the Council on our shared goal of making the District safer for everyone.

I look forward to your questions.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
POLICE COMPLAINTS BOARD
OFFICE OF POLICE COMPLAINTS

JOINT PUBLIC HEARING:

The Recommendations of the D.C. Police Reform Commission

B24-0094, The "Bias in Threat Assessments Evaluation Amendment Act of 2021"
B24-017, The "Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search-No Jump-out Searches Act of 2021"
B24-0112, The "White Supremacy in Policing Prevention Act of 2021"
and
B24-0213, The "Law Enforcement Vehicular Pursuit Reform Act of 2021"

TESTIMONY OF

MICHAEL G. TOBIN,
EXECUTIVE DIRECTOR
OFFICE OF POLICE COMPLAINTS

May 20, 2021

Good morning Chairman Allen and members of the Committee on the Judiciary and Public Safety. I am Michael G. Tobin, the executive director of the Office of Police Complaints (OPC). I appreciate the opportunity to provide testimony regarding police reform in the District of Columbia.

The mission of OPC is to improve community trust in the District's police departments through effective civilian oversight over the Metropolitan Police Department (MPD) and the District of Columbia Housing Authority Police Department (DCHAPD). OPC's mission of improving public trust has arrived at an important crossroad not envisioned by its current statutory authority.

Today my allotted time for speaking will be utilized to address the recommendations of the Police Reform Commission (PRC), and more specifically the provisions of the PRC report as they relate to the Police Complaints Board (PCB) and OPC.

The OPC and PCB were created to provide an effective and efficient review mechanism to oversee the "extraordinary powers" of the District's sworn police officers. At the time of their creation some twenty years ago it was considered a significant step forward in police oversight. The enabling statute created by the DC Council was the next step in the evolution of a long history

of oversight in the District that extends back to World War II and even the Civil War. On August 15, 1861. President Lincoln appointed 5 community members as Commissioners of Police for the Metropolitan Police Board of the District of Columbia. This was part of the same Congressional Act of August 6, 1861 that established MPD as the first regular federal police force for DC and created our first civilian oversight agency, the Metropolitan Police Board. By interpretation of these documents, it is reasonable to say that civilian oversight of MPD in the District began with the official establishment of MPD in 1861.

Since 1861 many iterations of oversight have come and gone in the District. Today we have an oversight agency that is primarily investigative in its function and limited in its jurisdiction, and a civilian board that has little authority to provide meaningful community input into police policy, procedure, discipline, and training. In fact, one of the "civilian" board members of the PCB tasked with providing community input is a sworn police member that is subordinate to and appointed by the police chief.

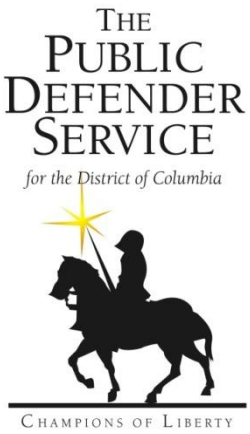
The PRC has made several recommendations to update the authority and jurisdiction of the PCB and OPC to reflect the current needs and desires of our community. It is time to give these recommendations serious consideration. It is time to move civilian oversight of MPD to the next iteration. In a sense, many of the recommendations are simply returning our system of police oversight to what it was intended by Congress in 1861. When President Lincoln appointed the first civilian board it was granted far greater responsibility and oversight than most boards in the country currently have. The first five Commissioners of Police appointed to the Metropolitan Police Board did not have any of the jurisdictional or authority limitations that currently restrict civilian oversight to a nominal existence.

Our current system of oversight is in dire need of improvement, and many of the PRC recommendations address these deficits. If the current process is not working properly, it would be beneficial to examine it more closely and determine what procedural, staffing, jurisdiction, and other modifications can be implemented to strengthen the existing system.

In reviewing the PRC report recommendations currently under consideration, there are multiple areas that will be beneficial to improving oversight. A partial compilation of the recommendations includes:

- The Council and Mayor should expand the authority of and rename the Police Complaints Board, which will continue to oversee the Office of Police Complaints, as the District of Columbia Police Commission.
- The Council and Mayor should expand the jurisdiction, authority, and resources of the Office of Police Complaints.
- The Council and Mayor should make permanent the Comprehensive Policing and Justice Reform Act Second Emergency Amendment Act of 2020's revision of the DC Code that "all matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable."
- The Council and Mayor should revise the Freedom of Information Act (FOIA) law and explicitly provide the public with access to officer's personnel records pertaining to misconduct allegations and complaints.

OPC will support this Committee in its effort to implement meaningful and lasting improvements to police oversight in our community. I thank the Committee for its time and we will be happy to answer any questions you may have.



TESTIMONY
OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

Concerning

The Recommendations of the D.C. Police Reform Commission,
Bill 24-107, the Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search – No Jumpout Searches Act of 2021
Bill 24-112, the White Supremacy in Policing Prevention Act of 2021, and
Bill 24-213, the Law Enforcement Vehicular Pursuit Reform Act of 2021

Presented by

Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COMMITTEE OF THE WHOLE
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

May 20, 2021

Avis E. Buchanan, Director
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

Thank you for the invitation to testify at this public hearing. I am Katerina Semyonova, Special Council to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia.

PDS commends and deeply appreciates the work of the Police Reform Commission (PRC). The PRC produced thorough and transformative recommendations for reform based on evidence, data, history, and lived experiences. The PRC conducted its work with transparency and broad engagement with District residents and organizations. The recommendations of the PRC span nearly the entire scope of policing in the District. PDS has supported many of the recommendations made in the PRC's report in prior testimony, for instance in advocating for non-police responses to community needs through a CAHOOTS style program[1] and in PDS's testimony on the Comprehensive Policing and Justice Amendment Act of 2020.[2] PDS's testimony today will focus on the PRC's recommendations surrounding strictly limiting police presence at schools, citation in lieu of arrest, consent searches, and accountability for MPD through the Office of Police Complaints and the release of body worn camera footage. PDS will also offer testimony on the White Supremacy in Policing Prevention Act of 2021.

PDS supports the recommendations of the PRC concerning police in schools including the need to radically transform a system where the PRC found that "youth of color in particular do not feel safe in educational spaces where they are interacting with a system of surveillance, control, and punishment that generally views Black and Brown

[1] HN23-0131, Committee on the Judiciary and Public Safety Public Oversight Roundtable on Exploring Non-Law Enforcement Alternatives to Meeting Community Needs, December 17, 2020.

[2] PDS testimony on the Comprehensive Policing and Justice Amendment Act of 2020, October 15, 2020. Available at: https://lims.dccouncil.us/downloads/LIMS/45506/Hearing_Record/B23-0882-Hearing_Record1.pdf

people as a threat."[3] As noted by the PRC, "schools populated mainly by students of color have more police officers, as well as more metal detectors, K-9 units, and military-grade weapons" and the large "number of officers has led to an increase in school-based arrests, in which Black students are arrested at more than twice the rate of White students."[4] Clients that PDS represents at special education meetings and disciplinary hearings are traumatized by being arrested and escorted out of buildings in front of their teachers and peers. School should be a safe place for all students, but the prevalence of officers and the fear of arrest means that students are afraid to attend school if they are in abscondence from a shelter house or out of compliance with court ordered conditions of release. For instance, if a 15-year-old absconds from a shelter house in order to return home, they will stop going to school for fear of being arrested. This fear then feeds a cycle where the student falls further behind academically, disconnects from peers and trusted adults, and has more unstructured out of school time which increases the likelihood that the young person could be arrested for a new offense. Particularly since the District knows that chronic school absences correlate with juvenile and adult system involvement for youth, the Council should take all possible steps to support, rather than disincentivize, school attendance. It should adopt the PRC's recommendation to "prohibit MPD from serving warrants, detaining, or arresting youth on campus or at school-related events for non-school-based offenses or custody orders."[5] Through funding for behavioral health programs, restorative justice, and other initiatives, the

[3] Report of the Police Reform Commission at 67.

[4] Report of the Police Reform Commission at 68.

[5] Even where the custody order is premised on a prior school-based event, arrest at school should be prohibited.

Council should also seek to minimize school-based circumstances that could lead to arrest and require schools to embrace more developmentally appropriate approaches for student behaviors that present challenges.

With respect to citation in lieu of arrest, the PRC recommended that the Council "replace the District's presumption-of-arrest standard with a presumption-of-citation standard by amending DC Code 16-1031, 23-581 and 23-584 to require either verbal warnings or citations in lieu of arrest ("field arrests" in the DC Code) in all circumstances enumerated in MPD's Executive Order 20-011, which addresses changes in MPD's citation release order due to the COVID19 pandemic."[6] The PRC explained that: "MPD officers should refrain from making an arrest unless doing so (1) reasonably advances the goal of public safety or addresses significant and chronic community disorder; and (2) the situation cannot be resolved in a less intrusive manner." The PRC also recommended that MPD establish and enforce a "most effective, least intrusive response" that requires a problem-solving approach to illegal activity.[7]

Arrests have adverse, and often severe, consequences for the arrested person and harm community-police relationships. Custodial arrests can terrify individuals, family members, and bystanders and lead to the use of force by officers and perpetuate an escalating pattern of trauma and fear on the part of residents and use of force on the part of police. Custodial arrests and the accompanying fingerprinting that happens during booking also endanger immigrant members of the community who may be targeted for immigration enforcement as a result of the use of national fingerprint databases during

[6] Report of the Police Reform Commission page 116.

[7] Report of the Police Reform Commission at 117.

booking. When fingerprints are taken by MPD, they are automatically sent to numerous federal databases, such as the FBI database and various immigration related databases, leading to a de facto notification to immigration authorities. Given that about 30 percent of arrests result in no papering decisions, lives are shattered by accusations that do not even rise to the level of warranting prosecution in the eyes of prosecutors. To protect immigrant residents, all fingerprinting should be delayed until after any conviction. Zero-tolerance arrest policies also fail from the public safety perspective: they increase fear and do nothing to drive down the level of serious crime.[8]

Under current law, MPD has narrow authority to perform "field arrests" which while called "arrests" do not involve taking an individual into custody but rather result in a ticket to appear at the MPD district between 15 and 90 days later to complete the booking process and either a forfeiture of collateral or a subsequent notice to appear in court. Field arrest, or what the PRC terms, citation in lieu of arrest, is the safest way to minimize harmful and traumatizing interactions between residents and police if a court process must in fact be started. DC Code § 23-584 provides the authority for MPD to perform "field arrests" for OAG offenses that are designated as eligible for field arrest by the chief of police.[9] The offenses deemed eligible for field arrest include digging for bait in Rock Creek Park, and various harbor regulations. While some more common offenses appear on the list such as disorderly conduct, the statute is outdated and fails to create a broad public policy rationale for dealing with interactions between police and residents in a manner other than arrest.

[8] Report of the Police Reform Commission at 118.

[9] MPD, PD Form 61-D, Violation Citation. Available at: https://go.mpdconline.com/GO/SOP_05_02.pdf

Citation release is another existing alternative to arrest and courthouse release, but unlike field arrests, it requires custodial arrest and the completion of the booking process at MPD prior to release with a notice to appear in court at a later date. Currently, citation and release has been somewhat expanded by the invocation of section (c) of DC Code § 23-584 which allows prosecuting authorities to expand the use of citation and release if the Chief Judge declares the existence of a condition that significantly impairs the functioning of Superior Court.[10] Under the pandemic-related changes, some additional offenses are eligible for citation and release and certain bars to citation and arrest have been lifted. But the changes currently in place do not go far enough – they do not address field arrest, and they leave too much discretion in the hands of prosecutors and police.

PDS agrees with the PRC recommendation that reform should start with a presumption of citation. The Council should amend the DC Code to require citation in lieu of arrest for a broad array of charges. The Council should also expand the offenses for which MPD may perform a field arrest or a citation release and narrow the criteria that may be used by officers to determine that someone is ineligible for those options.

PDS also supports the PRC's recommendations regarding ending all consent searches. As noted by the Police Reform Commission, "residents, especially in over-policed communities, rarely feel free and safe to make a voluntary choice." MPD's requests for so-called consent searches are inherently abusive, degrading, and coercive and are overwhelmingly targeted at Black residents. PDS urges Councilmembers to review video footage of Salehe Bembury, a Black man who was stopped by officers from the Los Angeles Police Department in daylight, on a busy street in Beverly Hills for

[10] Executive Order, 20-011, Coronavirus 2019 Modification to Citation Release Criteria, March 17, 2020. Available at: https://go.mpdconline.com/GO/EO_20_011.pdf

jaywalking. Mr. Bembury is an executive for Versace clothing company and when he was approached by two police officers for jaywalking he told them: "I am super nervous."[11] When an officer asked Mr. Bembury whether he could pat him down – run his hands all over his body, put his hands in Mr. Bembury's pockets, Mr. Bembury said: "**you can do whatever you need to do, I'm just nervous**." This is not consent. This is terror. And if the terror is there for a Black man who is a clothing company executive stopped in a busy public area in daylight, imagine that terror for someone who is young, or who has a prior record of arrest, or who is unemployed, or who is stopped at night, or in a deserted area. Adding a warning to that situation does nothing to allay a Black resident's fears of being shot and killed by the police. People cannot make an informed and voluntary choice whether to waive or assert their rights when they are just trying to survive the encounter.

The availability of consent searches provides an incentive for police to make discriminatory stops. The ACLU-DC's analysis of NEAR Act data for 2020 shows that MPD stops Black residents at vastly higher rates than their representation in the population and more frequently than they stop white residents. Black residents made up 74.6 percent of all *reported* MPD stops, despite comprising 46% of the District's population. Black people comprised more than 90% of the searches that resulted in no ticket, warning, or arrest.[12] In contrast only, white people accounted for only 5.5% of

[11] Salehe Bembury was stopped by the Los Angeles Police Department on October 1, 2020. LAPD released the officer's body worn camera footage. It is available at: https://ktla.com/news/local-news/versace-shoe-designer-says-he-was-racially-profiled-in-beverly-hills-video-shows-him-frisked-searched-police-say-its-for-jaywalking/

[12] Racial Disparities in Stops by the Metropolitan Police Department: 2020 Data Update, ACLU Analytics & ACLU of the District of Columbia. Available at: https://www.acludc.org/en/racial-disparities-stops-metropolitan-police-department-2020-data-update

searches that ended without an arrest, ticket, or warning.[13] The data shows that MPD continues to use stops and searches – likely consent searches – to subject Black residents to aggressive and unconstitutional policing.

Other jurisdictions have banned consent searches. In 2002, the New Jersey Supreme Court banned police from seeking consent to search lawfully stopped drivers or vehicles, for example drivers stopped for speeding, unless law enforcement had reasonable articulable suspicion of criminal wrong doing.[14] The Minnesota Supreme Court held that under the state constitution, police could not extend a valid traffic stop to request consent to search when the request was not supported by independent reasonable articulable suspicion.[15] Rhode Island legislated the same reform.[16] The Council should follow these precedents and the recommendation of the PRC to ban all consent searches.

PDS also wants to stress the importance of transparency and accountability in police reform. The PRC recommendations include changes to access to body worn camera footage and to the structure, scope, and function of the Office of Police Complaints. Expanding defense counsels' and the public's access to disciplinary information, body worn camera footage, legal settlements, and other information is a critical part of police reform. Pending complaints and sustained findings that include officers' names and narratives of incidents should be readily accessible on OPC's

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[13] *Id*.

[14] *State v. Carty*, 170 N.J. 632, 790 A.2d 903 (N.J. 2002).

[15] *Minnesota v. Mustafaa Naji Fort*, 660 N.W.2d 415 (Minn. 2003).

[16] Rhode Island Statute § 31-21.2-5(b) "No operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."

website.[17] Body worn camera footage should also be broadly available, at a minimum, in all instances where the civilian subject of the footage consents to its release. Defense access to this information creates a fairer trial and court process by allowing judges and jurors to use this information in making credibility determinations on issues of guilt or pretrial detention..

As recommended by the PRC, the Council should amend the Office of Police Complaint's authorizing statute to allow anonymous complaints. There is no legitimate reason for limiting OPC investigations to those instances where a complainant is available to pursue the complaint, has a contact address or phone number, or where a complainant feels comfortable interacting with government agencies and is free of concerns about police retaliation. The unnecessary barriers of complainant submission and complainant participation in addressing police misconduct serve only to shield police from accountability. Witnesses or those who possess video should be able to anonymously submit it to OPC and OPC investigations should proceed accordingly. Given the widespread availability of video evidence, any pretense that OPC *needs* a witness to proceed should be removed from the statute. OPC should also be charged to seek patterns of misconduct, by performing random checks of individual officers' body worn camera footage and by examining the conduct of units such as those that use jump out tactics despite official claims to the contrary. OPC must have easy, searchable access to all body worn camera footage, the ability to show that footage to individuals as part of

[17] Other jurisdictions including New York have increased the accessibility of police complaint and investigation information. *See* Ashley Southall, 323,911 Accusations of N.Y.P.D. Misconduct Are Released Online, New York Times, August 20, 2020. Available at: https://www.nytimes.com/2020/08/20/nyregion/nypd-ccrb-records-published.html.

investigations, and sufficient staff in order to perform its oversight functions. Nor should OPC investigations be limited to what is alleged by a complainant or to narrow legalistic definitions of abuse – OPC should investigate abusive conduct, bias, use of force, and deviations from the MPD sworn law enforcement code of ethics, which should also be updated.[18] At the conclusion of its investigations, OPC should be authorized to impose discipline.

PDS also strongly supports Bill 24-0112, the White Supremacy in Policing Prevention Act of 2021, and makes several suggestions to strengthen the bill. The focus of the auditor's investigation of white supremacy within MPD should not be limited to examining whether MPD officers have "ties to white supremacist or other hate groups." The audit should also look at whether individual officers espouse "white supremacist views or views that indicate a disregard for the constitutional rights or humanity of individuals or the community that they elect to serve." As currently drafted, the focus on affiliation with white supremacist and other hate groups will leave out examination of officers who hold and espouse hateful and racist views but who cannot be proven to be affiliated with local or national hate groups. Racist and white supremacist attitudes by police are harmful and dangerous to communities and individuals regardless of whether the DC Auditor can prove an officer's group affiliation. [19] Expanding the mandate to also

[18] MPD General Order 201.36, Metropolitan Police Department Sworn Law Enforcement Officer Code of Ethics. The Code of Ethics provides, for example, that officers will have "no compromise for crime" and engage in "relentless prosecution of criminals" in contradiction of, or lacking nuance surrounding the aims of diverting individuals from the criminal legal system instead of relentlessly pursuing prosecution. The Code of Ethics also fails to meaningfully address bias, prejudice, and hate and officer responsibilities to report biased and abusive policing by fellow officers.

[19] *See* Rachel Kurzius, D.C. Police Officers Fist Bumped A Proud Boy After Clashes In Front Of White House, DCist, July 5, 2019. Available at: https://dcist.com/story/19/07/05/d-c-police-officer-fist-bumps-a-proud-boy-after-clashes-in-front-of-white-house/. It is unclear whether fist bumping a member of the Proud Boys would sufficiently show a tie to a white supremacist group for the purposes of this bill, but it would at

address officer disregard for the constitutional rights of the individuals and communities they serve will also ensure that officers who, for example, glorify the violation of constitutional rights by wearing t-shirts that announce "let me see that waistband, jo" are identified.[20] It would also allow for the investigation of online behavior, like that uncovered in the Customs and Border Patrol where a Facebook group with more than 9,000 participants joked about the deaths of individuals crossing the border.[21] Finally, PDS urges the Council to make the final report and any interim findings of the DC Auditor available to the public and to identify by name any officers found to have affiliations with white supremacist or hate groups, or those who hold white supremacist views and support the violation of constitutional rights. Defense counsel should be able to use this information in trials and other proceedings where police, often as the only witnesses, profess that actions or statements were made by the accused.

PDS appreciates the work of the Council and of the Police Reform Commission. The report of the Police Reform Commission presents in many respects a roadmap for improving the lives of all District residents especially those most harmed by centuries of racist and abusive policing. PDS welcomes your questions and offers support for fashioning the legislation.

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a minimum show an affinity for the group's views and should be investigated and reported. Broader language in the bill would ensure the inclusion and investigation of this conduct.

[20] Monique Judge, DC Cop Under Investigation for Wearing Shirt With KKK Symbol While on Duty, The Root, July 28, 2017. Available at: https://www.theroot.com/d-c-cop-under-investigation-for-wearing-a-shirt-with-a-1797354445

[21] A.C. Thompson, Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes, Pro Publica, July 1, 2019. Available at: https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes. Zolan Kanno-Youngs, 62 Border Agents Belonged to Offensive Facebook Group, Investigation Finds, New York Times, July 15, 2019. Available at: https://www.nytimes.com/2019/07/15/us/politics/border-patrol-facebook-group.html

Office of the District of Columbia Auditor

Written Testimony of

The Hon. Kathy Patterson

D.C. Auditor

prepared for the

Council of the District of Columbia
Committee on the Judiciary and Public Safety
and the
Committee of the Whole

Public Hearing on
The Recommendations of the Police Reform Commission

May 20, 2021
9:30 a.m.

Virtual Platform
The John A. Wilson Building
1350 Pennsylvania Avenue N.W.
Washington, DC 20004

I am pleased to offer testimony for the joint hearing of the Committee on the Judiciary and Public Safety and the Committee of the Whole on the recommendations contained in the report of the D.C. Police Reform Commission, ***Decentering Police to Improve Public Safety***, published April 1, 2021.

On March 23, 2021, the Office of the D.C. Auditor released a report prepared for us by The Bromwich Group LLC and Steptoe & Johnson LLP, The Metropolitan Police Department and the Use of Deadly Force: Four Case Studies 2018-2019. The report details the officer-involved fatalities of four young Black men: Jeffrey Price, Jr., D'Quan Young, Marqueese Alston, and Eric Carter. The review was designed to evaluate the conduct of the Metropolitan Police Department (MPD) officers involved in the incidents and the MPD internal affairs investigations that followed to determine if they followed existing law, MPD policy, and best policing practices, and to assess the oversight by the Use of Force Review Board (UFRB) that reviews serious uses of force.

The report built on a review of the Department's policies and practices on use of force prepared by The Bromwich Group for ODCA in 2016. That review found that MPD and its overall policies on use of force "continues to be consistent with best practices in policing" and with the provisions of the earlier Memorandum of Agreement with the U.S. Department of Justice. We also identified deficiencies in use of force investigations that needed correction.

The four case studies published in March documented serious lapses in MPD's investigation of the 2018 and 2019 uses of deadly force. We note that "weaknesses identified in our 2016 report have not been remedied and, indeed, have grown substantially worse" while MPD has appeared "to resist or be unconcerned with remedying them." We found that MPD failed to comprehensively review the events leading up to the four fatalities and to fully explore the policy, tactical, and training issues they raised.

We recommended:

- Comprehensive investigation and analysis of use of force incidents including actions by all officers leading up to the use of force and any and all opportunities for de-escalation.
- Enhanced training for investigators who handle serious use of force cases.
- Requiring the UFRB to provide specific recommendations on training, policy, and best practices.
- Public release of both the Internal Affairs Division final report and the UFRB's resulting conclusions on use of force investigations.

Two of these major recommendations are similar to recommendations of the Police Reform Commission and the remainder of this testimony will provide additional details on those issues: the importance of de-escalation and the need for transparency generally in police investigations. Underlying each of these is the overarching finding of our 2018-19 case study report and an upcoming 2020 report: the excessively narrow focus of MPD use of force investigations.

De-escalation

The Commission's Recommendation 21 is as follows: "To fulfill its obligation under DC Code 5-107.02(b)(3) and (4), which require training on use of force, MPD should reinforce the importance of critical decision-making, avoiding escalation, and using force only if necessary, reasonable and proportional." The commission specifically recommended that MPD use the Integrating Communications, Assessment and Tactics (ITAC) training developed by the Police Executive Research Forum.

In our case study report issued in March, Recommendation 10 focused on the importance of de-escalation noting that "IAD investigators should explore the possibilities for de-escalation in every investigation and in every interview of an officer engaged in a serious use of force." The team of experts investigating the officer-involved fatalities on behalf of ODCA found that MPD officers were justified in their use of force in the three instances in which individuals were fatally shot because in each case there was an imminent threat to life and safety. The experts also included in each case that additional actions could have been taken that might have led to a different outcome. In the May 9, 2018, death of D'Quan Young the Bromwich/Steptoe team found that the off-duty officer, James Lorenzo Wilson III, failed to make any attempt to de-escalate the situation that unfolded.

The ODCA report notes that MPD officers "are also governed by the duty to de-escalate situations: to take all reasonable steps to avoid the use of any type of force, including deadly force." MPD's de-escalation policy, incorporated in 2016 as a central element in the overall use of force policy, states:

> All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to defuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques.

Further, the ODCA report notes, "the de-escalation requirement is the first principle listed under MPD's use of force regulations" reflecting "the primacy of de-escalation and its overarching applicability to situations in which the use of force may be necessary."

D'Quan Young encountered Officer Wilson when the officer was off duty and walking from his car to a get-together at a home on 15th Street NE. Young initiated a conversation, Wilson did not respond, and a confrontation ensued, captured not by body-worn cameras since the officer was off duty but by stationery cameras at an adjacent recreation center. Though Young initiated a conversation, the officer maintained contact by following Young from the street to the sidewalk. "Though Mr. Young initiated the encounter, Officer Wilson escalated it." And "at no point is there any evidence that Officer Wilson tried to walk away or otherwise show an intention to withdraw from engaging with Mr. Young," the report notes. "Further, in none of his subsequent statements to investigators did Officer Wilson state that he identified himself as a police officer in an effort to encourage Mr. Young to stand down."

As the two young men faced each other on the sidewalk Mr. Young pulled a gun from his waistband. As they backed away Mr. Young fired once, and, as he retreated Officer Wilson fired "numerous rounds" at Mr. Young as he continued to back away, and subsequently fired two additional shots from behind a car while Mr. Young was on the ground. While finding that Officer Wilson's use of deadly force was justified, the expert reviewers found that the officer should have been held accountable for failing to attempt to de-escalate the situation. And they found that the Internal Affairs investigation "should have fully explored the possibilities for de-escalation, addressed the issue in its report" and provided background on the situation for consideration by the UFRB.

The Bromwich/Steptoe report for ODCA: "We agree that the use of deadly force by Officer Wilson–in response to Mr. Young drawing, pointing, and shooting his pistol–was justified, but we disagree with the conclusion that Officer Wilson's actions taken as a whole were consistent with MPD policy. We believe his failure to make any effort to de-escalate the situation violated MPD's policy, which required de-escalation when feasible (as it as here.) The investigation should have explored the de-escalation issue and the UFRB should have addressed it. Neither of those things happened."

Returning to the Police Reform Commission's recommendation on de-escalation and Police Executive Research Forum (PERF) training that incorporates de-escalation tactics, the issue that presents itself is what actions MPD should take to ensure that what is currently embodied in written policy is actually practiced in the field? We have recommended that the Internal Affairs and UFRB review of use of deadly force encompass a thorough review of the full context when force is used, in order to identify whether and what discipline and additional training is warranted. Those investigations, though, are after the fact and before the fact adherence to policy is the better goal.

Transparency

In its Recommendation 9, the Police Reform Commission asked the Mayor and Council to "explicitly provide the public with access to officers' personnel records pertaining to misconduct allegations and complaints." The report quotes a WNYC News survey of the states on public access to police disciplinary records and found such records "public" in 12 states, "public in some situations" in 15, and "confidential" or "mostly confidential" in 23. The Commission notes, "It categorized police disciplinary records in DC as 'confidential' and 'mostly unavailable.' Since then more states including California and New York have made some or all disciplinary records available to the public. The District should become one of the growing number of jurisdictions where police disciplinary records are public."

As the basis for the recommendation, the Commission quotes President Obama's Task Force on 21st Century Policing, that "Building trust and nurturing legitimacy on both sides of the police/citizen divide is the foundational principle underlying the nature of relations between law enforcement agencies and the communities they serve."

In their recent report for ODCA, as noted, the Bromwich/Steptoe team reviewed the use of force investigations by MPD's Internal Affairs Division and the oversight provided by the Use of Force Review Board, focusing on the four officer-involved fatalities that took place in 2018 and 2019. We are concluding work, now, on the investigation of the first of two 2020 officer-involved fatalities and will produce reports on each of those cases. The report on 2018-19 cases recommended that the Department make public both the Internal Affairs Division's final investigative report on uses of force, and the Use of Force Review Board's conclusions after reviewing the IAD reports.

The ODCA report notes that the lack of public disclosure of the findings of use of force investigations constitutes an information gap and that "leads to a lack of public confidence in MPD's investigations, and can lead to public speculation and erroneous allegations of misconduct." The report published in March and the one forthcoming on the death of Deon Kay in 2020 are critical of the department's very limited review of the incidents. We call for far more comprehensive investigations and more and better specialized training for those conducting the use-of-force investigations. Our recommendation on public disclosure is also aimed at improved investigations:

> Disclosure in some form of the Final Investigative report will create powerful internal incentives for those investigations to be competently and thoroughly conducted and rigorously reviewed because there would be some public accountability for the MPD entities and personnel responsible for those matters. The release of MPD's findings would enhance the credibility of its work, thus raising the level of the public's trust.

When asked to review and comment in writing on the recommendation in the March ODCA report on the four case studies, Police Chief Robert J. Contee III wrote in a March 15, 2021, letter: "MPD agrees with all of the report's recommendations and will begin working on implementation immediately. We are targeting implementation of all recommendations by the end of 2021."

Subsequently, however, during his confirmation hearing on March 25, 2021, Contee was asked again about releasing use of force reports to the public. He responded: "I think that that's something I'm open to … I'm certainly open to it. I am. Because I think that again, this situation came out as a result of the auditor's report. I just need to talk to my team about the best way to do that. I think my goal is to work toward yes."

Given the specific recommendation on use of force investigative reports in the ODCA report and the overall emphasis on transparency with regard to MPD officers and discipline issues in the Police Reform Commission report, the issue of department transparency going forward is ripe for further discussion.

Following are suggested questions the Council Committees may wish to ask Chief Contee during the May 20, 2021 joint hearing based on the two policy areas reviewed here.

Suggested questions for Chief Contee

- The recently published case studies of MPD's use of deadly force in 2018 and 2019 by the D.C. Auditor found failures on the part of MPD officers to follow current policy that requires that members to "defuse use of force situations with de-escalation techniques." What steps will you take to ensure that all officers in all situations seek to defuse situations with use of de-escalation techniques? Will you, per the Police Reform Commission recommendation, engage with PERF and use the organization's ICAT training?

- In your March 15, 2021, letter to the D.C. Auditor on the report on 2018 and 2019 officer-involved fatalities, you said you agreed with all of the recommendations made in the report, including the recommendation to make Internal Affairs and Use of Force Review Board findings public. You appeared to walk back from that commitment in your confirmation hearing. Please clarify: will MPD make future use of force reports by Internal Affairs and the UFRB public?

- Also on the issue of transparency, the Police Reform Commission recommends providing the public with access to officers' personnel records pertaining to misconduct allegations and complaints, something that is occurring with greater frequency across the country, including in California and New York. Will you make discipline records public?

I hope this information on the recent work by ODCA is useful to the Committees. Please feel free to let me know if you have questions or if there is other related information we might be able to provide.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

May 20, 2021

Chairman Phil Mendelson
Councilmember Charles Allen
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Hearing on the Recommendations of the D.C. Police Reform Commission and Bills Related to the Metropolitan Police Department

Dear Chairman Mendelson and Councilmember Allen:

Thank you for holding a hearing on the recommendations of the Police Reform Commission (Commission) and on the "Bias In Threat Assessments Evaluation Amendment Act of 2021," the "Metropolitan Police Department Requirement of Superior Officer Present at Unoccupied Vehicle Search – No Jumpout Searches Act of 2021," the "White Supremacy in Policing Prevention Act of 2021" and the "Law Enforcement Vehicular Pursuit Reform Act of 2021." I write to provide my continued support for the Council's efforts to ensure policing in the District is equitable, safe, and effective, and to support the Police Reform Commission's call that we take a holistic approach to creating and protecting public safety in the District of Columbia.

The Police Reform Commission was established by the Council to examine policing practices in the District and provide evidence-based recommendations for reforming and revisioning those practices. It was comprised of 20 individuals, including a representative of my office. Although the Office of the Attorney General (OAG) did not vote on the individual recommendations, I am proud that OAG contributed to the important conversations that helped shape these recommendations.

The Commission's report offers an important framework for thinking about public safety in the District—both what public safety means and how to achieve it. At base, the Commission has recommended that the District reduce the need for police involvement by investing in strategies that strengthen communities and address the root causes of crime, including by ensuring access to quality schools in which students and their families feel supported; providing pathways to safe and permanent housing; improving access to behavioral health and substance use issues; and expanding and supporting violence interruption programs. I have long believed that protecting public safety requires thinking creatively and broadly about how to address residents' needs and have developed initiatives, such as OAG's violence interruption, restorative justice, and truancy prevention programs, that help reduce the need for police intervention and criminal justice system involvement. I look forward to continuing to work with the Council, our law enforcement partners,

and other District agencies to operationalize the important concepts embodied in the Commission's report.

I also want to thank the Council for considering legislation that will help ensure that policing practices in the District are safe and equitable, for example by ensuring police only engage in vehicle pursuits when they are necessary for the protection of public safety. High speed vehicle pursuits are extremely dangerous, both to officers and the public. Data on police pursuits between 1996 to 2015 demonstrate this danger. During this period, an average of approximately one person died each day as a result of a police vehicle pursuit. More than a third of those killed were bystanders, and approximately one percent of them were police officers.[1] Given these dangers, it is accepted best practice that police officers not engage in a vehicle pursuit unless the pursuit is necessary for public safety and the need for it outweighs any danger it is creating. Indeed, MPD's current general order reflects these principles, and legislation that codifies these restrictions provides them with additional force. OAG looks forward to working with the Council on this bill, and the others being considered at the hearing, as they move through the legislative process.

Thank you again for creating and supporting the important work of the Police Reform Commission, and for your work to increase public safety and fairness in the District of Columbia. If you have any questions or otherwise wish to discuss, please contact Emily Gunston, Deputy Attorney General for Policy and Legislative Affairs, at Emily.Gunston@dc.gov or (202) 805-7638.

Sincerely,

Karl A. Racine
Attorney General for the District of Columbia

cc: Councilmember Anita Bonds
Councilmember Mary Cheh
Councilmember Vincent Gray
Councilmember Christina Henderson
Councilmember Janeese Lewis George
Councilmember Kenyan McDuffie
Councilmember Brianne Nadeau
Councilmember Brooke Pinto
Councilmember Elissa Silverman
Councilmember Robert C. White, Jr.
Councilmember Trayon White Sr.

[1] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Police Vehicle Pursuits, 2012-2013," May 2017, available at https://www.bjs.gov/content/pub/pdf/pvp1213.pdf.

ATTACHMENT P

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B24-0254, THE "SCHOOL POLICE INCIDENT OVERSIGHT AND ACCOUNTABILITY AMENDMENT ACT OF 2021"

B24-0306, THE "YOUTH RIGHTS AMENDMENT ACT OF 2021"

AND

B24-0356, THE "STRENGTHENING OVERSIGHT AND ACCOUNTABILITY OF POLICE AMENDMENT ACT OF 2021"

Thursday, October 21, 2021, 9:30 a.m. – 3:00 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html
https://www.facebook.com/CMcharlesallen/

On Thursday, October 21, 2021, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to consider Bill 24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021"; Bill 24-0306, the "Youth Rights Amendment Act of 2021"; and Bill 24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021". The hearing will be conducted virtually via Zoom from 9:30 a.m. to 3:00 p.m.

The stated purpose of B24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021", is to amend the Attendance Accountability Act of 2013 to require local education agencies to maintain additional data with respect to school-based disciplinary actions involving law enforcement, to amend the Revised Statutes of the District of Columbia to require the Metropolitan Police Department ("MPD") to maintain records for school-involved arrests by race, gender, age, and disability, and to require MPD to biannually publicly report certain data from school-involved incidents.

The stated purpose of B24-0306, the "Youth Rights Amendment Act of 2021", is to amend Section 16-2316 of the District of Columbia Code to make a statement made by a person under eighteen years of age to a law enforcement officer or any individual working at the direction of or as an agent of a law enforcement officer during a custodial interrogation inadmissible unless given a reasonable opportunity to confer with an attorney; and to amend Section 23-526 of the District of Columbia Code to prohibit consent searches if the subject of the search is under eighteen years of age.

The stated purpose of B24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021", is to amend the District of Columbia Auditor Subpoena and Oath Authority Act of 2004 to create the position of Deputy Auditor for Public Safety within the Office of the District of Columbia Auditor, to establish minimum qualifications for the Deputy Auditor, and to prescribe the duties, responsibilities, and powers of the Deputy Auditor; to amend the Office of Citizen Complaint Review Establishment Act of 1998 to rename the Police Complaints Board the Police Accountability Commission, to change the membership of the Commission, to expand the authority of the Commission to review policies, procedures, and trainings, and to provide input on the job description and qualifications of a Chief of Police, to rename the Office of Police Complaints to the Office of Police Accountability, to expand the authority Office's Executive Director to encompass complaints against special police, to receive anonymous complaints, and to continue administrative investigations of officers while the U.S. Attorney's Office determines whether to pursue prosecution against an officer; to amend the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to provide stipends to members of the Police Accountability Commission; to amend the Freedom of Information Act of 1976 so disciplinary records of officers with MPD and the D.C. Housing Authority Police Department can no longer be withheld from the public; to require the Chief of Police to submit department policies, procedures, and updates to training to the Police Accountability Commission for comment; and to require MPD to create a publicly accessible database for disciplinary records of officers.

The Committee invites the public to provide oral and written testimony. Public witnesses seeking to provide oral testimony at the Committee's hearing must thoroughly review the following instructions:

- Anyone wishing to provide oral testimony must email the Committee at judiciary@dccouncil.us with their name, telephone number, and if testifying on behalf of an organization, organizational affiliation and title, by the **close of business on Friday, October 15, 2021**.
- The Committee will approve witnesses' registrations based on the total time allotted for public testimony. The Committee will also determine the order of witnesses' testimony.
- Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals (and any subsequent representatives of the same organizations) will be allowed a maximum of three minutes.
- Witnesses are not permitted to yield their time to, or substitute their testimony for, the testimony of another individual or organization.
- If possible, witnesses should submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.

- Witnesses who anticipate needing language interpretation are requested to inform the Committee as soon as possible, but no later than five business days before the hearing. The Committee will make every effort to fulfill timely requests; however, requests received fewer than five business days before the hearing may not be fulfilled.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be emailed to the Committee at judiciary@dccouncil.us **no later than the close of business on Friday, November 5, 2021.**

ATTACHMENT Q

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B24-0254, THE "SCHOOL POLICE INCIDENT OVERSIGHT AND ACCOUNTABILITY AMENDMENT ACT OF 2021"

B24-0306, THE "YOUTH RIGHTS AMENDMENT ACT OF 2021"

AND

B24-0356, THE "STRENGTHENING OVERSIGHT AND ACCOUNTABILITY OF POLICE AMENDMENT ACT OF 2021"

Thursday, October 21, 2021, 9:30 a.m. – 3:00 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://dccouncil.us/council-videos/
http://video.oct.dc.gov/DCC/jw.html
https://www.facebook.com/CMcharlesallen/

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

i. Government Witnesses (approx. 9:30 a.m.)

1. Robert J. Contee, III, Chief, Metropolitan Police Department
2. Sarah Jane Forman, General Counsel, Office of the State Superintendent of Education

3. Michael Tobin, Executive Director, Office of Police Complaints
4. Kathy Patterson, Auditor for the District of Columbia
5. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

ii. Public Witnesses (approx. 12 p.m.)

Panel 1

1. Eduardo Ferrer, Policy Director, Georgetown Juvenile Justice Initiative
2. Emily Tatro, Deputy Director, Council for Court Excellence
3. Danielle Robinette, Policy Attorney, Children's Law Center
4. Gregg Pemberton, Chair, D.C. Police Union
5. Akosua Ali, President, NAACP D.C. Branch
6. Naïké Savain, Policy Counsel, D.C. Justice Lab
7. Caitlin Holbrook, Policy Advocate & Research Associate, D.C. Justice Lab
8. Nicholas Robinson, Senior Legal Advisor, U.S. Program, International Center for Not-for-Profit Law
9. Yonah Bromberg Gaber, Public Witness
10. Ahoefa Ananouko, Policy Associate, ACLU-DC

Panel 2

11. Miya Walker, Policy & Advocacy Manager, Black Swan Academy
12. Kristi Matthews, Director, D.C. Girls' Coalition
13. Salim Adofo, Chair, ANC 8C
14. Fritz Mulhauser, Co-Chair, Legal Committee, D.C. Open Government Coalition
15. Emory Vaughan Cole, II, Public Witness
16. Joy Masha, D.C. Freedom Schools Instructions & Administrative Supervisor, Freedom Schools, Children's Defense Fund
17. Eva Richardson, Staff Attorney, Disability Rights D.C., University Legal Services
18. NeeNee Tay, Co-Conductor, Harriet's Wildest Dreams
19. Makia Green, Co-Conductor, Harriet’s Wildest Dreams
20. Qiana Johnson, Co-Conductor, Harriet’s Wildest Dreams

IV. ADJOURNMENT

ATTACHMENT R

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Metropolitan Police Department

Public Hearing on

B24-306, the "Youth Rights Amendment Act of 2021,"

B24-356, the "Strengthening Oversight & Accountability of Police Amendment Act of 2021,"

and

B24-254, the "School Police Incident Oversight & Accountability Amendment Act of 2021"

Testimony of
Robert J. Contee III
Chief of Police

Before the
Committee on the Judiciary & Public Safety
Charles Allen, Chairperson
Council of the District of Columbia

Virtual Hearing
October 21, 2021

It is the mission of the Metropolitan Police Department to safeguard the District of Columbia and protect its residents and visitors with the highest regard for the sanctity of human life. We will strive at all times to accomplish our mission with a focus on service, integrity, and fairness by upholding our city's motto, Justitia Omnibus -- Justice for All.

Good morning, Chairperson Allen, members and staff of the Committee, and everyone watching this hearing remotely. Thank you for the opportunity to testify today on proposed public safety legislation. Before I discuss the specific bills, I would like to take a moment to emphasize some of the many core values and principles for public safety in the District that we share. We agree that the city needs to invest in people and neighborhoods to help prevent violence before it occurs. We agree that we should work with our kids early to teach them about effective conflict mediation and resolution. We agree that public safety may be best served if people who violate the law have real opportunities for rehabilitation. We agree that police accountability is essential to strong police-community relations. I know we all agree that violence – especially the current level of gun violence in the city – is unacceptable. And I sincerely hope you agree that our police force is full of committed, dedicated professionals who have earned the support of the community, and deserve support from the Council. I often hear from Councilmembers about the fantastic work you see in your communities every day. But while we agree on these core issues, in my testimony I will highlight several areas in two of the proposed bills with which I do not agree.

Youth Rights Amendment Act

The Youth Rights Amendment Act would provide that only an attorney can waive a youth's right to remain silent, and that any statements made during a custodial interrogation before an attorney waives these rights would be inadmissible in delinquency or criminal proceedings. In addition, it stipulates that any evidence obtained from a consent search of someone under 18 years of age would be similarly inadmissible.

In brief, this bill will further shield youth in the city from any consequences for delinquent or serious criminal acts and will significantly limit the ability of the juvenile or criminal justice system to deal with serious crimes committed by juveniles. While the language of the bill may seem simple and reasonable – requiring a developmentally appropriate Miranda warning or a warrant – it has far reaching implications.

As an initial matter, a custodial interrogation is generally interpreted by the court as words or actions that the police should know are reasonably likely to elicit an incriminating response from a person who is suspected to have committed a crime and who is under formal arrest, or whose freedom of movement has been restrained to the degree associated with a formal arrest. But this and the Miranda warning may become almost irrelevant if an attorney is the only individual who can waive a youth's rights to remain silent. A broad interpretation by a judge may lead to clear statements of culpability being suppressed, and a youth involved in violent offenses returning to the community with no additional supervision or support, possibly to commit offenses of escalating seriousness.

The elimination of consent is also going to have broader implications. For instance, rather than risk escalating criminal involvement, parents or other family members sometimes convince young people who have been involved in crime to surrender themselves and any weapons to

police at a station. In these scenarios, any statements and evidence may be suppressed unless the family had also arranged for an attorney and MPD had been able to get a warrant. Keep in mind that consent is not just a matter for people committing a crime. For example, robbery victims have provided MPD access to their Cloud account in real time, where the criminals were already uploading pictures and videos taken with the stolen phone. Under this bill, if the victim was a juvenile, this information incriminating the robber would be inadmissible.

Make no mistake, this Administration and I believe in the power and importance of rehabilitation. For decades, MPD has devoted significant resources to organizing and sponsoring countless programs in our communities to support youth, especially at-risk youth, to help develop relationships and foster opportunities for our kids. In the past few years, we have gone beyond youth programs to reexamining how we interact with youth during basic encounters. MPD worked collaboratively with the Office of the Attorney General (OAG) to improve our policies governing interactions with youth. The policy implemented in January 2020 expands diversion opportunities, limits handcuffing, and reduces incidents where officers take a youth into custody for an arrest. With this new policy and the support of an OAG hotline to discuss charging decisions before a youth is taken into custody, juvenile arrests dropped 38 percent in 2020.[1] MPD conducted training with all members in 2020 to support implementation of the new policy. In 2022, we plan to build on this foundation with training on Adolescent Development developed by Professor Kristen Henning, Director of the Juvenile Justice Clinic at the Georgetown University Law School.

The Administration is deeply committed to the belief that the rehabilitation of youth offenders is the best long-term strategy for their personal development and for enhancing public safety because the emphasis is on providing youth with the tools they need to successfully transition into adulthood. The District's juvenile justice agency, the Department of Youth Rehabilitation Services (DYRS) ensures all aspects of its operations—from staff training, to youth programs, to the agency's accountability mechanisms—support that philosophy. Over the past decade, the District's long-term commitment to this philosophy has resulted in an 81 percent reduction in the average daily population of committed youth. In 2011, DYRS had an average daily population of 1,006 committed youth. That has decreased steadily to an average daily population of just 196 committed youth in 2019.

What happens to youth who commit crimes but are not committed to DYRS? There are youth in our communities who are committing violent carjackings, robberies, sex assaults, and shootings. The Criminal Justice Coordinating Council recently looked at juvenile arrests during the pandemic. In reviewing two overlapping 12-month periods, they found in each cohort nearly 100 juveniles with three or more arrests during the year.[2] A substantial proportion of these arrests (42 percent and 58 percent of the two cohorts) were for violent offenses – robberies, assaults with dangerous weapons, and homicides. It is risky for the community and for the juveniles themselves to have a system that teaches them there are no consequences for actions that harm people. This not only allows but encourages escalating delinquent and criminal acts until they are

[1] The 38 percent drop in juvenile arrests exceeded the 34 percent decrease in adult arrests in the same time period.

[2] In the first cohort (April 1, 2020 – March 31, 2021), 89 juveniles were arrested three or more times, with 42% of the arrests being for violent offenses. In the second cohort (July 1, 2020 – June 30, 2021), 96 juveniles were arrested three or more times, with 58% of the arrests being for violent offenses.

committing violent offenses and potentially seriously injuring or killing themselves or others. Who does this help? The victim? The community? The youth? I don't believe it helps anyone.

This bill will make it exceedingly difficult to ensure that youth who are committing serious crimes are held accountable and get the support they need to redirect their lives. Our community members are invested in our youth, but they are also tired of the violence that too many juveniles commit with impunity. In the past 22 months alone, we have arrested 24 juveniles for homicide. In 2021, we have arrested 78 juveniles for carjackings – four of them more than once. When we have credible evidence that they committed the crimes – from their own statements or surrendered weapons – we cannot dismiss this evidence and allow them to continue to endanger the community under the theory that they are not responsible for either their actions or their words. I urge the Council to take no action on this bill.

Strengthening Oversight and Accountability of Police Amendment Act

As the Chief of Police, I am committed to high standards of accountability for myself and everyone who works for me. And make no mistake, there is a strong network of accountability surrounding this Department. We are accountable to elected officials, including the Mayor, the Council, and Advisory Neighborhood Commissioners. And each of these officials is accountable to the District residents who elect them. The Department and its members are also accountable to the District's Office of Police Complaints, the DC Auditor, and the Inspector General. We are held accountable through civil litigation. As individuals, MPD members can be and have been prosecuted for criminal misconduct. And above all of this, from every officer on the street to the Chief of Police, we answer to the community every day. Whether we are attending a community meeting, answering a phone, or simply walking a block, the public frequently and vocally holds us accountable for the actions of all of our members.

So when I say the proposed bill goes too far, it's not because I don't want accountability. It is because it treats our officers, the overwhelming majority of whom serve our community faithfully, unfairly. It is because it will bog the Department down in endless bureaucracy that will prevent the agency from effectively and efficiently serving the city. And it is because it does not protect the privacy interests of everyone who is victimized by crime or chooses to work with the Department.

Officers

The requirement for a comprehensive personnel database to be made public means that much of an officer's personnel record – from discipline to training and commendations – for the length of their career would be open to public inspection. No other public employees are subject to this level of scrutiny. Not the firefighters or EMTs who have access to the homes of sick residents. Not the teachers or social workers who work with our students and make decisions about families, youth, and seniors. Not the staff of correctional facilities.

All of these employees have a tremendous impact on the lives of our residents, especially when they are vulnerable. And sometimes, members of their professions also make mistakes or violate the public trust. But their entire professional lives have not been opened for public inspection. Their families and their homes are not going to bear the brunt of information in the hands of people who may target them. Several public officials in DC, including members of this Council, have been targeted for harassment or threats in their homes. And perhaps that is the

price we pay for our high ranking jobs. However, lower level employees should not be subjected to these same conditions. They are – and should be – held accountable for their actions in their professional capacity, but there should be some limits that allow them and their families to continue to function as private individuals. If their personnel information is going to be open for public inspection, then let it apply to all District government employees, just like the public database of all employee salaries.

The proposed amendment to the DC Freedom of Information Act (FOIA) also violates the privacy of complainants, victims, and civilian witnesses by eliminating the normal privacy exemptions under DC FOIA. In their place, the proposed legislation allows "the home addresses, personal telephone numbers, personal cell phone numbers, or personal email addresses of any officer or complainant" to be redacted. However:

- The names of complainants, victims, or witnesses would be disclosed without their consent.
- Where complainants, victims, and/or civilian witnesses work, their work phone numbers, and work email addresses cannot be redacted.
- There is also no provision for "the home addresses, personal telephone numbers, personal cell phone number, or personal email addresses" of witnesses to be redacted.
- Other identifying or descriptive information which may disclose where complainants or civilian witnesses live or work are not subject to redaction.
- In domestic situations, there is no provision to redact the names of the spouse or children of the involved officer.
- Highly personal information, such as financial information, allegations of marital infidelity, or an officer being the victim of domestic violence cannot be redacted.

In addition to the harm this may cause to these individuals, the new provision may have a chilling effect on individuals coming forward to complain or cooperate.

Officers also have due process rights in criminal and administrative matters. Giving the Office of Police Complaints (OPC) the authority to conduct administrative investigations while criminal matters proceed not only potentially violates the individual's rights, but it also jeopardizes the government's ability to sustain outcomes in either the criminal or administrative matter. This principal was recognized by the Council in the past which determined that the timeline for departmental misconduct investigations should be tolled while prosecutors conduct criminal investigations. Without that, criminal or disciplinary penalties may be overturned because of inconsistencies in parallel investigations or findings. This might make for a faster resolution of administrative matters, but that is not necessarily a just process or outcome. In the end, having cases overturned serves neither the public nor the employee. As you know, we have extensive experience in this area with discipline – particularly in the most egregious cases – being overturned in arbitration. Being forced to reinstate officers that the agency has already terminated is one of the worst tasks in my job. We certainly don't want to see this problem expanded. More to the point, how can we expect officers to respect constitutional rights if the city government disrespects theirs?

Expanding Bureaucracy

The proposed bill would significantly expand the scope of OPC's operations. The nine voting members of the OPC Board would include:

- Three members, ages 15-24, from neighborhoods with higher than average stops and arrests,
- Two from immigrant communities, or groups serving them,
- Two from LGBTQIA communities, or groups serving them, and
- Two with disabilities, or groups serving them.

The proposed bill provides for no other qualifications for this group, such as legal, labor, or law enforcement experience or expertise. Yet they are expected to review and advise on serious uses of force, in-custody deaths, discipline, and almost all police policy and training. They also specifically would be required to authorize an administrative investigation being done concurrently with a criminal one. I have already highlighted the significant risks with such an action.

Moreover, it is unclear how the Board would be able to handle this tremendous volume of work. As written, MPD would be transmitting about 50 "non-administrative" policies and more than 100 trainings per year. MPD would practically need to dedicate a full time person to explain these policies and trainings to the Board and hire a Director of OPC Correspondence. The 45-day period for Board review would delay action on important issues, jeopardizing the Department's ability to quickly adjust to ever changing public safety needs to serve our community. For instance, we have issued more than 70 policies during the public health emergency. But the 45-days would not be long enough for the Board to learn the issues or gather public comment for what will be an average of 13 trainings and policies transmitted every month. In addition, every area where OPC and MPD disagree is going to be rife for use in every discipline arbitration, criminal prosecution, or civil case.

The current process for OPC recommendations to MPD and our response works. OPC currently issues about five or six policy reports per year. MPD responds to all policy recommendations received from OPC. Since 2015, we have agreed in whole or in part with 87 percent of OPC's recommendations. Among the OPC recommendations implemented by MPD are changes to the way we collect use of force data, changes to our policy governing neck restraints, updated guidance on language access and the use of interpreters, and updated guidance on Hatch Act implications for MPD employees.

One area where we disagreed illustrates exactly how this should be handled. OPC recommended that a form documenting consent searches be completed for every consent search. The Department was concerned about the feasibility of documenting and tracking this paperwork, but we agreed that it should be captured on the BWC video. The Council agreed with our position and legislated it. This represents an appropriate process for decision making in the public interest.

It seems clear that the sheer work load is more than a part-time board could handle. And it is important to recognize that MPD has a team of professionals working on these issues every day. They have advanced degrees or training in areas such as law, public administration, and education. They consult with outside sources, including community groups, police groups, and

other agencies, in developing policy and training. And they work continuously to try to balance often competing priorities. Ultimately, that is what the government is entrusted to do – try to weigh many factors to arrive at the best option for the public interest. While there is absolutely a role for the public voice in these matters, it is not necessarily in weighing minute details of almost every policy and training.

Unfettered Access to Sensitive Information

In addition to opening up information on victims, complainants, and witnesses in police personnel files, the legislation would allow the new OPC to have "unfettered access" to all MPD information. This would cover every piece of information or file in MPD, with no recourse for reasonable discussion or vetting. This includes information such as witnesses or confidential sources. There is no oversight for OPC to ensure this information is protected. OPC already has unfettered access to body-worn camera videos. This trust was violated by an employee who was watching videos with no justification or reason. This activity only came to light during a termination hearing for another reason, at which the employee attempted to justify their productivity by citing the logs for all the videos they had viewed. Unlike all the layers of accountability for MPD, OPC does not have that level of oversight, and therefore they should not have unfettered access to all of the sensitive information in MPD files.

School Police Incident Oversight and Accountability Amendment Act

MPD is continually striving to make more data about public safety and police operations available to the public while respecting important privacy boundaries. In that spirit, we support this bill but would like to work with the Committee on specific language to ensure that the parameters are clear and can be met without revealing information that would potentially enable the public to identify arrested youth.

There are a number of issues that make providing data on student-related interactions challenging. It is not simply a matter of pulling incidents at school addresses. The list of schools changes from year to year, and some schools, especially charter schools, may share a building with other organizations. Moreover, any incident at a school address may be unrelated to students. For example, an incident at a school address may be an assault involving staff members, theft of school property after hours, or a car stolen from the street in front of a school. It is easier to validate a narrow set of data provided by School Resource Officers, but with the legislatively-mandated elimination of that program looming, any patrol officer might respond to incidents at schools. It is more challenging to ensure consistency in data when the responding officer may only report on one or two school incidents per year.

The Department will continue to work to improve that reporting, but we recommend that the language be amended in certain areas. For instance, officers should not ask whether an involved person has a disability, nor should officers document observations about abilities unless it has a bearing on the case. For instance, an officer might note in a narrative field that a victim cannot identify an assailant because of impaired vision. In addition, MPD is also not involved disciplinary matters and should not track them. The Office of the State Superintendent for Education tracks disciplinary data.

* * *

In closing, I believe we can work together to further our common goals for public safety and accountability. I look forward to the opportunity to work with you in greater detail on the legislation. I am available to answer your questions.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Office of the State Superintendent of Education

Public Hearing on
Bill 24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021"

Testimony of
Sarah Jane Forman, Esq.
General Counsel
Office of the State Superintendent of Education

Before the
Committee on the Judiciary & Public Safety
The Honorable Charles Allen, Chairman

Virtual Hearing
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004

October 21, 2021
10:00 am

Good morning, Chairperson Allen and members of the Committee on the Judiciary and Public Safety. My name is Sarah Jane Forman, and I am the General Counsel at the Office of the State Superintendent of Education (OSSE). I am pleased to appear before you today to testify on a bill that implicates OSSE's work, B24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021."

Students and families deserve to be treated with dignity, respect, and fairness in every school and by every part of the government that serves them. Students and teachers deserve school environments that are safe and supportive places for teaching and learning.

The overwhelming majority of our children in our schools meet our behavioral expectations every day. Even when we must engage in difficult conversations like the ones we are having today about the role of policing in our schools and other accountability measures, it cannot be stressed enough, that the largest share of our children do not receive an out-of-school suspension, in-school suspension, or an expulsion. They go to school. They behave appropriately. And they want to receive a high-quality education.

Yet, it is a hard reality that acts of violence or other criminal behavior can come into the schoolhouse doors. And when it does, it must be dealt with appropriately to protect student and staff safety and maintain a positive school culture so students can learn and grow. It is critical that the response to disruptive student conduct be done in a manner that preserves the constitutional rights and dignity of students. Further, it is important that our response address the behavior in a meaningful way that supports the student's continued growth and development.

Current Practice

That's why the Office of the State Superintendent of Education (OSSE) has taken steps to support schools in improving their discipline practices. OSSE is committed to supporting schools as they work to protect the rights and safety of all students. We publish an expansive data set, as required by local law on school discipline on the DC School Report Card. This data includes counts of in-school suspensions, out-of-school suspensions, expulsions, school related arrests associated with school disciplinary actions, incidents of violence, and incidents of bullying and incidents of harassment.[1] The DC School Report Card also disaggregates this data by student subgroup, for example, race, disability status, and at-risk status. OSSE also publishes an annual discipline report that provides important analytical insight on discipline in our schools.[2] Through these analytical reports, OSSE has written on important topics regarding disproportionate discipline practices in our schools and the relationship between an out-of-school suspension and attendance. We work diligently to support our schools in efforts to respond to these challenges. For example, our Division of Teaching and Learning provides a robust array of professional development experiences for educators on building positive school culture and climate, restorative justice practices, and trauma informed approaches to discipline.[3] We believe that all of these resources are helpful to providing transparent, accessible information to our stakeholders on the state of discipline in our schools and to support our educators in improving their practice in the classroom.

OSSE collects discipline data using the OSSE Discipline Data Collection Template and Certification (Discipline Guidance)[4] at the end of the school year. D.C. Official Code 38-236.09 requires each local

[1] "DC School Report Card." Office of the State Superintendent of Education.
[2] "Discipline Report." Office of the State Superintendent of Education.
[3] "Teaching & Learning PD Bulletin." Office of the State Superintendent of Education. October 2021.
[4] "Student Discipline Data Collection Guidance." Office of the State Superintendent of Education.

education agency or entity operating a publicly funded community-based organization to provide statutorily mandated discipline data in the form and manner prescribed by OSSE. This data is due to OSSE in August of each year.

When there is a disciplinary incident in a school, for example, disruptive behavior, academic dishonesty, physical altercations or more serious actions, they can result in the school taking a disciplinary action, for example an in-school suspension, out-of-school suspension, or expulsion. These actions and their corresponding incidents must be reported to OSSE through the discipline data collection. These incidents are reported at the student level. Schools must also report when a student is referred to law enforcement or when there's a school related arrest that the school has knowledge of resulting from a disciplinary incident.

Feedback on the School Police Incident Oversight and Accountability Amendment Act of 2021

B24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021" intends to require schools to report more detailed information on school related arrests. The proposed bill adds a definition of law enforcement and amends annual reporting requirements for school related arrests. The proposed bill requires schools to provide the reason for involving law enforcement, the type and count of weapons, contraband, or controlled substances recovered, and law enforcement involvement in any school action or activity. Further, the bill requires a description of the conduct that led to certain disciplinary actions. We believe that the existing discipline data collection already includes these requirements in a manner that comports with the bill sponsor's goals, and should this bill move in the legislative process, further codifying existing practices would be the better path forward.

For example, lines 64-68 require descriptions of conduct that lead to disciplinary actions. The discipline collection already requires a disciplinary incident to be associated with any disciplinary action. Appendix A of the discipline guidance lists all the disciplinary incidents. These disciplinary incidents include a wide range of conduct and help us better standardize data for reporting purposes. We prefer the use of this coding of incidents over narrative descriptions because it leads to easier and cleaner data for use and reporting.

Another example, lines 59-60 of the proposed bill requires schools to report on the type and count of weapons, contraband or controlled substances that are recovered. The disciplinary incidents in our collection already include detail on the type of weapons. Appendix E of the discipline guidance lists out the weapons type, including handguns, rifles, shotguns, knives, and multiple weapons. The disciplinary incidents also include codes for alcohol, marijuana, tobacco, and those excluding them, which would cover other controlled substances. We believe further detail on drugs and weapons is outside of the school's expertise and are best left to the investigative authorities, and the existing collection is sufficiently detailed for public reporting.

It is important to be clear that OSSE's discipline data is collected when a student's misconduct results in a disciplinary action. The proposed bill includes a provision in lines 61-62 that requires schools to report law enforcement involvement in any school action or activity. This is too broad. Police are an important part of our communities. They participate in school events. They read books to children. They come to career days and more. The bill sponsors should clarify that this type of involvement isn't what is constituted by "any school action or activity." Reporting should be tied to student misconduct, and this section of the proposed bill should be further clarified.

Thank you for allowing me the opportunity to provide some thoughts on the 24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021, in furtherance of tightening the language to ensure it meets the spirit and intent of the proposal. We hope that the data and reports that OSSE publishes increase transparency and are illustrative to the Committee's work on keeping our community safe and protecting the constitutional rights of all residents. I am prepared to answer any questions that you may have.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
POLICE COMPLAINTS BOARD
OFFICE OF POLICE COMPLAINTS

PUBLIC HEARING:

B24-0356, The "Strengthening Oversight and Accountability of Police Amendment Act of 2021"

BEFORE THE

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY
& PUBLIC SAFETY
CHARLES ALLEN, CHAIR

Testimony of Michael G. Tobin, Executive Director
Office of Police Complaints

October 21, 2020

TESTIMONY OF

MICHAEL G. TOBIN,
EXECUTIVE DIRECTOR
OFFICE OF POLICE COMPLAINTS

October 21, 2021

Good morning Chairman Allen and members of the Committee on the Judiciary and Public Safety. I am Michael G. Tobin, the executive director of the Office of Police Complaints (OPC). I appreciate the opportunity to provide testimony regarding police reform in the District of Columbia, today in the context of B24-0356 "Strengthening Oversight and Accountability of Police Amendment Act of 2021."

The mission of OPC is to improve community trust in the District's police departments through effective civilian oversight over the Metropolitan Police Department (MPD) and the District of Columbia Housing Authority Police Department (DCHAPD). OPC's mission of improving public trust has arrived at an important crossroad not envisioned by its current statutory authority.

Today my allotted time for speaking will be utilized to address the provisions of B24-0356, as they relate to the Police Complaints Board (PCB) and OPC.

The OPC and PCB were created to provide an effective and efficient review mechanism to oversee the "extraordinary powers" of the District's sworn police officers. At the time of their creation some twenty years ago it was considered a significant step forward in police oversight. The enabling statute created by the DC Council was the next step in the evolution of a long history

of oversight in the District that extends back to World War II and even the Civil War. On August 15, 1861. President Lincoln appointed 5 community members as Commissioners of Police for the Metropolitan Police Board of the District of Columbia. This was part of the same Congressional Act of August 6, 1861 that established MPD as the first regular federal police force for DC and created our first civilian oversight agency, the Metropolitan Police Board. By interpretation of these documents, it is reasonable to say that civilian oversight of MPD in the District began with the official establishment of MPD in 1861.

Since 1861 many iterations of oversight have come and gone in the District. Today we have an oversight agency that is primarily investigative in its function and limited in its jurisdiction, and a civilian board that has little authority to provide meaningful community input into police policy, procedure, discipline, and training.

The proposed legislation makes several statutory changes to update the authority and jurisdiction of the PCB and OPC while also creating other new police reform measures. I will address each of those primary measures with an important caveat- it is time to give serious consideration to evolving the civilian oversight of the District's sworn police to the next generation of reforms that reflect the current needs and desires of our community. In a sense, much of the police reform movement of today is simply returning our system of police oversight to what it was intended by Congress in 1861. When President Lincoln appointed the first civilian police board it was granted far greater responsibility and oversight than most police boards in the country currently have. The first five Commissioners of Police appointed to the Metropolitan Police Board did not have the jurisdictional or authority limitations that currently restrict civilian oversight to a nominal advisory role in reflecting the desires of our community.

Our current system of police oversight is in dire need of improvement. That is one reason why we are all here today. There is an enormous amount of interest and concern for police oversight in our community. There is a significant desire by many individuals involved in the process to "do something" to initiate change. In the rush to effect change we must be cognizant of the practical effects of any legislation, along with all the attendant consequences, intended and unintended, that can result from these proposals.

The proposed legislation first creates the position of Deputy Auditor for Public Safety within the Office of the District of Columbia Auditor, along with the associated qualifications and duties of this new position. The qualifications of the proposed position all describe attributes of which the PCB through the personnel in OPC already possess and exercise daily as local experts on police misconduct, use of force, conducting investigations, analyzing data, and issuing recommendations. The duties and responsibilities of the proposed position describe functions that are currently authorized for the Office of the District of Columbia Auditor and are also duplicative of several functions that OPC already conducts on a regular basis. In the absence of the proposed legislation the Office of the District of Columbia Auditor can currently conduct the same duties as described. In fact, we understand they are currently conducting audits concerning MPD use of force and also the impact of civil lawsuits concerning police misconduct. The creation of an additional police oversight agency within the DC Auditor's Office with duplicative authority to our existing systems essentially adds another layer of bureaucracy rather than implementing the needed improvements to our current system. In the past I have advocated for OPC to produce the type of audits identified in the duties of the proposed new position of Deputy Auditor, and I do so again today. OPC possesses the experience necessary to conduct the duties of the proposed Deputy

Auditor, but we lack the funding resources and direct statutory authority to do so. I suggest that prior to creating a new oversight agency within the Office of the District of Columbia Auditor, we work together to provide adequate funding and authority to the existing agency that is also best suited for such a role – OPC.

The proposed legislation next seeks to modify the PCB by changing its name and composition and providing a stipend for its members, without a significant change in its duties. The proposal allows the renamed oversight board to provide comments on MPD policy, procedure, or training – not substantively different from authority it currently possesses to provide recommendations in these same areas of police operations. The proposal also allows comment on the job description and qualifications for a Chief of Police of MPD but lacks any meaningful participation in the selection process. More significantly, the proposal also requires the oversight board to indirectly report to the proposed new position of Deputy Auditor for Public Safety, thus removing an important layer of independence from the community oversight board.

Changing the name of the oversight board, providing compensation in the form of a stipend, and increasing the board to ten persons with specific qualifications for age, residency in areas "with higher levels of police stops and arrests," residency or representatives of immigrant communities, persons with undefined disabilities, and members of the LGBTQIA community, and retaining an active member of MPD may satisfy some critics and appeal to members of these identified groups. However, we should not falsely convince ourselves that this will lead to police reform. These changes to the oversight board will have no effect on police reform in our community if the duties of the board remain substantively unchanged. The proposed legislation fails to enact meaningful improvements in jurisdiction and authority of the oversight board while

making it more difficult to recruit and retain board members and more cumbersome to conduct essential board business.

The proposed legislation next seeks to provide authority to OPC to receive and investigate complaints against special police. Our assumption is that the intent of the proposal is to allow OPC to investigate misconduct of special police, however, the legislation lacks clear guidance on how this would be implemented beyond providing a brief reference to such authority in a single subsection of the proposal. Expanding the responsibilities of OPC to include the investigation of complaints concerning special police in the District without a full understanding of the consequences of such a provision is problematic.

There are approximately 7,000 individuals licensed as special police in the District. This includes individuals that are licensed to carry firearms and individuals that are not licensed to carry firearms. Some of these individuals are District government employees and most are employees of private companies. The jurisdiction of each individual officer varies, along with their authority to arrest and detain persons. Their training and hiring qualifications span a large spectrum of varied requirements and experience. There is no reliable system to track and monitor the hiring, experience, qualifications, or training of special police officers. There is no reliable system of oversight of the misconduct records or required training of individuals or of the companies for which they are employed. No uniform system of employee personnel or disciplinary records exists. No system of documentation or verification of required training exists. No system of progressive discipline or tracking of imposed discipline exists. There is no legislative authority to impose any levels of progressive discipline beyond the singular measure of a potential license revocation of individual officers. There is no uniform employee appeal system for wrongful discipline or

termination. No District government or private entity can tell our community exactly how many individuals are employed as special police officers by how many private companies, how many of those individuals have been trained for how long, what training they have received, who conducted the training, or even when it occurred.

The special police officer program in the District is a dysfunctional system rife with managerial and systemic failures of accountability. The front end problems with standards and guidelines in the special police officer program need to be rectified before we attempt to implement an unenforceable misconduct investigation program. Assigning responsibility to investigate complaints of misconduct to OPC at the back end of the system after the conduct has already occurred will not rectify the systemic issues that exist in the front end of the system. In fact, such a proposal will only add another layer of ineffective bureaucracy to an already failed system of accountability in the special police officer program. In addition, the proposal lacks any ability to take any disciplinary action against the individual or private company upon an investigative finding of misconduct. Enforcement and proper oversight of private company contracts, licensing, and training requirements are the first steps towards accountability. Without these corrective actions through legislative mandates the lack of accountability in the system will persist no matter how many complaints of misconduct are investigated.

The proposed legislation gives authority to OPC to conduct administrative investigations and make findings on all serious use of force incidents and in-custody deaths involving MPD, HAPD, or special police regardless of whether a complaint is filed regarding the incident. This function is currently performed by MPD internal affairs investigators. It is laudable to move this function outside of the purview of MPD and onto an independent agency. The proposal is silent as

to what role, if any, the MPD internal affairs investigation would play in such a reorganization. However, the committee should be aware that this function would likely require OPC to have a 24/7/365 incident response capability along with a very significant and continuing fiscal commitment in personnel and additional trainings.

Two provisions of the proposed legislation would be immediately beneficial to OPC operations and the community. The ability to investigate an anonymously submitted complaint, and the ability to have unfettered, timely and complete access to documentation from MPD and HAPD. However, two additional provisions of this section of the proposal would be detrimental to the independence of OPC and to its timely completion of investigations. The first of these provisions would require the OPC executive director to report to the Deputy Auditor for Public Safety on the status and actions taken on every complaint, the reasons justifying dismissal of a complaint, and provide an appeal to the police chief for any complaint dismissed. This provision negates the independence of OPC and effectively requires the executive director to report to both the Deputy Auditor for Public Safety and the police chief, in addition to the independent police oversight board. This contravenes the original intent of maintaining independence of the executive director and OPC.

The second detrimental provision of this section of the proposed legislation would require the concurrence of three oversight board members to dismiss any complaint. Currently the concurrence of one board member is required for dismissal. The current system requiring a single board member's concurrence has successfully worked for almost twenty years, even though it may sometimes delay the process by a month or more while awaiting a board member's review. Requiring three board members to review and concur on each complaint to be dismissed would

significantly delay the completion of investigations and provide no added value to the process.

The proposed legislation places further constraints on the investigation of a complaint by requiring the executive director to notice and call an oversight board meeting and procure a majority vote of the board at the meeting to proceed with an administrative investigation in which the decision to criminally prosecute is pending with the United States Attorney. The provision would also require consultation with the United States Attorney and presumably their concurrence also prior to proceeding. We are unsure why this provision is part of the proposed legislation, as it serves no useful purpose and will only further delay a complaint investigation by introducing unnecessary layers of administrative approvals in order to proceed with an investigation.

The proposed legislation also contains an indirect reference that the executive director may propose a certain disciplinary action when an allegation is sustained in a complaint investigation. The proposal then allows the police chief 45 days to explain, if necessary, why such disciplinary recommendation will not be followed. The executive director currently can make such recommendations but has declined due to a lack of access to officer personnel records that would be required to make such a determination. The proposal does nothing to address this shortfall and merely adds an additional 45 days to the timeline for finalizing a disciplinary finding. In addition, this section ignores the fact that the MPD has historically failed to follow the recommendations of both the executive director or oversight board, and this proposal will do nothing to correct such shortcomings. The PCB has issued a recommendation to this Council last year for a system for imposing discipline in the cases under its jurisdiction. The recommendation contains a framework and language for statutory change that would improve community trust in the disciplinary process. The PCB recommendation calls for imposition of discipline by OPC and the executive director

rather than the police chief, together with an appeal process to our community's police oversight board. I strongly urge the Council to implement the PCB recommendation and discard this proposed legislation language related to discipline.

The proposed legislation offers a significant step toward transparency with the requirement for MPD to publish a database of the disciplinary history of each officer. In addition, the Freedom of Information Act exemptions for officer's individual disciplinary records and complaints will also improve the community trust in the disciplinary process by eliminating the cloak of secrecy that has long shielded the public's understanding of police misconduct.

We will continue to support this Committee in its effort to implement meaningful and lasting improvements to police oversight in our community. Some of the recommendations of this proposed legislation will provide meaningful improvements to our current system of police oversight. However, there are also many provisions of this proposed legislation that fall short of what our community needs. Indeed, some provisions will turn the clock back and hamper our efforts to improve community trust in our police forces. I ask this committee to take into consideration all the input it has received and implement meaningful improvements that will truly impact policing in our community. It is once again time for our nation's Capital city to become a national example of modern police oversight, just as it was when our first police oversight board was established in 1861. I thank the Committee for its time and will be happy to answer any questions you may have.

Office of the District of Columbia Auditor

Testimony of

The Hon. Kathy Patterson

D.C. Auditor

before the

Council of the District of Columbia

Committee on the Judiciary and Public Safety

Hearing on

B24-0356 the "Strengthening Oversight and Accountability of Police Amendment Act of 2021 *and other legislation*

October 21, 2021

Virtual Hearing via Zoom

Chairperson Allen, Councilmembers, and staff, thank you for this opportunity to testify on legislation before the Committee including Bill 24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021" introduced by Chairman Phil Mendelson.

Before I comment specifically on the Deputy Auditor for Public Safety proposed in Bill 24-356 I would like to make a few general comments on the task before you. While testifying today as the D.C. Auditor, it is also with the perspective of having served three terms on the D.C. Council and four years as chair of the Committee on the Judiciary.

As I have shared in previous testimony, a characteristic of statutory language that creates sound, effective public policy is that it is simple, clear and unambiguous. Language written for the D.C. Code should create bright lines. In the case of Bill 24-356, it will be important that lines be drawn clearly between the roles and responsibilities of the two principal accountability agencies covered by the legislation, the Office of the D.C. Auditor (ODCA) and the Office of Police Complaints, to be renamed the Office of Police Accountability (OPA).

One such bright line would be to be clear – *if this is your view and your intention* – that the Office of Police Accountability looks forward and the Office of the D.C. Auditor and its new Deputy Auditor for Public Safety look backward; that OPA has a role in reviewing Metropolitan Police Department (MPD) policies before the fact; that ODCA audits what has already taken place, after the fact. Another bright line with regard to the two agencies would be a focus for OPA on actions of individual members of the MPD, as is the case today, and that ODCA restrict its work to policies and practices but not the actions of individuals separate from their implementation of policies and practices.

As introduced, I don't believe the legislation is as clear as it could and should be on the distinctive roles and responsibilities of the agencies. I urge the Committee as you consider this important legislation to bear in mind the need for clarity to avoid duplication or omissions.

A second general point is this: Please don't include requirements that cannot be measured or reports that may not be used because they either are never produced or were submitted but not reviewed due to the press of other business. In an attached red-line version of the legislation I recommend deleting requirements that are not precise enough to know if and when they have been accomplished. For example, "improving public disclosure procedures" and "providing for timely information about the status of reviews" are clearly laudable goals, but I recommend not including such descriptions unless further definition is added including whether it can be known if we have arrived at the desired destination.

With regard to including reporting requirements in legislation, over the last 46 years the Council has added statutory language requiring at least (alt: a total of) 574 reports to be submitted to the Council to assist with legislative oversight of policies and programs. According to the "Statutorily Required Reports to be Delivered to the Council" (source: https://f4a4b25a-57d2-403e-b460-1159c2c1f189.filesusr.com/ugd/087b9e_64c9f228c85f4970a2f19d9b35105ae3.pdf) issued by the Office of the Secretary as of August 31, 2020, of the 574 reports required in the D.C. Code, only 103 were reported as having been submitted in Council Period 23.

One example: D.C. Code § 5–1032 required the Metropolitan Police Department (MPD) to compile and deliver a report on police misconduct, discipline, and equal employment grievances to the Mayor and Council each year with an effective date of January 2006. ODCA's team working on a current project on police terminations for misconduct learned that this report had not been submitted in the last few years. As a result of discussion following our request for the report, the current MPD leadership submitted a report covering calendar years 2016 to 2020 on September 16, 2021. The requirement also applied to the Department of Fire and Emergency Medical Services (FEMS) and that agency has submitted that report throughout the Bowser Administration. (It's unclear how this requirement will be affected by B24-0356 which would make disciplinary records public information and require MPD to create a publicly accessible database for disciplinary records of officers.)

A final and related point is one on which I quote the late U.S. Senator Sam Ervin from his introduction to the 1974 report of the Senate Watergate Committee. "Law is not self-executing," he wrote. That admonition was just recently quoted in U.S. Representative Adam Schiff's new memoir. Whatever new policy this Committee and this Council adopts and makes a part of the D.C. Code will NOT be self-executing. It will become the responsibility of the Council and this Committee to use its oversight authority to ensure that any new accountability measures are implemented with fidelity, are effective, and meet their intended purpose. (And if you would like examples of instances in which this has not always been the case I am happy to provide examples.)

Deputy Auditor for Public Safety

The Police Reform Commission proposed, and Chairman Mendelson incorporated in Bill 24-0356, a new Deputy Auditor for Public Safety in the Office of the D.C. Auditor. I am grateful to Commission Co-Chairs Robert Bobb and Christy Lopez for sharing this proposal with me prior to issuing the Commission's report and soliciting my views on the proposal. I indicated to the Commission that I understood there were alternatives to placing this position within ODCA and that they included creating an Inspector General within the MPD, as has been done in New York City, or creating a wholly independent entity, or placing the function within the Office of Police Complaints. The Committee may wish to consider all such options. I told the co-chairs, and repeat here, that I would be ready and willing to take on the responsibility of implementing such a proposal and would do so to the best of my ability.

Legislative Provisions

With regard to the legislation itself, I recommend deleting the word "powers" from the long title of the legislation. As many of you know the Office of the D.C. Auditor has wide authority today -- authority vested in the office in the Home Rule Act. Because the Home Rule Act provisions are so robust, there are no additional powers that the Deputy Auditor for Public Safety would need; that is, the position would derive its ample authority from the power of the office as it exists today.

The legislation proposes a search committee made up of specific individuals including the leaders of the major public safety agencies and the Chairman of this Committee. It would certainly be my intention to seek the views of individuals in each named position on both drafting a position description and recruiting to fill that position. But I don't think it is appropriate to place a new responsibility in the hands of the D.C. Auditor or any other current or created government official and then prescribe in statute how the D.C. Auditor or other person named goes about hiring individuals to fulfill the responsibility. I recommend the legislative language related to a search committee be included in the Committee report as a recommendation but not required as a provision in the D.C. Code.

With one exception I concur with the qualifications set out in the legislation. I do not believe the Deputy Auditor must be an attorney. Given my experience leading the Council's Judiciary Committee and similarly leading work on police matters in my current position I would be qualified for this position though I am not now nor have I ever been an attorney. I am simply the handiest example; there are other individuals who could perform well in this role without being attorneys including some who served on the Police Reform Commission.

I also recommend deleting the language that limits the removal of the Deputy Auditor other than for cause, and believe removal is an issue best left to creation of a position description including which government service the individual is a part of.

I recommend adopting the language from the Police Reform Commission when enumerating the various areas that the Deputy Auditor would be expected to delve into and offer that language in the attached red-line text.

I mentioned at the outset the importance of being clear on the respective roles of ODCA and the Office of Police Complaints (OPC). The legislation would require the Deputy Auditor to basically review the work of the OPC. ODCA has that authority today; we could review the work of the OPC. But I would advise against mandating such reviews. Today the Office of the D.C. Auditor and the OPC, and ODCA and the Office of the Inspector General, have good working relationships. ODCA and the OIG share work plans; we strive to avoid duplication of efforts. Creating a situation in which one accountability organization is required to oversee the work of another could impinge on a collaborative working relationship and even limit the effectiveness or one or the other agency. To repeat: ODCA today can review the OPC's work, but we have not done so and I would hope we do not do so, but we *could* do so under current authorities if exigencies seemed to require it. I recommend leaving the issue alone in this legislation.

I also recommend deleting additional sections as unnecessary and/or as language more appropriate to a Committee report to provide the Council's perspective but short of a statutory requirement. It is not necessary to restate the office's authority with regard to MPD, though it may be useful to be very specific about the Office's authority with regard to the D.C. Housing Authority and private sector security agencies that have received licenses from the D.C. government.

I would like to touch on one provision that is not in the legislation but was recommended by the Police Reform Commission and that is subpoena authority. Because the Office of the D.C.

Auditor has subpoena authority and has had that authority since the office's creation in the 1970s, it is not necessary for new legislation to restate an existing authority. And if the Council were to grant subpoena authority to the Deputy Auditor it could create confusion as to whether that authority was separate from the authority that resides in the hands of the D.C. Auditor which would violate the "bright line" of clarity I recommended earlier.

Finally, Mr. Chairperson, I would like to address the resources I believe are necessary for a Deputy Auditor for Public Safety to fulfill the broad responsibilities envisioned by the Police Reform Commission and in the legislation before you. The Commission itself called for the unit's budget to "be sufficient for the deputy auditor for public safety to perform all of its responsibilities." In response to a question during the FY22 budget cycle from Chairman Mendelson, I provided an outline of the budget I believe is necessary to fulfill those responsibilities. It was for a total annual budget of $2 million and nine FTEs with salary ranging from $80,000 to $230,000. I also explained that I would recommend less than a full year budget for FY22 since this legislation had not been considered much less enacted, and that creating the position and hiring someone as deputy auditor would likely wait until the second quarter of the year or later.

Regrettably, while the Committee of the Whole and the full Council approved an additional $1.2 million for the ODCA budget as a partial-year funding for the new unit, the Office of Budget and Planning apparently considered that total to be a full year's funding and has not provided sufficient funds for successive fiscal years. I sought to receive the 5-year-financial plan with the budget for the outyears (which is required by the D.C. Code but has not been made available for many years) in order to know what the shortfall would be. I mention this because while there are sufficient funds to begin the operations of a Deputy Auditor for Public Safety unit within ODCA, the matter will need revisiting in the FY23 budget since it would not be responsible on my part to hire in FY22 individuals whose salaries would not be supported in FY23.

In addition to the red-line version of the bill appended to my written testimony, I also include a summary of the recommendations included in the second report The Bromwich Group completed for ODCA on officer-involved fatalities between 2018 and 2020. The third and final report will review the internal investigation of the death of Karon Hylton-Brown, which will follow action on the criminal case brought by the U.S. Attorney's Office. MPD's responses to the two reports established target implementation dates for the recommendations—the end of 2021 for the recommendations contained in the March 23 report, and September and October 2021 for recommendations in the May 25 report. In the attached response MPD gives a target date of September 2021 to define the purpose and functions of Crime Suppression Teams and to develop departmental policy on foot pursuits. Law is not self-executing, nor are auditor recommendations! I encourage the Committee to follow up on the recommendations made in the reporters earlier this year in your ongoing oversight of the Metropolitan Police Department.

Thank you for the opportunity to provide these views, and I am happy to answer any questions.

Chairman Phil Mendelson

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the District of Columbia Auditor Subpoena and Oath Authority Act of 2004 to create the position of Deputy Auditor for Public Safety within the Office of the District of Columbia Auditor; to establish minimum qualifications for the Deputy Auditor; to prescribe the duties and~~,~~ responsibilities~~, and powers~~ of the Deputy Auditor; to amend the Office of Citizen Complaint Review Establishment Act of 1998 to rename the Police Complaints Board the Police Accountability Commission; to change the membership of the Commission; to expand the authority of the Commission to review policies, procedures, and trainings, and to provide input on the job description and qualifications of a Chief of Police; to rename the Office of Police Complaints to the Office of Police Accountability; to expand the authority Office's Executive Director to encompass complaints against special police, to receive anonymous complaints, and to continue administrative investigations of officers while the U.S. Attorney's Office determines whether to pursue prosecution against an officer; to amend the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to provide stipends to members of the Police Accountability Commission; to amend the Freedom of Information Act of 1976 so that disciplinary records of officers with MPD and the D.C. Housing Authority Police Department can no longer be withheld from the public; to require the Chief of Police to submit department policies, procedures, and updates to training to the Police Accountability Commission for comment; and to require MPD to create a publicly accessible database for disciplinary records of officers.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Strengthening Oversight and Accountability of Police Amendment Act of 2021".

Commented [PK(1]: Powers as drafted here already reside with the Office of the DC Auditor

Sec. 2. The District of Columbia Auditor Subpoena and Oath Authority Act of 2004, effective April 22, 2004 (D.C. Law 15-146; D.C. Official Code § 1301.171 et seq.) is amended as follows:

(a) A new section (5) is added to read as follows:

"Sec. 5. Establishment and Qualifications of a Deputy Auditor for Public Safety.

"(a) There is established within the Office of the District of Columbia Auditor a Deputy Auditor for Public Safety.

"(b) The Deputy Auditor for Public Safety shall be appointed by the Auditor. ~~The Auditor shall create a search committee composed of relevant stakeholders, including the Chair of the Public Safety Committee of the Council, the Chief of Police, the Executive Director of the Office of Police Accountability, and the Director of the Department of Corrections. The Auditor shall consider the recommendations of the search committee in making his or her selection.~~

"(c) In addition to other qualifications the Auditor deems necessary, the Deputy Auditor for Public Safety shall:

"(1) ~~Be an attorney with~~ Have substantial experience in criminal, civil rights, and/or labor law, or corporate and/or governmental investigations, or ~~an individual with at least 5 years of~~ experience in law enforcement and/or corrections oversight; and

"(2) Have knowledge of law enforcement and/or corrections policies and practices, particularly regarding internal investigations for misconduct and use of force.

~~"(d) The Deputy Auditor for Public Safety may only be removed by the Auditor for cause.".~~

(b) A new section 6 is added to read as follows:

"Sec. 6. Duties and Responsibilities of the Deputy Auditor for Public Safety.

Commented [PK(2]: Suggestions for a search committee could be included as committee recommendation in the committee report.

"(a) The Deputy Auditor for Public Safety shall, with regard to the Metropolitan Police Department, Housing Authority Police Department, District-licensed security companies (special police) and Department of Corrections,

(1) review, analyze and make findings regarding ~~have the authority and responsibility to~~

~~"(1)~~ system-wide patterns and practices including but not limited to serious uses of force; searches and seizures; use and execution of search warrants; hiring, training and promotions; internal investigations and discipline. ~~Review the handling of serious of use of force incidents as defined in MPD General order 901.07 or any subsequent orders, serious property or vehicle damage, first amendment demonstrations, or other issues by officers of the Metropolitan Police Department, the D.C. Housing Authority Police Department, or a District-licensed security company. This may include auditing, monitoring, or other review of administrative investigations to assess the quality, thoroughness, and integrity of the investigations, specific findings of investigations, and after-action reports;~~

"(2) Conduct ~~semi-annual~~periodic reviews of Office of Police Accountability's handling of misconduct complaints and cases to assess and certify the timeliness, quality and integrity of those investigations and findings;

~~"(3) Review, analyze, and make findings and recommendations on any policy, practice, or program within the Metropolitan Police Department, the District of Columbia Housing Authority Police Department, the Department of Corrections, or a District-licensed security company;~~

"(24) Monitor the implementation of ~~any~~ findings or recommendations ~~made by the Office of the Auditor, the Executive Director of the Office of Police Accountability or the Police Accountability Commission~~; and

Commented [PK(3]: ODCA has significant authority today per provisions of the Home Rule Charter

Commented [PK(4]: Making language more consistent with recommendations of the Police Reform Commission

Commented [PK(5]: Recommending investing the Deputy Auditor with discretion on timing and frequency

Commented [PK(6]: While ODCA already has the authority to conduct such reviews, recommend thorough discussion on the kind of relationship the legislation fosters between ODCA and the OPC. Generally speaking oversight/accountability bodies do not evaluate one another and that could be seen as more appropriately the role of the elected DC Council, i.e. to serve as the overseer of the oversight bodies.

Commented [PK(7]: This is duplicative of language above

Commented [PK(8]: The District's Office of Risk Management has the statutory responsibility of monitoring the implementation of recommendations made by ODCA and OIG.

~~"(5) Collaborate with the Police Accountability Commission, Office of Police Accountability, and the Metropolitan Police Department in improving system transparency, including improving public disclosure procedures or mechanisms of the Metropolitan Police Department, and providing for timely information about the status of reviews, audits, or investigations.~~

~~"(d) The Deputy Auditor for Public Safety shall notify an agency of any upcoming reviews and analyses under subsection (a) of this section.~~

~~"(e) The Deputy Auditor for Public Safety shall S~~solicit comments from the District of Columbia Police Accountability Commission for reviews and analyses related to the Metropolitan Police Department or the District of Columbia Housing Authority Police Department under subsection (a) of this section.

~~"(f) Analyses, findings, recommendations, and any relevant supplemental materials shall be delivered to the Mayor and Council and made publicly available after the receipt of final comments from the agency.~~

"(g) The Deputy Auditor for Public Safety shall conduct regular outreach to District residents to share information with the public about its mission, policies, and operations, and to provide updates reviews or investigations where applicable.

"(h) Beginning on December 31, 2023 and by December 31 every year thereafter, the D.C. Auditor ~~Deputy Auditor for Public Safety~~ shall deliver a report to the Mayor and the Council that includes the activities of the Deputy Auditor for Public Safety ~~his or her activities~~ in the prior year.".

(c) A new section 7 is added to read as follows:

"Sec. 7. Powers of the Deputy Auditor for Public Safety.

Commented [PK(9]: ODCA already does this as a standard practice

Commented [PK(10]: This is already required by DC Code

Commented [PK(11]: This would be better as Committee report language and is a responsibility that the DC Auditor already undertakes; there may be times/opportunities for broader public dialogue than the issues reserved to the DAPC.

"(a)(1) In addition to powers already enumerated in D.C. Code Section 1-204.55(c) the D.C. Auditor and by delegation the ~~The~~ Deputy Auditor for Public Safety shall have access~~, as is necessary to conduct his or her work,~~ to all books, accounts, records, reports, findings and all other papers, things, or property belonging to or in use by ~~the Metropolitan Police Department,~~ the District of Columbia Housing Authority Police Department and~~, the Department of Corrections, or~~ any District-licensed security company.

~~"(2) The Deputy Auditor for Public Safety shall maintain confidentiality of persons named in any documents transferred from the Metropolitan Police Department, the District of Columbia Housing Authority Police Department, the Department of Corrections, or a District-licensed security company pursuant to this subsection to the extent required by District law.~~

~~"(b)(1) Upon receipt of any findings and recommendations made by the Deputy Auditor for Public Safety, the Metropolitan Police Department, the District of Columbia Housing Authority Police Department, or the Department of Corrections shall have 30 days to provide a written response that includes a description of any corrective action the agency intends to make, and the basis for rejecting any finding or recommendation in whole or in part.~~

~~(2) The agency may request an extension in writing to Deputy Auditor for Public Safety of up to 15 additional days as deemed necessary."~~.

Sec. 3. The Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1101 *et seq.*), is amended as follows:

(a) Section 4 (D.C. Official Code § 5–1103) is amended as follows:

(1) Paragraph (1) is struck.

(2) Paragraph (2) is designated as paragraph (1).

Commented [PK(12]: This section should amend existing authorities of the D.C. Auditor with language that says specifically, "including the District of Columbia Housing Authority and any District-licensed security company." As written this could imply that ODCA does not currently have these authorities, so it's important to specify where there is added, or clarified, authority with those two recommended references added to current DC Code provisions.

Commented [PK(13]: ODCA already complies with all DC and federal laws that would be encompassed in this language

Commented [PK(14]: These are audit procedures already largely in place in ODCA and do not need to be reflected in DC Code. Could be included as report language, indicating the Committee's support for standard auditing procedures.

(3) A new paragraph (2) is added to read as follows:

(2) "Commission" means the District of Columbia Police Accountability Commission.

(4) Paragraph (4) is amended by striking the phrase "Complaints." and replacing it with the phrase "Accountability.".

(b) The title of Section 5 (D.C. Official Code § 5–1104) is amended by striking the phrase "Police Complaints Board" and replacing it with the phrase "Police Accountability Commission.".

(c) Section 5 (D.C. Official Code § 5–1104) is amended to read as follows:

"(a) There is established a District of Columbia Police Accountability Commission ("Commission"). The Commission shall be composed of nine voting members and one ex-officio member. The Commission shall include:

"(1) At least three members between the ages 15 and 24 residing in neighborhoods with higher-than-average levels of police stops and arrests;

"(3) Two persons from immigrant communities, or representatives of service providers or advocacy organizations who serve immigrant persons;

"(4) Two persons from the LGBTQIA community, or representatives of service providers or advocacy organizations who serve LGBTQIA people;

"(5) Two persons with disabilities, or representatives of service providers or advocacy organizations who serve persons with disabilities in District; and

"(7) A member of the Metropolitan Police Department selected by the Chief serving as an ex-officio member.

"(b) All members of the Commission shall be residents of the District.

"(c) Members of the Commission shall be appointed by the Mayor, subject to confirmation by the Council. The Mayor shall submit a nomination to the Council for a 90-day period of review, excluding days of Council recess. If the Council does not approve the nomination by resolution within this 90-day review period, the nomination shall be deemed disapproved.

"(d) Commission members shall serve a term of 3 years from the date of appointment or until a successor has been appointed. A Commissioner may be reappointed and serve two consecutive terms. The Mayor shall designate the Chairperson of the Commission and may remove a member of the Commission from office for cause. A person appointed to the Commission to fill a vacancy occurring prior to the expiration of a term shall serve for the remainder of the term or until a successor has been appointed.

"(e) Commission members shall be entitled to a stipend pursuant to D.C. Official Code § 1-611.08(c-2)(6).

"(f) The Commission shall:

"(1) Conduct periodic reviews of the citizen complaint review process, and make recommendations, where appropriate, to the Mayor, the Council, the Chief of the Metropolitan Police Department, and the Director of the District of Columbia Housing Authority;

"(2) Review, solicit community feedback, and provide comments on non-administrative Metropolitan Police Department policies, procedures, and updates to training, prior to those policies, procedures, and trainings being finalized and binding upon employees of the MPD. The Commission shall have 45 days from the date the Chief of Police submits the policy, procedure, or updated training curriculum to provide comments;

"(3) Provide comments and input on the job description and qualifications of a Chief of Police of the Metropolitan Police Department;

"(4) Share information with the Deputy Auditor for Public Safety as is deemed necessary or required by law or formal agreements;

"(5) Collaborate with the Deputy Auditor for Public Safety and the Metropolitan Police Department in improving system transparency, including improving public disclosure procedures or mechanisms of the Metropolitan Police Department, and providing for timely information about the status of investigations and their outcomes.

"(g) The Executive Director, acting on behalf of the Commission, shall have unfettered, timely and complete access to information and supporting documentation from the MPD, HAPD, and any District-licensed security company to which the subject special officer, specifically related to the Commission's duties.

"(h) Within 60 days of the end of each fiscal year, the Commission shall transmit to the entities named in subsection (f)(1) of this section an annual report of the operations of the Commission and the Office of Police Accountability.

"(i) The Commission is authorized to apply for and receive grants to fund its program activities in accordance with laws and regulations relating to grant management.".

(d) The title of Section 6 (D.C. Official Code § 5–1105) is amended by striking the phrase "Complaints" and replacing it with the phrase "Accountability.".

(e) Section 6 (D.C. Official Code § 5–1105) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "Complaints" and replacing it with the phrase "Accountability.".

(2) Subsection (b) is amended striking the phrase "Board" and replacing it with phrase "Commission" wherever it is found.

(f) Section 7(c) (D.C. Official Code § 5–1106(c)) is amended by striking the phrase "Board" and inserting phrase "Commission" wherever it is found.

(g) Section 7(d) (D.C. Official Code § 5–1106(d)) is amended by striking the phrase "Board" and inserting phrase "Commission" wherever it is found.

(h) Section 8 (D.C. Official Code § 5–1107) is amended to read as follows:

"(a)(1) The MPD and the Office shall have the authority to receive or audit a citizen complaint against a member or members of the MPD for alleged abuse or misconduct.

"(2) If MPD receives a citizen complaint under subsection (a) of this section, the MPD shall transmit the citizen complaint to the Office within 3 business days after receipt.

"(b) The Office shall have the authority to receive or audit a citizen complaint against a member or members of the District of Columbia Housing Authority Police Department (HAPD) or special police licensed by the District.

"(c)(1) The Office shall have the sole authority to dismiss, conciliate, mediate, adjudicate, or refer for further action to the MPD or the HAPD a citizen complaint received under subsection (a) or (b) of this section.

"(2) If during the investigation of a civilian complaint, the Office finds evidence of abuse or misconduct not in included in the original complaint, the Office may include these allegations in the original complaint.

"(c) In addition to investigating authority granted under subsections (a) and (b) of this section, the Office shall have the authority to:

"(1) Conduct administrative investigations and make findings on all serious use of force incidents, as defined in MPD General order 901-07 or any subsequent orders, by MPD, HAPD officers or special police licensed by the District; and

"(2) Conduct administrative investigations and make findings on all MPD or HAPD in-custody deaths.

"(d) Any individual having personal knowledge of alleged police misconduct may file a complaint with the Office on behalf of a victim.

"(e) To be timely, a complaint must be received by the Office within 90 days from the date of the incident that is the subject of the complaint. The Executive Director may extend the deadline for good cause.

"(f) Each complaint shall be reduced to writing. Complaints may be submitted anonymously.

"(g) The Executive Director shall screen each complaint and may request additional information from the complainant. Within 7 working days of the receipt of the complaint, or within 7 working days of the receipt of additional information requested from the complainant, the Executive Director shall take one of the following actions:

"(1) Dismiss the complaint, with the concurrence of three Commission members;

"(2) Refer the complaint to the United States Attorney for the District of Columbia for possible criminal prosecution;

"(3) Attempt to conciliate the complaint;

"(4) Refer the complaint to mediation;

"(5) Refer the complaint for investigation; or

"(6) Refer the subject police officer or officers to complete appropriate policy training by the MPD or the HAPD.

"(h) The Executive Director shall notify in writing the complainant, the subject police officer or officers, and the Deputy Auditor for Public Safety of the action taken under subsection (g) of this section. If the complaint is dismissed, the notice shall be accompanied by a brief statement of the reasons for the dismissal, and the Executive Director shall notify the complainant that the complaint may be brought to the attention of the Police Chief who may direct that the complaint be investigated, and that appropriate action be taken.

"(i) MPD and HAPD shall notify the Executive Director when a subject police officer or officers completes policy training pursuant to subsection (g)(6) of this section.

"(j) The Executive Director, acting on behalf of the Commission, shall have unfettered, timely and complete access to documentation from the MPD, HAPD, and any District-licensed security company to which the subject special officer belongs for any of the duties of this section.

"(k) This subchapter shall also apply to any federal law enforcement agency that, pursuant to Chapter 3 of this title, has a cooperative agreement with the MPD that requires coverage by the Office; provided, that the Chief of the respective law enforcement department or agency shall perform the duties of the MPD Chief of Police for the members of their respective departments.

"(l) By February 1 of each year, the Office shall provide a report to the Council on the effectiveness of the Metropolitan Police Department's Body-Worn Camera Program, including an analysis of use of force incidents.

"(m) Beginning December 31, 2023 and every December 31 thereafter, the Office shall provide a report to the Mayor and Council regarding civilian complaints accepted pursuant to subsections (a) and (b) of this section. The report shall include:

"(1) The number, type and disposition of citizen and internally-generated complaints received, investigated, sustained, or otherwise resolved, and the race, national origin, gender, and age of the complainant and the subject officers;

"(2) The proposed discipline, appeals, and the actual discipline imposed on an officer as a result of any sustained complaint;

"(3) All use of force incidents, serious use of force incidents retaliation or serious use of force as defined in MPD General order 901-07 or any subsequent orders, and serious physical injury incidents; and

"(4) The number of cases the Office closed in the prior year by disposition type;

"(5) The number of days it takes to close a complaint, from the date of receipt of the complaint, by disposition type;

"(6) Reasons why cases are closed as dismissed on the merits, by disposition type and merit categorization.".

(i) Section 10(d) (D.C. Official Code § 5–1109(d)) is amended to read as follows:

"(d)(1) After a case is referred to the United States Attorney but a decision to prosecute is pending, the Executive Director shall endeavor to complete all possible investigative processes within his or her authority.

"(2) The Executive Director may complete an administrative investigation, including conducting interviews of subject officers, in cases where the public interest weighs

against delaying the completion of the administrative investigation until after the United States Attorney decides whether to prosecute. The Executive Director shall only be able to complete an administrative investigation under this subsection after receiving authorization from the Commission through a majority a vote and consultation with the prosecutor.".

(j) Section 12 (D.C. Official Code § 5–1111) is amended as follows:

(1) Subsection (i) is amended to read as follows:

"(i)(1) If the complaint examiner determines that one or more allegations in the complaint is sustained, the Executive Director shall transmit the entire complaint file, including the merits determination of the complaint examiner, to the Police Chief for appropriate action."

"(2) Within 45 days of receipt of the complaint file, the Police Chief shall provide written comment to the Executive Director confirming or rejecting the Office's recommended disciplinary action for the sustained allegations. If the Police Chief rejects a recommended disciplinary action, the comment shall explain the justification for the rejection.

(2) A new subsection (j) is added to read as follows:

"(j) If the complaint examiner determines that no allegation in the complaint is sustained, the Executive Director shall dismiss the complaint and notify the parties and the Police Chief in writing of such dismissal with a copy of the merits determination.".

(k) Section 13 (D.C. Official Code § 5–1112) amended by adding a new subsection (f-1) to read as follows:

"(f-1) In addition to providing notice under subsection (f), the Police Chief shall provide written comment to the Executive Director and the Deputy Auditor for Public Safety

confirming or rejecting the Office's recommended disciplinary action for the sustained allegations. If the Police Chief rejects a recommended disciplinary action, the comment shall explain the justification for the rejection.".

(l) Section 16 (D.C. Official Code § 5–1115) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "Board" and inserting the phrase "Commission" in its place.

(2) Subsection (b) is amended by striking the phrase "Board" and inserting the phrase "Commission" in its place.

Sec. 4. Section 1108(c-2) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-611.08(c-2)) is amended by added a new paragraph (6) to read as follows:

"(6) Each Commissioner of the Police Accountability Commission shall be entitled to a stipend of $5,000 per year for their service on the Commission; the Chairperson shall be entitled to $7,000 per year. Each member also shall be entitled to reimbursement of actual travel and other expenses reasonably related to attendance at commission meetings the performance of official duties."."

Sec. 5. Section 204 of The Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-534) is amended as follows:

(1) Subsection (a)(3) is amended by striking the phrase "Office of Police Complaints" and inserting the phrase "Office of Police Accountability" in its place.

(2) Subsection (a)(3)(A)(iii) is amended by striking the phrase "Office of Police Complaints" and inserting the phrase "Office of Police Accountability" in its place.

(3) Subsection (a)(12) is amended by striking ";" and inserting "or for records described in subsection (d-1) of this section;"

(4) A new subsection (d-1) is added to read as follows:

"(d-1)(1) The provisions of this section shall not apply to disciplinary records of officers with the Metropolitan Police Department or the District of Columbia Housing Authority Police Department (HAPD).

"(2) For purposes of this subsection, the term "disciplinary records" means any record created in the furtherance of a disciplinary proceeding against an MPD or HAPD officer, including:

"(A) The complaints, allegations, and charges against an officer;

"(B) The name of the officer complained of or charged;

"(C) The transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

"(D) The disposition of any disciplinary proceeding; and

"(E) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the officer.

"(3) When providing records pursuant to subsection (d-1)(1), the responding agency may redact:

"(A) Technical infractions. "Technical infraction" means a minor rule violation, solely related to the enforcement of administrative departmental rules that

(a) do not involve interactions with members of the public, and (b) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

"(B) Items involving the medical history of the officer or complainant, not including any records obtained during the course of an investigation such officer's misconduct that are relevant to the disposition of the investigation;

"(C) The home addresses, personal telephone numbers, personal cell phone numbers, or personal email addresses of any officer or complainant;

"(D) Any social security numbers; or

"(E) Disclosure of the use of any employee assistance program, mental health service, or substance abuse treatment service by an officer or complainant unless such use is mandated by a disciplinary proceeding that may be otherwise disclosed pursuant to this subsection.".

Sec. 6. Chief of Police and MPD Policies and Procedures.

(a)(1) The Chief of Police shall submit non-administrative policies and procedures, and changes in training curriculum, to the Police Accountability Commission ("Commission") for comment. The Commission shall have 45 days to review and provide comments to the Chief before said policies, procedures, and trainings are finalized and binding upon employees of the MPD. The Chief shall consider the comments of the Commission prior to issuing final policies and procedures.

(2) If the Chief rejects proposed changes to the policy, procedure or training suggested by the Commission, he or she shall provide a written comment to the Commission within 30 days of receiving the Commission's comments. The comment shall contain a justification for the rejection.

(b) Where the Chief determines it necessary to issue binding policies and procedures before submitting them to the Commission, he or she shall submit the interim policies or procedures to the Commission pursuant to (a).

Sec. 7. Officer Disciplinary Records Database.

By December 23, 2023, the Metropolitan Police Department shall publish a database that contains the following information:

(a) Rank and shield history of each sworn officer;

(b) Department commendations, recognition or awards of each sworn officer;

(c) Trainings, including in-service, promotional, and other modules, that each sworn officer have received; and

(d) Disciplinary history and records of each sworn officer, consistent with D.C. Official Code § 2-534(d-1)(1)-(d-1)(3).

Sec. 8. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Cade § 1-301.47a).

Sec. 9. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973, (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT

May 14, 2021

Kathleen Patterson
District of Columbia Auditor
Office of the District of Columbia Auditor
717 14th Street, NW, Suite 900
Washington, DC 20005

Dear Ms. Patterson,

Thank you for providing the Metropolitan Police Department (MPD) with an opportunity to review the draft Office of the District of Columbia Auditor (ODCA) report, *"MPD and the Use of Deadly Force: The Deon Kay Case."* We recognize that as our country tackles the important issue of police reform nationwide, we must ensure that our policies and training continue to serve as models for de-escalating situations whenever possible and promoting the sanctity of human life.

The loss of Mr. Kay's life is tragic, for his family, friends, and community, and indeed, our city. Nevertheless, the report confirmed our findings that the officer's use of deadly force in this case was justified. As a progressive police department committed to fair and constitutional policing, we remain open to examining and improving our policies and training to ensure that deadly force is used only as a last resort. Accordingly, with one limited exception, we agree with the recommendations outlined in your report, and have started working on implementation. Our specific responses to your recommendations, along with projected implementation dates, appear below.

ODCA Recommendation Summary	MPD Response
1. Revise the MPD use of force investigations policy to ensure that IAD investigations are sufficiently comprehensive to allow the UFRB to meet its mandate.	**AGREE** MPD agrees with this recommendation. MPD is currently revising our use of force orders consistent with your previous report and will include this recommendation in our revision. **Target Implementation: September 2021**
2. IAB should mandate that, in every case involving the use of deadly force, interviews of relevant witnesses be conducted at least twice and walkthroughs with involved officers should be recorded.	**AGREE IN PART** MPD agrees in part with this recommendation. MPD agrees that involved officers should be interviewed at least twice in every case involving deadly force and that walkthroughs should be recorded. However, we believe the recommendation's wording of interviewing "relevant witnesses" may be interpreted too broadly to mean that every witness will be interviewed twice, including non-involved officers

ODCA Recommendation Summary	MPD Response
	and witnesses. While we do not believe interviewing witnesses twice is always necessary, we will ensure our investigators conduct complete and through interviews in all cases. As you know, MPD cooperated with the auditor's suggestion that the audit team supply areas of questioning for the interviews in the Kay investigation, and we will use what we have learned to strengthen our investigative questioning techniques going forward. The requirements that involved officers be interviewed at least twice in deadly force cases and that walkthroughs be recorded will be memorialized in our updated use of force order when it is published. **Target Implementation: September 2021**
3. MPD should create a policy that defines the purpose and function of Crime Suppression Teams.	**AGREE** MPD agrees with this recommendation. MPD will issue a policy governing the operations of the district crime suppression teams. **Target Implementation Date: September 2021**
4. CST officials should receive specialized training in management and leadership principles, as well as risk assessment, planning, and leadership. CST members should be trained, and retrained at regular intervals, on matters relevant to their assignments and should "embrace the principles of working with the community, reducing bias, and improving cultural competency."	**AGREE** MPD agrees with this recommendation. MPD's Metropolitan Police Academy is developing training for both CST officials and officers that addresses the recommended topics. **Target Implementation Date: October 2021**
5. MPD should create a policy on the use of social media in conducting criminal investigations.	**AGREE** MPD agrees with this recommendation. MPD is drafting a policy governing the use of social media for investigative purposes. **Target Implementation Date: September 2021**
6. MPD should develop a policy on foot pursuits.	**AGREE** MPD agrees with this recommendation. MPD has reached out to other jurisdictions as well as the International Association of Chiefs of Police to review best practices. We have also engaged with our union to begin discussing development of a policy that will provide guidance to our officers

ODCA Recommendation Summary	MPD Response
	that appropriately balances the need for foot pursuits in some circumstances with the potential risk factors pursuits may present to officer safety and members of the public. **Target Implementation Date: September 2021**
7. The Use of Force Review Board (UFRB) findings should improve how Board feedback is memorialized by including more detailed findings of fact, more detailed "soft feedback" on how the officers could have improved tactically, and more specific recommendations related to MPD training and policy.	**AGREE** MPD agrees with this recommendation. The UFRB will revise the format of their findings to better capture recommendations and feedback provided by the Board. **Target Implementation Date: October 2021**

In closing, we would like to thank your office and The Bromwich Group for your continued work on this important issue. MPD is committed to ensuring our use of force policies, training, and practices remain a model for the nation, and we believe the implementation of these recommendations will further strengthen our agency and serve the District of Columbia. Please do not hesitate to contact us if you have any further questions.

Sincerely,

Robert J. Contee III
Chief of Police

Office of the District of Columbia Auditor

Additional Written Testimony of

The Hon. Kathleen Patterson, D.C. Auditor

Office of the District of Columbia Auditor

prepared for the

Council of the District of Columbia

Committee on the Judiciary and Public Safety

Hearing on

B24-0356 the "Strengthening Oversight and Accountability of Police Amendment Act of 2021 *and other legislation*

October 21, 2021

Virtual Hearing via Zoom

717 14th Street, N.W. ▪ Suite 900 ▪ Washington, DC ▪ 20005 ▪ 202-727-3600 ▪ dcauditor.org

Chairperson Allen, Chairman Mendelson, Councilmembers and Council staff: I write to provide additional comments on the Committee on the Judiciary and Public Safety hearing on police accountability and next steps in marking up Bill 24-356, the Strengthening Oversight and Accountability of Police Amendment Act of 2021.

Prior Questions

To move forward with significant changes in the current structure of accountability for the Metropolitan Police Department (MPD), the Council will likely need to ask and answer these questions:

- Who sets policy for the Metropolitan Police Department?
- Who selects leadership for the Metropolitan Police Department?
- Who investigates violations of policy or violation of law by members of the MPD?
- Who determines the outcomes of any investigations of sworn members for violation of law or policy?

Setting policy

Today policy is set by the Executive and specifically by the Chief of Police with the concurrence of his chain of command, and is set, as well, by the Council of the District of Columbia through amendments to the D.C. Code. Accountability agencies—including the Office of the D.C. Auditor (ODCA), the Office of Police Complaints (OCP), and the Office of the Inspector General (OIG)—make recommendations for change in policy and practice but the recommendations do not carry the force of regulation or law. Bill 24-356 as introduced would give the OCP a degree of authority to approve policies proposed by the MPD.

Selecting leadership

Today it is clearly within the authority of the Mayor to name the Chief of Police with the advice and consent of the D.C. Council. Bill 23-356 as introduced would give the OCP a role in recommending qualifications and specific candidates for Chief of Police but stops short of giving the OPC (or the Commission) the authority to name the Chief of Police as is the case in some cities with police commissions.

Investigations

Today the MPD conducts investigations of officers through the Internal Affairs and Use of Force Review Board structures. The OCP also conducts investigations and Bill 24-356 contains language authorizing the OPC to investigate all serious uses of force and to conduct investigations independent of citizen complaints, but it does not compel the OPC to conduct investigations in addition to those it conducts today. ODCA and the OIG have authority to conduct investigations of policy and of individual police actions based on broad independence and authority outlined in D.C. Code. It appears to be the intent of Bill 24-356 that there be multiple investigations of each serious use of force incident but there is no change to how the outcome is determined.

Outcome/Discipline

Today the outcome of disciplinary proceedings rests with several entities but primarily with the Chief of Police. The Public Employee Relations Board (PERB) and the Office of Employee Appeals (OEA) also have a limited role in regard to cases that proceed under the auspice of collective bargaining agreements (PERB) or outside collective bargaining (OEA) and cases that go through these administrative law procedures have access to D.C. Superior Court. Finally, the Office of the U.S. Attorney investigates the potential for criminal charges in cases of serious use of force. Proposed legislation would not change these various decision-making authorities.

Policing police

In determining whether to change statutory authority for these important roles and responsibilities the Council may wish to pose another prior question: does the Council concur with the assumption cited by the Police Reform Commission, "that the police cannot police themselves?" (p. 166, of Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission).

Former Police Chief Charles Ramsey and former Mayor Anthony Williams clearly did not hold this view in 1999 when they invited the Department of Justice (DOJ) to work with the District on the police department's policy and practice on use of force. What followed that invitation was a DOJ review and then roughly eight years of work with a monitor selected by the District and DOJ to develop and implement a comprehensive program to investigate uses of force within the Department. After the expenditure of significant time and resources the MPD had what was arguably a national best-in-class policy and practice on use of force. Then time passed and leadership changed; the instances of serious use of force declined, and what had been a separate unit of investigators with specialized training was folded into Internal Affairs. When ODCA contracted for a review of use of force in MPD and issued the 2016 report, The Durability of Police Reform: The Metropolitan Police Department and Use of Force 2008-2015, we concluded that while many of the reforms had held, there were certain red flags identified. We issued 38 recommendations designed to restore MPD to its "best in class" status.

The fact here, today, is that the most significant among those recommendations made to the MPD were not adopted. The specialized unit was not restored; recommendations to speed up the administrative reviews of uses of force were not adopted. And when ODCA returned to the subject matter in reviewing officer-involved fatalities that occurred between 2018 and 2020, we found significant deterioration in the department's investigations of use of force. Should one conclude, then, that "police cannot police themselves?" The reforms apparently worked for a number of years. And then they did not.

Following publication of the 2016 ODCA report, our contractor, Michael R. Bromwich–who had served as the police monitor from 2001 to 2008–and I authored an op-ed in the Washington Post. We concluded that "it is possible to reform police departments and sustain those reforms" but in order to do so, "leadership is critical from the police chief and her command staff, as well as from civilian political leaders, to implement and sustain those reforms." This poses the question: whom would you hold responsible for the fact that the reforms were not sustained? And will legislative action you take today serve to strengthen the District's ability to sustain reform?

Legislative issues

One important issue the Committee discussed with witnesses during the hearing was the need to move forward with administrative reviews while the U.S. Attorney considers use of force and other potential criminal cases. I share with this written testimony an excerpt from the 2016 report, which included a four-page discussion of the issue. The expert team fielded by The Bromwich Group believed that MPD should move forward with much of the administrative review so that a final assessment could be made faster than is the case today. That is, the only part of the administrative investigation that should be deferred is the interview of the involved officer unless that interview is voluntary. Chief Contee made a point on this subject during the hearing but it is a very limited point: if the interview is compelled, it can taint the criminal case. But there is no risk associated with collecting all other relevant evidence promptly so that if and when the prosecutor declines prosecution, the administrative investigation can be wrapped up quickly. The issue was explicitly addressed in the Memorandum of Agreement (MOA) that MPD signed with the Department of Justice in 2001:

> "70. MPD shall consult with the USAO regarding the investigation of an incident involving allegations of criminal misconduct in the categories of matters described in paragraphs 72 and 73. If the USAO indicates a desire to proceed criminally based on the on-going consultations with MPD, or MPD requests criminal prosecutions in these incidents, any compelled interview of the subject officers shall be delayed, as described in paragraph 71. **However, in order to ensure the collection of all relevant information, all other aspects of the investigation shall proceed."**

Mr. Bromwich noted in recent correspondence with me, that "the issue of unnecessarily delaying administrative use of force and misconduct investigations exists in almost every major PD (police department), has been noted in most DOJ pattern-or-practice investigations and is frequently addressed in consent decrees." He shared language from the current Baltimore consent decree:

> "If at any time during the intake or investigation of the misconduct complaint the investigator finds evidence indicating apparent criminal conduct by any BPD personnel, the investigator shall promptly notify [internal affairs management]. [Internal Affairs management] shall consult with the relevant prosecuting agency or federal law enforcement agency regarding the initiation of a criminal investigation. Where an allegation is investigated criminally, [internal affairs] **shall ... continue with the administrative investigation(s) of the allegation, absent specific circumstances that would jeopardize the criminal investigation. In such circumstances, the decision to postpone the administrative investigation, along with the rationale for doing so, will be documented in writing and reviewed by the Commissioner or his/her designee...."** Baltimore Consent Decree, https://www.justice.gov/opa/file/925056/download, at p. 131.

In its response to ODCA a year after we issued the 2016 report, MPD continued to indicate that they would not follow the recommendation–despite the fact that it was part of the MOA to which they agreed earlier–on proceeding with the administrative review. I also include as an attachment the 2017 update on the ODCA/Bromwich recommendations provided by MPD from which I quoted during the question-and-answer portion of the hearing.

Mr. Chairperson and other Councilmembers, when you have an opportunity to review the status update that Chief Contee committed to provide responding to recommendations ODCA made in the March and

May 2021 reports on officer-involved fatalities, I urge you to also review the status of the 38 recommendations we made to the MPD in 2016. I believe there are issues like the issue of the administrative review that you may wish to consider as potential statutory provisions or committee report language when moving forward with the police accountability legislation.

Finally, I also include below a list of "features of an effective police oversight body" published by the National Association for Civilian Oversight of Law Enforcement for your consideration.

Thank you for considering these additional views.

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National Association for Civilian Oversight of Law Enforcement

What are the features of an effective police oversight body?

A:
There is no right answer as to what an effective police oversight body "must" look like. As many of the FAQ's point out, flexibility is key. You can still get to the right outcome through different mechanisms. However, here are some features, some tangible, some not, which are key to effective police oversight:

1. Independence. The oversight body must be separate from all groups in order to garner trust by being unbiased.
2. Adequate funding. Oversight bodies must have enough funding and spending authority to fulfill the duties set forth in the enabling legislation. This includes enough money for adequate staff and money to train that staff.
3. Access to all critical pieces. This includes access to all necessary information and evidence in an investigation, but it also means access to decision makers in both the law enforcement agency and elected officials.
4. Rapport. The talent, fairness, dedication, and flexibility of the key participants- in particular the oversight director, chief elected official, police chief or sheriff, and union president. The rapport between the chief players can be far more important to the success of the oversight system than the systems structure. [1]
5. Ample authority. Whatever the oversight model chosen, it must have enough authority to be able to accomplish those goals.
6. Ability to review police policies, training and other systematic issues. Many see this as one of the most important roles an effective oversight agency can have. This ability shifts the focus on being reactive to past events to proactive with the possibility to resolve issues before they begin.

7. Community/Stakeholder Support and Outreach. Maintaining community interest is important for sustaining an agency through difficult times when cities or government jurisdictions may need to cut services for budget reasons. [2]
8. Transparency. Systematic reporting provides transparency and accountability to the community, and typically includes complaint analysis and other observations about the law enforcement organization and its practices. Reporting also increases public confidence in the oversight agency, as much of the work related to complaint investigations may be confidential and protected from public disclosure.[3]

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[1] [1] Peter Finn. Citizen Review of Police: Approaches and Implementation, p. xi (Nat'l Institute of Justice 2001).
[2] http://nacole.org/wp-content/uploads/Oversight-in-the-United-States-Attard-and-Olson-2013.pdf
[3]http://nacole.org/wp-content/uploads/Oversight-in-the-United-States-Attard-and-Olson-2013.pdf

Attachment A from testimony from The Hon. Kathleen Patterson, D.C. Auditor, prepared for the Council of the District of Columbia Committee on the Judiciary and Public Safety Hearing on B24-0356 the "Strengthening Oversight and Accountability of Police Amendment Act of 2021" and other legislation.

Excerpt from The Durability of Police Reform: The Metropolitan Police Department and Use of Force, January 2016, Pages 62-65

b. Completion of MPD Administrative Investigations

MPD's administrative investigation of serious uses of force cases begins with a preliminary investigation, usually completed within 24 to 72 hours. This preliminary investigation generally includes interviews of police officer witnesses, interviews of civilian witnesses, witness canvasses, collection of physical evidence from the scene, photographs of the scene and of the involved officers and civilians, collection of relevant video footage,[120] and the collection of relevant MPD dispatch tapes, among many other sources of evidence. The fruits of the preliminary investigation are provided to the USAO, which then works with IAD investigators to develop additional relevant evidence, including forensic evidence, necessary to make a decision to prosecute or decline prosecution of officers involved in the use of force.

By the terms of DC's Fire and Police Disciplinary Action Procedure Act of 2004, any disciplinary action against a MPD officer must be commenced within days of the underlying incident relating to the proposed disciplinary action.[121] However, any period during which the officer's conduct is the subject of a criminal investigation is tolled—*i.e.*, not included in the calculation of time within which the disciplinary action must be commenced. In effect, referrals to the U.S. Attorney's Office provide additional time for IAD to conduct the investigations that may form the basis for discipline. There is no prohibition, in law or in fact, that prevents IAD investigators from proceeding with the administrative investigation while the matter is under review by the USAO, and in fact the criminal and administrative investigations rely largely on the same body of evidence, with some exceptions. In these circumstances, the main investigative step that cannot be taken until and unless the USAO issues its declination is an interview of the subject officer(s) whose conduct is under investigation.

However, The Review Team's examination of various MPD use of force cases reflects that, in many instances, the development of the MPD administrative investigation and the investigative file come to virtually a complete halt while the case is being considered by the USAO. This approach means that instead of a small number of additional steps necessary for completing the administrative investigation—in some cases, the only step that cannot be taken before the declination is interviewing the subject officer(s)—IAD investigators delay the development of

the administrative case until after MPD has received the USAO's declination. Because, as we have just described, MPD serious use of force cases, especially fatal shooting cases, are frequently pending in the USAO for extended periods of time, the administrative investigation is frequently resumed long after the preliminary investigation was completed.[122] In monitoring the UFRB's consideration of numerous cases presented between June and late September, we observed many occasions in which the final phases of the administrative investigations, because of the passage of time, were conducted by someone other than the original investigator—the original investigator had transferred out of IAD, had retired, or was otherwise unavailable to complete the investigation. Indeed, one of the first UFRB cases we observed had become the responsibility of the third IAD investigator assigned to the case. Not surprisingly, the investigator was not as familiar with the facts as he would have been had he handled the case from the beginning, and he could not answer basic questions asked by members of the UFRB.

The failure to promptly conduct as many aspects of the administrative investigation as possible has a number of adverse consequences. First, incomplete preliminary investigations require substantial additional investigative work after the case has been sent back to MPD, and in many cases, because of the passage of time, by a different investigator. Second, investigators find themselves in many cases scrambling to gather evidence that may be less available because of the delay caused by the USAO's extended consideration of the case; this may be true for both witness testimony and categories of physical evidence. Third, inadequate and incomplete preliminary investigations may limit the ability of the UFRB to commence disciplinary action because of the 90-day clock, which restarts once the USAO's declination sends the case back to MPD.

Our observation of the UFRB's meetings and discussions confirmed these difficulties caused by IAD's setting the administrative case aside while the USAO investigates and considers it. The Use of Force Review Board General Order states that, "Absent special circumstances, the [UFRB] shall meet twice monthly to review use of force incidents."[123] In fact, the UFRB meetings that took place from April through September 2015 were scheduled erratically to meet fast approaching 90-day deadlines rather than on a recurring, predictable basis.[124] In many cases, the UFRB met to consider a case within a very few days before the 90-day deadline: of the 23 cases heard by the UFRB over a six month period, 12 were considered with seven days or less left in the 90-day period. In a number of cases, this timing problem forced the UFRB to confront the difficult choice of deciding whether to direct IAD to conduct further investigation, with the knowledge that doing so would bar the imposition of any discipline on the officer, or deciding the case based on an incomplete or inadequate record. We were unable to determine with certainty why the vast majority of IAD cases to come before the UFRB were completed so late on the 90-day calendar, and no one within MPD provided any justification for failing to advance the administrative investigations and compile the investigative file while the cases are pending at the USAO. The Review Team has concluded that these unnecessary delays in completing the administrative investigation interfere with the ability of the UFRB to do its important job.

The Review Team recommends that the IAD administrative investigation move forward expeditiously while a case involving a serious use of force is being considered by the USAO. The objective should be to minimize any additional investigation once the case has been returned to MPD, and to complete the IAD administrative investigation and investigative report within 30 days of the time the letter of declination is received. IAD investigator performance evaluation should explicitly consider the timeliness of the investigations he or she conducts. (Recommendation No. 17).

[119] The two USAO prosecutors advised us in general terms that the USAO review process has recently been modified to reduce these delays, but we are unaware of the details of those changes and have no means to judge their likely efficacy in reducing delays. We note, however, that within two months of our interviews of the two prosecutors, and within a span of four days, three of the officer-involved fatal shooting cases were returned to MPD with letters of declination.

[120] This includes video from DC government video cameras, private cameras deployed by retail establishments and/or commercial buildings, and private cameras for residences identified during the canvass.

[121] DC Code § 5-1031; GO-PER-201.22.

[122] In its comments on the draft report, MPD stated that is disagreed with this characterization but agreed that IAD investigators should more promptly assemble the case file and prepare a draft of the final report while the case is pending at the USAO. MPD further stated that it is hopeful that Cobalt, its new records management system, will allow MPD to more closely and effectively monitor IAD investigations. We agree with MPD that closer monitoring and oversight are necessary.

[123] GO-RAR-901.09, at 4. A copy of the Use of Force Review Board General Order is attached as Exhibit G.

[124] The UFRB meetings took place on April 14, May 4, June 5, July 1, August 11, August 18, August 28, September 21, and September 25.

ODCA Office of the District of Columbia Auditor

March 20, 2017

The Hon. Charles Allen, Chairman
Council Committee on the Judiciary and Public Safety
The John A. Wilson Building
1350 Pennsylvania Avenue NW
Washington D.C. 20004

Dear Councilmember Allen:

I write to share the enclosed update on the status of the Metropolitan Police Department's implementation of recommendations made in the report issued by this office in January 2016, entitled *The Durability of Police Reform: The Metropolitan Police Department and Use of Force 2008-2015.*

Of the 38 recommendations included in the report -- produced on our behalf by The Bromwich Group -- the MPD is reporting that it has implemented 15 recommendations, has implemented another 13 in part, and five recommendations are "in progress." MPD indicates that five of the recommendations will not be implemented, primarily because the Department disagrees with the recommendation. The "comments" section includes explanations.

Because this was a contract audit and not produced by the ODCA staff, we are not including the recommendations in our annual compliance reporting. We share with you and your colleagues so that the Committee may follow up on the findings and recommendations in the course of your oversight of the MPD. Please let me know if you have any questions on the information.

Thank you.

Sincerely yours,

Kathleen Patterson
District of Columbia Auditor

cc: Councilmembers
Officers of the Council
Betsy Cavendish, Counsel to the Mayor

Office of the District of Columbia Auditor

Implementation of Recommendations for: The Durability of Police Reform: The Metropolitan Police Department and Use of Force 2008-2015

Issued January 2016

The following provides the status of the Metropolitan Police Department's implementation of recommendations made by the Office of the D.C. Auditor. The Metropolitan Police Department provided the information below on March 15, 2017 and we include their response in full.

- **Implemented** – Agency has implemented recommendation
- **In progress** – Management is implementing but implementation is not yet complete
- **Will not be implemented** – Agency disagrees with recommendation and will not implement; agency accepts risk

	Recommendation	Status	Comments
1	MPD's use of force policy should be modified to include more detailed treatment of neck restraints, and that any use of neck restraints by MPD officers be treated as a serious use of force and be investigated by IAD.	Implemented	The Metropolitan Police Department's (MPD's) revised version of GO-RAR-901.07 (Use of Force), published August 12, 2016, includes a more detailed discussion of the prohibition against neck restraints and requires that the use of neck restraints be classified as a serious use of force. All serious uses of force are investigated by MPD's Internal Affairs Division (IAD).
2	MPD should comprehensively review and, if necessary, revise its use of force policies no less frequently than every two years.	Implemented	MPD considers our use of force policies throughout our use of force investigations, and the Use of Force Review Board (UFRB) is mandated to continually consider policy and recommend updates if needed. To further codify these practices, we are revising GO-RAR-901.09 our (Use of Force Review Board) to require the Board to conduct a formal, documented review of the GO-RAR- 901.07 (Use of Force) and GO 901.08 (Use of Force Investigations) every two years.

	Recommendation	Status	Comments
3	MPD's canine policy should restrict off-leash deployments to searches for suspects wanted for violent felonies; searches for burglary suspects in hidden locations inside buildings; or who are wanted for a misdemeanor and whom the officers reasonably believe to be armed.	In Progress	As currently worded, the Auditor's recommendation would allow off-leash searches for suspects of non-violent *misdemeanors* who are suspected of being armed, but not non-violent *felonies* who are suspected of being armed. Accordingly, we are revising our policy to limit off-leash deployments to searches for (1) suspects of crimes of violence as defined in D.C. Code 23-1331(4)[1] or (2) suspects who are reasonably suspected of being armed.
4	MPD's canine policy should require that the number of verbal warnings provided prior to canine deployment be increased from one to three; and that in open field or block searches, an additional warning be given each time the canine team has relocated the equivalent of a city block from where the initial warnings were given.	In Progress	MPD is currently working on an updated version of GO-RAR-306.01 (Canine Teams) that includes the requirement that three warnings be given, when tactically sound, to include each time the canine team has relocated the equivalent of a city block from where the initial warnings were given. While we believe that the additional warnings are good practice, we believe it is critical to clarify that the additional warnings should only be given when tactically sound to ensure officer safety.
5	MPD should reinstate use of force *reporting* for hand controls and resisted handcuffing.	Will Not Be Implemented	MPD disagrees with this recommendation. MPD's policy remains that all uses of force that result in injury or a complaint of pain to any person are both reported and investigated, to include the use of hand controls and resisted handcuffing. However, members routinely encounter arrestees who do not willingly submit to

[1] The term "crime of violence" means aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

	Recommendation	Status	Comments
			handcuffing. In those cases, hand control procedures such as the use of firm grips and escort holds assist the officers in placing handcuffs on arrestees while ensuring both the safety of the officer and the arrestee. In the vast majority of those cases, the result is no injury or complaint of pain. While there may be limited value in tracking this information, on a practical level, this must be weighed against the consequences: requiring officers to take time off the street, away from their patrol duties, to complete an administrative report documenting the justified use of hand controls every time a suspect offers minor resistance when being handcuffed.
6	MPD should reinstate use of force reporting *and investigations* for individual and team takedowns.	Implemented in Part	MPD's policy remains that all uses of force that result in injury or a complaint of pain to any person are both reported and investigated, including takedowns. Additionally, MPD's revised version of GO-RAR-901.07 (Use of Force), published August 12, 2016, added a requirement to report solo and team takedowns where there is no complaint of pain or injury. However, we continue to disagree that takedowns without injury or complaint of pain should result in a full investigation unless there is an injury or complaint of pain.
7	MPD should make all substantive changes in use for force reporting and investigations polices through a transparent process that ensures that the public, all MPD stakeholders, and MPD officers have access to current MPD policies, rather than through limited internal communications.	Implemented	MPD's revised version of GO-OMA-101.00 (Directives System), published June 3, 2016, eliminated the decades-long practice of issuing policy updates by internal teletypes. The updated version of GO-OMA-101.00 (Directives System) authorizes the creation of "executive orders." Executive orders allow the Chief of Police to change policies and procedures in an expeditious manner, similar to the former teletype process. However, approved executive orders are available on the internal "MPD Directives Online" website for our members, as well as the MPD public website. They are also linked to

	Recommendation	Status	Comments
			the policies they amend to make changes clear.
8	IAD should develop a comprehensive use of force investigations procedural manual that incorporates the requirements of the MOA, relevant General Orders, and an appropriate set of procedures based on the original FIT Manuals.	In Progress	MPD is finalizing an updated IAD Operations Manual governing the standard operating procedures for conducting both use of force and police misconduct investigations. The revised manual consolidates the contents of the previous Force Investigation Team (FIT) and IAD Manuals, related MPD policies, and incorporates relevant requirements of the 2001 Department of Justice Memorandum of Agreement (MOA).
9	MPD should require that all civilian witnesses and officer witnesses involved in a use of force matter be interviewed and that the interviews be either audio and/or video recorded, except when a civilian witness declines to give consent to taping.	Implemented in Part	The 2001 Department of Justice MOA required – and MPD's policy since 2002 has been – that in investigations involving a serious use of force or serious physical injury, interviews of complainants, involved officers, and material witnesses are tape recorded or videotaped. However, we disagree that the statements in all use of force investigations need to be recorded. IAD reviews all use of force incidents to determine who will conduct the investigations (i.e., IAD or chain of command officials.) By policy, serious use of force investigations (e.g., firearm discharges, canine bites, uses of force indicating potential criminal conduct) are always investigated by IAD, and those interviews are recorded.
10	MPD should transcribe all recorded statements in serious use of force cases and the transcript should be included in the investigative file for ease of reference and to ensure the accuracy of investigative reports.	In Progress	While MPD believes, and our policy requires, that statements in serious use of force cases be recorded, we do not believe that all recorded statements in serious use of force cases must be transcribed. MPD's draft IAD Operations Manual, once implemented, will require the transcription of statements in the following cases investigated by IAD: • Fatal uses of force; • Police shootings that result in injury; • Cases where the misconduct will likely result in an

	Recommendation	Status	Comments
			adverse action hearing; • In-custody deaths; • Vehicle pursuits resulting in a fatality; and • Any other cases as determined by the Commanding Official of IAD.
11	MPD should restructure the Internal Affairs Division so that it contains specialists in conducting use of force investigations. This restructuring does not require the reversal of the FIT/IAD merger, which was driven primarily by a diminishing caseload. The use of force investigative specialists can undertake non-use of force investigations, but use of force would be considered their special area of expertise. They would serve as lead investigators on all serious use of force investigations. The members of this group should be officers who have demonstrated the proper attitude and skills for conducting use of force investigations.	Will Not Be Implemented	MPD disagrees with this recommendation. MPD's IAD agents are trained in conducting comprehensive use of force investigations. MPD continues to conduct specialized in-service training for our IAD investigators to enhance their skills, and the training includes training on use of force and other topics that are central to conducting internal affairs investigations. MPD also continues to ensure that personnel selected for IAD positions have the required skills and commitment to producing fair and impartial investigations.
12	MPD should provide the use of force specialists with comprehensive, specialized training similar to the training that was provided to FIT when it was formed in 1999. This training should include, among other things, instruction on how to conduct tactical analyses that evaluate the decisions that led up to the use of force, not merely the use of force itself. The training should instruct the investigators on how, as part of such a comprehensive analysis, they should identify any policy, training, or equipment issues raised by the use of force incident.	Implemented	Upon assignment, all new IAD investigators are provided with comprehensive training by an IAD official on conducting use of force investigations. The training emphasizes conducting tactical analyses of the decisions that lead up to the use of force as well as identifying other issues (e.g., policy, training, equipment) raised by the incident.
13	MPD should reinstate the practice of requiring IAD investigators to respond to the scene of all serious use of force incidents, including but not limited to head strikes and canine bites.	Implemented	On November 10, 2015, MPD reinstated the requirement that IAD investigators respond to the scene of head strikes and canine bites, consistent with our policy to respond to the scene of all serious uses of force.
14	MPD should require that IAD investigators be required to investigate all reported or claimed strikes to the head	Implemented in Part	For more than fifteen years, MPD's policy has required that IAD be responsible for conducting the investigation

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	whether or not the head strike is confirmed by a field supervisor and regardless of whether there is an injury or corroborative evidence; and that IAD investigators be required to investigate all canine bites.		of canine bites and confirmed head strikes. MPD remains committed to this policy. However, the *Neighborhood Engagement Achieves Results Act of 2015* (D.C. Law 21-125; D.C. Official Code § 5-1107) effective June 30, 2016, grants the Office of Police Complaints (OPC) sole authority to determine whether MPD or OPC will investigate citizen complaints, including complaints of excessive force. Claims or complaints of head strikes will be referred to OPC for determination on who will investigate the complaint consistent with District law.
15	MPD and the United States Attorney's Office for the District of Columbia should work together to reengineer the system for reviewing the most serious use of force cases involving MPD officers with the goal of eliminating lengthy delays.	Implemented in Part	The Chief of Police continues to meet monthly with the United States Attorney's Office (USAO), and those meetings provide an opportunity to discuss the status of our serious use of force cases. The USAO is an important partner, and they have demonstrated an ongoing commitment to reducing the length of their reviews. We will continue to work with them to ensure that reviews proceed as expeditiously as possible.
16	MPD and the USAO should establish a goal of completing the USAO review of serious use of force cases within six months, with that period to be extended only by explicit agreement between the US Attorney and the Chief of Police, and the specific reasons provided that justify the need for additional time.	Will Not Be Implemented	As described above, MPD has been very pleased with the commitment shown by the USAO in reviewing our serious use of force cases in a timely manner and will continue to work with the USAO to support any protocols that can be put in place to help expedite their reviews.
17	MPD should require that the IAD administrative investigation move forward expeditiously while a case involving a serious use of force is being considered by the USAO. The objective should be to minimize any additional investigation once the case has been returned to MPD, and to complete the IAD administrative investigation and investigative report with 30 days of the time the letter of declination is received. The IAD investigator's performance evaluation should explicitly	Implemented in Part	IAD supervisors work closely with their subordinate investigators to ensure they proceed with their investigations to the greatest degree possible (conducting interviews, etc.) while awaiting USAO declination decisions. This requirement is also being added to the draft IAD Operations Manual. The timeliness and quality of investigations are also considered in IAD investigator performance evaluations.

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	consider the timeliness of the investigations he or she conducts.		However, MPD disagrees that all cases can be completed within 30 days of a declination. There are times when extensions beyond 30 days of the declination are warranted and allow for a more comprehensive, complete investigation of the incident.
18	MPD should provide members newly appointed to the UFRB with specific orientation and training on their responsibility as UFRB members and the responsibilities of others involved in the UFRB process, including the UFRB Administrator, the Assistant Chief of IAB, the Commander of IAD, and IAD investigators.	*Implemented*	*MPD's revised version of GO-RAR-901.09 (Use of Force* Review Board), published March 30, 2016, requires that the UFRB Chairperson conduct an orientation with new Board members to include a review of the policy governing the UFRB, the role of the Board members and IAD, and a general overview of Board operations.
19	The UFRB should actively monitor the progress of IAD in completing use of force investigations and raise concerns about the timeliness of use of force investigations with the Assistant Chief of IAB and, if necessary, the Chief of Police. *This will help to avoid cases in which the UFRB's freedom to* take appropriate action is hamstrung because it receives the investigative report so late in the process.	Implemented	MPD's GO-RAR-901.09 (Use of Force Review Board) continues to require the UFRB Administrator to track the progress of investigations conducted by the IAD and notify the Assistant Chief, Internal Affairs Bureau (IAB), *regarding any cases that are at risk of missing the 90-day* deadline. In addition, the UFRB was moved under the purview of the Office of Risk Management (ORM) at the end of fiscal year 2016. This allows a risk-based approach to cases and monitoring. The ORM works with the UFRB Chairperson and the Assistant Chief of IAB to ensure timely disposition of cases.
20	The UFRB should enforce the requirement that a Decision Point Analysis be prepared for each case that comes before the UFRB, but should consider transferring the responsibility *for preparing the Analysis to the IAD investigator rather than* the UFRB Administrator.	Implemented in Part	In MPD's revised GO-RAR-901.09 (Use of Force Review Board), we have clarified that the Board must prepare a decision point matrix analysis, and the analysis must be *incorporated into the record of the meeting. We believe* it is critical for the matrices to be prepared during the meeting, with input from all Board members, and not in advance by the UFRB administrator or the case investigator for two key reasons. First, there is a risk that if the matrix is prepared in advance, it may unintentionally sway the Board members as to what the

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			decision points in the use of force incident actually are. Second, we do not want to risk creating an environment where our Board members may potentially rely on reading the summaries in advance of the hearing in lieu of reading the actual investigation.
21	The Review Team recommends that the Board Administrator highlight the most significant pieces of evidence so that each member makes sure to examine those items with special care.	Will Not Be Implemented	MPD believes that for the UFRB to function as intended, Board members must have the responsibility, as part of their review, to highlight what they find to be the most significant pieces of evidence. Similar to our view on the decision point matrix, we believe there is risk in having someone other than the Board members responsible for the identification of the most significant pieces of evidence.
22	The UFRB should consult with the Assistant Chief of IAB and the Commander of IAD on a quarterly basis to provide feedback on the quality and timeliness of recent IAD use of force investigations.	Implemented	MPD agreed with this recommendation, but felt this communication needed to occur more frequently than quarterly. The UFRB Chairperson and the Assistant Chief of IAB were already routinely communicating regarding the quality and timeliness of investigations. However, the March 30, 2016, revision of GO-RAR-901.09 (Use of Force Review Board) codified this practice by requiring that the Board notify the IAB at any time during their review when they find a use of force investigation to be lacking in quality or timeliness.
23	The officer's direct supervisor, as well as the second-level supervisor, should in all cases be involved in the SSP review.	Implemented	MPD Standard Operating Procedure (SOP) 07-01 [Personnel Performance Management System (PPMS) and Supervisory Support Program (SSP)] requires (1) that the member's direct supervisor be involved in the SSP process, to include an initial meeting with the member to review the incidents that lead to the SSP, (2) a meeting be held with the member's other command officials to review the SSP intervention plan with the member, and then (3) a meeting be held every two weeks thereafter to

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			ensure the member is making sufficient progress with his or her SSP plan.
24	SSP should be modified to flag officers against whom multiple use of force or misconduct allegations have been logged even if those allegations were not substantiated.	Implemented in Part	A focus of MPD's Professional Conduct and Intervention Board (PCIB) has been to review members who have multiple uses of force within a given time period. It is important to note that the use of force is a necessary component of police work and when used consistent with the law and MPD policy, is an important tool that officers have to protect both themselves and others from harm. However, we also realize that use of force situations present a risk both to the officer and the agency. By having the Board examine officers with multiple uses of force and/or allegations of misconduct, we can identify officers who may need additional training and support.
25	MPD's analysis of PPMS data should focus not only on individuals but also on units and sub-units within MPD.	Implemented in Part	While PPMS's front-end reporting function is currently limited, the PCIB administrator has looked at districts and units when identifying members for PCIB review. By focusing on particular police districts and units within those districts, the Board is able to evaluate broader management issues than would otherwise be possible by focusing on individual members only. We are also exploring how PPMS and SSP may be modified to generate reports that focus on units and sub-units within the Department.
26	The PCIB Administrator should prepare an analysis of each case in advance of PCIB meetings. At present, substantial raw material is provided to the PCIB but no analysis.	Will Not Be Implemented	While the PCIB was created by MPD long after the termination of the MOA, we appreciate the recommendations made by the Auditor regarding the administrative operations of the Board. That being said, we disagree with this recommendation for the same reason we do not feel that the UFRB administrator or case investigator should prepare case summaries of use

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			of force cases in advance of meetings. There is a risk that if the PCIB administrator prepares a summary in advance, Board members will not take the opportunity to conduct their own analyses. However, the PCIB administrator will continue to prepare a data summary report of all members who appear before the Board.
27	The PCIB Administrator should outline remedial options based on review of the officer's record and the PCIB's actions in prior similar cases.	Implemented in Part	Since its inception, the PCIB has identified remedial options that may be appropriate based on the Board's review of individual members, including, but not limited to, interventions with management officials, referral to our employee assistance program, and referral to newly developed tactical communication training. However, we feel that the discussions and input of all Board members during the meetings are key elements to ensuring that when remedial options are chosen, they reflect the full range of knowledge and input from our Board members. We do not want to inadvertently limit our analyses or options by requiring the Board administrator to prepare them in advance.
28	The Assistant Chief of IAB should direct the PCIB Administrator to circulate in writing, on a quarterly basis, developments in cases previously considered.	Implemented in Part	As part of her ongoing duties, the PCIB administrator periodically reviews the status of members previously reviewed by the Board to see if there have been further developments, either positive or negative, with those members, and notifies the Board as appropriate.
29	The monthly PCIB meetings should be used to discuss new cases rather than review cases previously discussed. Developments in prior cases should be addressed in writing, distributed to Board members, and can be placed on the agenda if requested by a Board member.	Implemented in Part	While the discussion of new cases accounts for the vast majority of time at Board meetings, we believe there is value in discussing developments in previous cases before the Board as a whole on an as-needed basis to get input and suggestions from members on any additional actions by the Board that may be warranted.
30	ORM must be operated under leadership capable of formulating and directing substantive audits, including MOA-	Implemented	MPD remains committed to ensuring ORM command officials conduct substantive and comprehensive audits.

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	related audits.		
31	ORM's annual audit plan should contain a significant percentage of audits focused on MOA-related issues.	Implemented	MPD is committed to ensuring that MOA-related audits are conducted on an annual basis. However, the number of MOA audits conducted will vary from year to year depending on the risk factors faced by the Department.
32	ORM should provide its annual audit plan to the District of Columbia Auditor and the District of Columbia Office of the Inspector General.	Implemented	MPD has shared its Fiscal Year 2017 audit plan with the District of Columbia Auditor and the Office of the Inspector General.
33	MPD should reexamine whether, as a matter of policy, mere flight is sufficient grounds for pursuing a suspect, and for stopping him, and should provide comprehensive training on the issue.	Implemented	MPD's policy on conducting stops is constitutionally sound and is consistent with court findings. We provide comprehensive training to our members on conducting lawful stops.
34	MPD should provide specific intensive training for handling officer-involved shooting cases and limit the handling of those cases to a small number of skilled and experienced IAD investigators.	Implemented in Part	As previously described, MPD does not agree that there should be a limited number of use of force specialists within IAD. However, MPD remains committed to ensuring all IAD investigators are both capable and engaged in conducting comprehensive and sufficient use of force investigations. We believe the basic principles of investigations are consistent regardless of the investigation type. These principles can be applied, and with the proper training and retraining, ensure quality, comprehensive investigations in use of force as well as police misconduct. IAD investigators will continue to receive specialized training upon their assignment to the unit, and we will continue to provide specialized in-service training for our IAD investigators.
35	Once MPD completes the preliminary investigation of the officer-involved shooting in the first 24-72 hours after the incident and the cases has been referred to the USAO, the investigator, in consultation with his or her supervisor, should develop a detailed investigative plan which, as recommended above, is designed to complete the MPD administrative	Implemented in Part	MPD is committed to conducting timely investigations of officer-involved shootings, and IAD officials meet regularly with their assigned investigators for case reviews to ensure timely case progression. Our draft IAD Operations Manual includes requirements to formalize these meetings. However, we do not believe that adding

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	investigation within 30 days of the incident, with the exception of forensic reports and interviews of the involved officers.		an additional requirement to develop a separate investigative plan will ensure completion of an investigation within 30 days of the incident. Investigative plans must be flexible to accommodate the specific facts and circumstances of each case.
36	IAD investigators should scrupulously follow the requirements of MPD's Use of Force Investigations General Order in officer-involved shooting cases, which requires, among other things, that all relevant witnesses be interviewed, and that the investigator identify and attempt to resolve (if possible) inconsistencies in the accounts of witnesses to the incident.	Implemented	MPD continues to follow the requirements of GO-RAR-901.08 (Use of Force Investigations) in officer-involved shooting cases, including ensuring that all relevant witnesses are interviewed and that the investigator identifies and attempts to resolve inconsistencies in the accounts of witnesses to the incident.
37	MPD should modify its Use of Force Investigations General Order to address the problems created by using leading questions during investigative interviews and counsel IAD investigators to avoid using them to the maximum extent possible.	In Progress	MPD has added language to our draft update to GO-RAR-901.08 (Use of Force Investigations) reminding investigators to avoid using leading questions. However, it is important to note that the Auditor's report identified only one investigation where leading questions were used. MPD understands the importance of ensuring leading questions are not part of an interview, and as reported to the Auditor, MPD selected a new vendor to provide training on interview and interrogations in 2014 to ensure our investigators were provided with high quality training on this topic.
38	DC's misdemeanor Assault on Police Officer statute should be amended so that the elements of the offense require an actual assault rather than mere resistance or interference with an MPD officer.	Implemented	*The Neighborhood Engagement Achieves Results Act of 2015* (D.C. Law 21-125; D.C. Official Code § 5-1107) effective June 30, 2016, clarifies the elements of the assault on a police officer charge and creates a specific offense of resisting arrest that is more comparable to other jurisdictions.

November 4, 2021

The Hon. Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Chairperson Allen:

I write to share written comments on Bill 24-0254, the School Police Incident Oversight and Accountability Amendment Act of 2021, to be included as part of the Council of the District of Columbia (the Council) Committee on the Judiciary and Public Safety's October 21, 2021, hearing record.

Student discipline data required in the proposed legislation

The School Police Incident Oversight and Accountability Amendment Act of 2021[1] would clarify student discipline reporting requirements for Local Education Agency (LEA) reporting to the Office of the State Superintendent of Education (OSSE). While the clarifications resemble OSSE's prior and current discipline data collection elements, Councilmembers expressed interest during the hearing in OSSE making publicly available more of these already-collected data elements regularly received by OSSE. Councilmembers also expressed interest in closer monitoring of discipline data in order to address what have been substantial differences in disciplinary action and law enforcement involvement by race, ethnicity, and special education status. We encourage the Council to closely monitor OSSE's regular reporting on student discipline to be sure the data are understood and that OSSE is meeting public reporting needs.

Because the bill focuses on the discipline data collection, it offers the potential to address many of the discipline data collection and subsequent reporting issues that the Office of the D.C. Auditor (ODCA) identified in our recent education data audit, Measuring What Matters: More and Better Data Needed to Improve D.C. Public Schools. If the collection and reporting issues are not rectified, the Council is unlikely to receive accurate reporting on discipline incidents and law enforcement involvement which will hamper the effort to address inequities.

The bill also proposes new reporting requirements using some parallel data elements maintained by the Metropolitan Police Department (MPD). For this reason, it is important to consider why the current collections may differ. For example, OSSE's discipline data collection is tied to discipline incidents based

[1] https://lims.dccouncil.us/Legislation/B24-0254

on federal reporting requirements. It is possible to have law enforcement involvement or arrests without a preceding discipline incident reported by a school. Therefore, as the collection is currently designed, the OSSE totals may not match with MPD totals and the extent of that mismatch could differ by school and by the presence of law enforcement.

Below we explain what discipline data is required for both federal and local reporting, what is wrong with our current discipline data collection, and the ODCA recommendation to address these problems via legislation. Finally, we provide supplementary technical information about OSSE's data collection mechanisms.

Discipline data required for federal reporting

The District has both federal and local requirements to collect and report on student discipline data and today Local Education Agencies (LEAs) and the District as a state have multiple and duplicative reporting requirements. According to OSSE's discipline data guidance, the data elements required for federal reporting by OSSE are as follows:

- The length and quantity of in-school suspensions, out-of-school suspensions, and expulsions.
- The reason a student was disciplined.
- Detailed information on incidents involving firearms, including the type of weapon involved.
- Whether students with disabilities who are disciplined continued to receive educational services.
- Removals to an interim alternative education setting by type and reason for students with disabilities.[2]

The Individuals with Disabilities Education Act (IDEA) was most recently reauthorized in 2004,[3] and the District's compliance with its provisions is monitored by the U.S. Department of Education's Office of Special Education Programs (OSEP). The law requires submission of data on disciplinary actions involving students with disabilities, including in-school and out-of-school suspensions, expulsions, continuation of services, and resulting changes in the placement of students with disabilities.[4] OSEP uses these data for annual reporting to Congress including monitoring disproportionality in disciplinary actions based on students' disability status.[5]

The federal Gun-Free Schools Act of 1994 requires all states that receive federal funds to report annually the number of students suspended or expelled statewide for the possession of firearms on school property.[6]

Federal law also required local education agencies (LEAs) to report discipline data directly to the federal U.S. Department of Education's Office of Civil Rights (OCR) biannually for the Civil Rights Data Collection (CRDC). The U.S. Department of Education Organization Act authorizes OCR to collect data needed to ensure compliance with multiple civil rights laws, including The Civil Rights Act of 1964, Title IX of Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973. In addition, OCR has a role in enforcing Title II of the Americans with Disabilities Act of 1975 and the Boy Scouts of America

[2] https://osse.dc.gov/publication/student-discipline-data-collection-guidance
[3] https://www.congress.gov/search?q=%7B%22search%22%3A%22cite%3APL108-446%22%7D
[4] https://www2.ed.gov/programs/osepidea/618-data/collection-documentation/index.html
[5] https://sites.ed.gov/idea/files/significant-disproportionality-qa-03-08-17-2.pdf
[6] https://oese.ed.gov/files/2020/07/Guidance.Gun-Free-Schools-Act.pdf ; https://www.govinfo.gov/content/pkg/USCODE-2011-title20/pdf/USCODE-2011-title20-chap70-subchapIV-partA-subpart3-sec7151.pdf

Equal Access Act.[7]

The federal Every Student Succeeds Act (ESSA) requires that many of the same discipline data elements that are collected via the CRDC be published annually at the state and school district level in the form of school report cards.[8] These required data elements include rates of in-school suspensions, out-of-school suspensions, expulsions, school-related arrests, referrals to law enforcement, chronic absenteeism, and incidences of violence, including bullying and harassment, at the state, school district, and school level. OSSE has published these discipline data elements in school report cards using a combination of sources including CRDC data and OSSE-collected data. Because CRDC data is only collected biannually and there is a lag in federal reporting, the 2018 and 2019 STAR report cards published some of the same 2016 CRDC data.

The federal data reporting requirements are supported by extensive technical assistance on best practices for collecting, maintaining, and using student discipline data by the National Forum for Education Statistics and the Statewide Longitudinal Grant Program. OSSE's general counsel who testified at the hearing very usefully noted that reporting codes are helpful for gathering accurate and reliable data. The National Center for Education Statistics (NCES) created the Common Education Data Standards (CEDS)[9] including codes for discipline data which are in use by many of the states that maintain a statewide longitudinal data system, which the District does not yet have.

Discipline Data Required for Local Reporting

The Student Fair Access to School Amendment of 2018 enacted by the Council requires additional student discipline data to be collected and reported.[10] The text below from OSSE's discipline data guidance displays the data required by this local law. As Councilmembers noted in the hearing, many of these data elements may be collected but are not yet included in local reporting.

Data Elements Required

The data elements mandated under the Fair Access Act, per DC Official Code § 38-236.09(b):

- Student demographic data.
- Disciplinary actions taken by schools including school-based interventions, in-school suspensions, involuntary dismissals, out-of-school suspensions, emergency removals, disciplinary unenrollment (expulsions, modified expulsions, and involuntary transfers), referrals to law enforcement, and school-based arrests and, for students with disabilities, change in placement -- including frequency and duration of the disciplinary action.
- Description of the misconduct or reasoning behind each disciplinary action.
- Special education services data, including whether the student received during the school year a functional behavioral assessment, an updated behavior improvement plan or a manifestation determination review – including the number of suspension days that triggered the review, whether the suspension days were cumulative, and the outcome of the review.
- Indication of incidents resulting in a referral to an alternative education setting for the course of a suspension and associated attendance.
- Indication of incidents resulting in school-based intervention rather than an in-school suspension, and a description of the school-based intervention.
- Voluntary and involuntary transfers and withdrawals.

[7] https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crdc.html
[8] https://www2.ed.gov/policy/elsec/leg/essa/report-card-guidance-final.pdf
[9] https://ceds.ed.gov/Default.aspx
[10] DC Official Code § 38-236.09(b)

Moving to a unified, annual discipline collection

The Council may want to consider amending the legislation in a manner that would require a single annual discipline collection to be provided by LEAs to OSSE and reported publicly, and from which LEAs could, on a biennial basis as required, also submit directly to the Civil Rights Division to meet the CRDC requirement, or OSSE could "prepopulate" the CRDC collection using these data on behalf of LEAs. Codifying in local law what is already required federally would also require that the Council maintain consistency with federal requirements if and when the federal requirements change with simplification for LEAs as well as local public reporting as goals for the legislation.

In fact, The National Forum on Education Statistics (The Forum), has recommended that state education agencies support the collection of these data. A recent resource document outlined options for this state level support and reported on an eight-state pilot effort from 2013 to "prepopulate" CRDC data to reduce data burden faced by LEAs.[11]

There are multiple examples of state education agencies aligning their local and federal requirements by collecting these data locally, including Virginia,[12] North Carolina,[13] Kentucky[14] and more. These states collect all four of the broad discipline categories required in CRDC including discipline incidents, law enforcement referrals and arrests, bullying and harassment, and the use of seclusion and restraint in schools, even though the use of seclusion and restraint is not required to be on school report cards. A recent Data Quality Campaign report noted the limited student protections and reporting around the use of seclusion and restraint in the District.[15]

OSSE's student discipline data collection mechanism undermines data quality

In addition to data elements that are collected but not reported, one of ODCA's key audit findings was that OSSE's current discipline data is of poor quality. For this reason, efforts to improve discipline data reporting must address both the content of what is reported and the underlying quality of the data.

More specifically, we found differences across in-school suspension data collected by OSSE by school sector (i.e., traditional public versus public charter), differences that can be explained by data collection practices rather than differences in the discipline incidents that are the subject of the reports. These differences mean that prior discipline data was biased and could easily be misused or misinterpreted.

The data collection practices that led to these errors include not collecting enough data via the automated data system (ADT) and allowing public charter schools to report discipline data through a multi-step process instead of directly to OSSE.

Importantly, OSSE's new discipline guidance does change the entity to which LEAs may report and now only allows reporting directly to OSSE. This critical change, in line with audit recommendations, should significantly lessen any bias in the discipline data by sector, and checks can be performed to assess this. However, the new guidance does not resolve the remaining ODCA findings and recommendations.

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[11] https://nces.ed.gov/pubs2017/NFES2017168.pdf

[12] https://www.doe.virginia.gov/info_management/data_collection/support/school_safety/discipline_crime_violence/dcv-user-guide-2020-21.pdf

[13] https://www.dpi.nc.gov/media/13112/open

[14] https://education.ky.gov/districts/tech/sis/Documents/DataStandard-Behavior.pdf

[15] https://www.autcom.org/pdf/HowSafeSchoolhouse.pdf ; https://dataqualitycampaign.org/the-case-for-publicly-reporting-data-on-seclusion-and-restraint/

In the audit, we explain that OSSE's current multiple collection mechanisms, which include the ADT and additional ad hoc reporting systems and templates, lead to both increased error and increased burden on LEAs. The SLDS Grant Program encourages the practice of "collect once and use many times," to encourage state education agencies to collect as much data as possible in one automated and integrated system. Further, The Forum notes that automated data extracts from LEA data systems that are aligned to federal reporting requirements reduces the burden of CRDC reporting.[16] Alignment across LEA data collections, state collections and federal reporting requirements is common in many states and support automated systems. For example, Virginia[17] collects discipline data in an automated system as do other states with successful statewide longitudinal data systems such as Kentucky,[18] Washington,[19] North Carolina,[20] Illinois,[21] and Florida.[22] Further, both Maryland[23] and Virginia require that all discipline data elements be included in local student information systems. Notably, the District modeled its ADT collection mechanism after Rhode Island but that state, unlike the District, requires that the vast majority of data, including discipline data, flow through the ADT and be collected on a daily basis.[24]

Some of these state level investments in discipline data collection are supported by legislation. One recent example is Hawaii, a state with a strong statewide longitudinal data system, where the state legislature last year passed a bill requiring additional standardized collection and reporting of discipline, seclusion and restraint, and school climate data.[25]

On the reporting side, the audit also showed that adult education students are included in OSSE's annual discipline reporting denominators. Including adult students in denominators inappropriately lowers the percentage of students disciplined and creates an artificially low comparative discipline rate in the charter sector which serves more adults than are served in traditional public schools. Additionally, OSSE candidly acknowledges other important data quality issues such as missing data and data that does not match other OSSE collections in their annual discipline reports, problems that would be ameliorated with better controls and automation.

Discipline data should be collected via the ADT to ensure quality

The deficiencies identified in the audit can be remedied with improved collection mechanisms and close monitoring. We recommend that the Council require that all student discipline data be collected via the ADT and with controls that ensure that all data is comparable and help ensure that daily administrative record keeping is aligned with both local and federal reporting needs.

LEAs spend significant time on data reporting; therefore, it is critical to improve data collection mechanisms so that the time invested produces meaningful and valid data for the public, and federal

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[16] https://nces.ed.gov/pubs2017/NFES2017168.pdf

[17] https://www.doe.virginia.gov/info_management/data_collection/support/school_safety/discipline_crime_violence/dcv-user-guide-2020-21.pdf

[18] https://education.ky.gov/school/sdfs/Pages/Safe-Schools-Data-Collection-and-Reporting.aspx

[19] https://www.k12.wa.us/data-reporting/reporting/cedars

[20] https://www.dpi.nc.gov/data-reports/discipline-alp-and-dropout-data

[21] https://www.isbe.net/Documents/student_discipline.pdf

[22] https://www.fldoe.org/safe-schools/discipline-data.stml

[23] https://p3cdn4static.sharpschool.com/UserFiles/Servers/Server_2744/File/records_management_program/misc/StudentRecordsSystemManual.pdf

[24] https://www.ride.ri.gov/InformationAccountability/RIDEDataResources/DataCollection.aspx#39341498-data-collection-specifications

[25] https://capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=2486&year=2020

and local requirements. Collecting all student discipline data directly, combined with collecting discipline data via the ADT, will together produce substantive improvements in data quality and subsequent reporting.

Additional information on using separate templates versus the ADT

OSSE issued new discipline data collection guidance on Oct. 5, 2021.[26] As noted above, this guidance makes an improvement in that LEAs must submit discipline data directly to OSSE. The guidance continues to implement a separate, and in many cases, duplicative data collection process for student discipline data and does not address key collection problems that lead to misinterpretations of discipline data, nor does it align with the many state examples listed above, which include aligned discipline data collections in LEAs' student information systems (SIS).

Instead of requiring the collection of discipline data via the ADT as recommended, OSSE has created a new discipline data submission process requiring LEAs to submit discipline data four times a year directly to OSSE. This additional submission process will continue to lead to error and burden on LEAs and, in fact, OSSE notes that they anticipate there will be continued misalignments between discipline data, enrollment data, and demographic data between this new collection and data submitted via the ADT.

Importantly, many of the required data elements in the new discipline data collection are already collected in the ADT via attendance codes. As evidence, OSSE provides a crosswalk of attendance codes to discipline elements in the guidance, shown below. Instead of collecting these elements repeatedly in a separate data collection, OSSE should be using the data it already has to maintain a daily, real-time understanding of student discipline, as is done in other states, rather than replicating that collection four times a year.

Table 3. Disciplinary Action and Attendance Code Crosswalk

Disciplinary Action	Suspension Period	OSSE Attendance Code
In-School Suspension	Greater than 50% of the instructional day	Present – In-School Suspension (PIS)
Out-of-School Suspension	Full-day out-of-school suspensions	Absent, Out-of-School Suspension (AOS)
Out-of-School Suspension	Partial day out-of-school suspensions that are 50% or more of the instructional day	Absent, Out-of-School Suspension (AOS)
Involuntary Dismissal	Removal for less than 50% of the instructional day	Present Partial Excused (PPE)

The new discipline data collection also requires demographic information and student IDs, all elements that are already collected and maintained by OSSE. These continued, burdensome requests show that OSSE data is not sufficiently linked by student ID, another audit finding. The guidance anticipates continued errors due to this duplication and provides many examples. For instance, if an LEA reports a validated attendance code of "Present – In School Suspension (PIS)" for a student on the same day that student has a recorded disciplinary action of out-of-school suspension, the UDE Report will identify a data error that the LEA must reconcile before resubmission of data. Last year's annual student discipline report described these same errors.

[26] https://osse.dc.gov/publication/student-discipline-data-collection-guidance

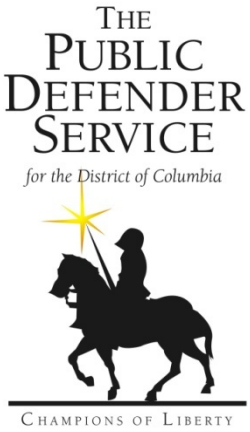
School-based interventions in response to discipline incidents could be added to the ADT and collected in an automated way. Again, this could easily be an option in the ADT, like in-school suspension, for when students are out of the classroom for at least 50% of the school day receiving an intervention other than an in-school suspension. The current definition that does not include an amount of time out of the classroom and is not included in an LEA's student information system (SIS) is unlikely to produce reliable data across schools.

Thank you for considering these comments on Bill 24-0254 and we would be happy to provide any additional information that might be useful to the Committee.

Sincerely yours,

Kathleen Patterson
D.C. Auditor

cc: D.C. Councilmembers
Dr. Christina Grant, Interim State Superintendent of Education



TESTIMONY
OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

Concerning

The Youth Rights Amendment Act of 2021, Bill 24-0306
The Strengthening Oversight and Accountability of Police Amendment Act of 2021, Bill 24-0356

Presented by

Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COMMITTEE OF THE WHOLE
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

October 21, 2021

Avis E. Buchanan, Director
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I am Katerina Semyonova, Special Council to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia. This testimony will first address the Youth Rights Amendment Act of 2021 and then the Strengthening Oversight and Accountability of Police Amendment Act of 2021.

PDS strongly supports the two provisions of the Youth Rights Amendment Act that will provide for a more developmentally appropriate approach to the interrogation of youth and that will end the use of so-called consent searches of youth.

Children under age 18 are routinely interrogated by police. These interrogations can take place behind closed doors at youth shelter houses and in police districts, without the help of lawyers. Prior to these interrogations, youth, some as young as 10 years old, are read the same Miranda[1] warnings regarding their Fifth Amendment rights under the United States Constitution that are read to adults. The warnings state:

> You are under arrest. Before we ask you any questions, you must understand what your rights are. You have the right to remain silent. You are not required to say anything to us at anytime or to answer any questions. Anything you say can be used against you in court. You have the right to ask a lawyer for advice before we question you and to have him with you during questioning. If you cannot afford a lawyer and want one, one will be provided for you. If you want to answer questions now without a lawyer present you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.[2]

After being read their Miranda rights, children are asked to check off four boxes, either waiving or asserting their rights, and to sign their name. Nearly always, a child's Miranda rights card will only include a printed name as the signature because the child

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Metropolitan Police Department form PD-41.

hasn't developed a signature yet. In PDS's experience the vast majority of clients under age 18 who are read their Miranda rights, give up those rights. Nationally, about 90% of youth waive their Miranda rights, amounting to a much higher percentage of waiver than that of adults.[3] Under the Supreme Court's framework, statements derived from custodial interrogation are admissible if there is a knowing, intelligent, and voluntary waiver of the right to remain silent and to the right to counsel. However, everything we know about children shows that it is highly unlikely that they are able to make such a waiver in the absence of meaningful help from counsel.

For a youth to make a reasoned decision about whether to waive Miranda rights, the youth "must have a working memory adequate to hold [all] components of the [Miranda] warning--for example, that you have the right to remain silent, that anything you say can be used against you, that you have the right to counsel, that if you cannot afford an attorney one will be appointed for you, and that you have the right to stop answering questions at any time--in mind while processing the meaning of the words and concepts they express and calculating how to answer."[4] A youth also "must think through what questions will be asked, what facts are known or may be ascertained by the

[3] Barry C. Feld, Behind Closed Doors: What Really Happens When Cops Question Kids, 23 CORNELL J.L. & PUB. POL'Y 395, 429 (2013). On average, police interrogators estimate that sixty-eight percent of adult suspects waive their rights and undergo interrogation. Saul M. Kassin et al., Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs, 31 LAW & HUM. BEHAV. 381, 389 (2007)

[4] Kenneth J. King, Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights, 2006 WIS. L. REV. 431, 431-432 (2006) (footnotes omitted); see also id. at 432 n.4 ("To waive Miranda rights, a juvenile must: (1) understand the meaning of the words and concepts expressed, (2) understand how the warnings relate to the situation, and (3) use knowledge of the Miranda rights and of how courts function to make a choice about waiving or invoking the rights." (citing THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 50-51 (1998)). "Working memory is 'the immediately accessible form of memory in which information is held in mind and manipulated.'" Id. at 432 n.3 (quoting Russell A. Poldrack & Anthony D. Wagner, What Can Neuroimaging Tell Us About the Mind?, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 177, 177 (2004)).

questioner, and why the questioner is interested in the answers."[5] All of these skills are still underdeveloped in youth. Beyond information processing, an intelligent waiver also requires the youth to "reason about what will happen if she waives or invokes rights--that is, if she chooses to answer questions or remain silent. This requires an understanding of both short- and long-term consequences of a waiver and a deliberative decision-making process--but children and adolescents have difficulty effectively weighing behavioral options because they overemphasize the probability of short-term benefits over long-term consequences and are prone to act impulsively rather than make thought-out decisions."[6] Children are also susceptible to thought distortion and impulsivity in high stress situations such as interrogations or ones that are emotionally charged, such as when police invoke peers as potential witnesses or suspects.[7] The District's children are particularly vulnerable in the waiver context given that so many children who are involved in the criminal legal system also have special education needs and emotional and learning disabilities.

Once children waive their rights, they are at greater risk for giving false confessions.[8] According to legal scholars, among suspects later proven to have given false confessions, children and adolescents are grossly overrepresented, as they are "less

[5] *Id*. at 433.

[6] Naomi E. S. Goldstein, Emily Haney-Caron, Marsha Levick, Danielle Whiteman, Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights, 21 N.Y.U. J. Legis. & Pub. Pol'y 1, 25 (2018).

[7] *Id*.

[8] *Id*. at 42-43, noting that legal scholars have analyzed cases of proven false confession and found that juveniles comprise at least one third of those cases--a disproportionate percentage, and citing Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. REV. 891, 944 (2004); Brandon L. Garrett, Contaminated Confessions Revisited, 101 VA. L. REV. 395, 400 (2015).

equipped to cope with stressful police interrogation and less likely to possess the psychological resources to resist the pressures of accusatorial police questioning than adults."[9] Real life examples such as the conviction of the Central Park Five[10] have shown the dangers of subjecting children to police interrogation.

The Youth Rights Amendment Act is forward-thinking and recognizes the science of adolescent brain development by allowing custodial interrogation of children only when a child has received the assistance of counsel in understanding their Miranda rights and has waived those rights through counsel. The Youth Rights Amendment Act is consistent with the recommendations of the American Psychological Association, which counsels that vulnerable populations, including youth, "be provided special and professional protection during interrogations such as being accompanied and advised by an attorney or professional advocate."[11] The Youth Rights Amendment Act is also consistent with reform enacted in California which requires the assistance of counsel prior to the waiver of Fifth Amendment rights by children. [12] A similar reform is also pending in New York.[13]

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[9] *Id*.

[10] Five teenage boys were convicted of rape and assault based largely on false confessions extracted by police. They served between five and twelve years in prison. *See* Yusef Salaam, Kevin Richardson and Raymond Santana, *Opinion: We Are the 'Exonerated 5.' What Happened to Us Isn't Past, It's Present.* New York Times, January 4, 2021. Available at: https://www.nytimes.com/2021/01/04/opinion/exonerated-five-false-confessions.html also Marty Tankleff??

[11] See footnote 6, infra.

[12] On September 30, 2020, California governor Gavin Newsom signed into law Senate Bill 203 which requires that youth consult with counsel about their Fifth Amendment rights. See https://www.hrw.org/news/2020/09/30/california-new-law-protects-children-police-custody#.

[13] New York Senate Bill S4980B requires that youth consult with an attorney prior to waiving their Fifth Amendment rights. See https://www.nysenate.gov/legislation/bills/2019/s4980.

Some states that have recognized the need for youth to have advocates during police interrogation have placed parents in that role. Parental involvement in interrogation is unwarranted and ultimately unhelpful to most youth. Most parents, like children, do not fully understand the criminal legal system and cannot begin to advise their children on the merits of making statements to the police. Often parents and children are also in conflict or a parent may be concerned about negative consequences that they themselves could face, for example a loss of housing, based on their child's actions. Importantly, the Youth Rights Amendment Act requires that youth consult with a lawyer prior to waiving their constitutional rights to remain silent and to have a lawyer assist them with questioning, and requires that any such waiver take place through that lawyer. The Youth Rights Amendment Act should clarify however that the youth will have confidential, private, and in person access to a lawyer. Given all of the comprehension difficulties, challenges in developing trust, and fear and anxiety experienced by children, in order to render meaningful legal advice, lawyers must meet with the youth in person.

The Youth Rights Amendment Act also takes the step of barring police from seeking the consent of youth for searches. For all of the reasons that youth are not able to engage in a thoughtful analysis of their rights in the Miranda/5th Amendment context, they are also not able to evaluate their rights and consider whether to invoke their constitutional rights in the context of a street encounter with police. Street encounters between police and youth present their own particular coercive circumstances. Given the unending risk of police violence, adults and children rarely feel free to assert their rights during street encounters with armed police officers.[14] Searches of youth during street

[14] PDS urges Councilmembers to review video footage of Salehe Bembury, a Black man who was stopped by officers from the Los Angeles Police Department in daylight, on a busy street in Beverly Hills for

encounters are so common that PDS lawyers often see body worn camera footage of groups of kids lifting their shirts as soon as they see a police officer in their vicinity because they have been forced to do this to avoid further violations of their rights.

As PDS testified on May 20, 2021, in a hearing regarding the recommendations of the Police Reform Commission, PDS also urges the Council to go further than banning consent searches of youth under 18 and instead ban all searches where police seek to base the search on consent. The Police Reform Commission recommended that the Council ban all consent searches "given that voluntary consent is an oxymoron in the policing context and that residents, especially in over-policed communities, rarely feel free and safe to make a voluntary choice."[15]

The availability of consent searches also provides an incentive for police to make discriminatory stops. The ACLU-DC's analysis of NEAR Act data for 2020 shows that MPD stops Black residents at vastly higher rates than their representation in the population and more frequently than they stop white residents. Black residents made up 74.6 percent of all *reported* MPD stops, despite comprising 46% of the District's population. Black people comprised more than 90% of the searches that resulted in no ticket, warning, or arrest.[16] In contrast, white people accounted for only 5.5% of searches

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jaywalking. Mr. Bembury is an executive for Versace clothing company and when he was approached by two police officers for jaywalking he told them: "I am super nervous."[14] When an officer asked Mr. Bembury whether he could pat him down – run his hands all over his body, put his hands in Mr. Bembury's pockets, Mr. Bembury said: "**you can do whatever you need to do, I'm just nervous**." This is not consent. This is terror. People cannot make an informed and voluntary choice whether to waive or assert their rights when they are just trying to survive an encounter with police.

[15] Final report of the Police Reform Commission 2021, page 21. Available at: https://dccouncil.us/wp-content/uploads/2021/04/Police-Reform-Commission-Full-Report.pdf.

[16] Racial Disparities in Stops by the Metropolitan Police Department: 2020 Data Update, ACLU Analytics & ACLU of the District of Columbia. Available at: https://www.acludc.org/en/racial-disparities-stops-metropolitan-police-department-2020-data-update

that ended without an arrest, ticket, or warning.[17] The data shows that MPD continues to use stops and searches – likely consent searches – to subject Black residents to aggressive and unconstitutional policing.

Other jurisdictions have banned consent searches. In 2002, the New Jersey Supreme Court banned police from seeking consent to search lawfully stopped drivers or vehicles, for example drivers stopped for speeding, unless law enforcement had reasonable articulable suspicion of criminal wrong doing.[18] The Minnesota Supreme Court held that under the state constitution, police could not extend a valid traffic stop to request consent to search when the request was not supported by independent reasonable articulable suspicion.[19] Rhode Island legislated the same reform.[20] The Council should follow these precedents and the recommendation of the Police Reform Commission to ban all consent searches, not just those of youth under age 18.

PDS also supports the goals and purposes of the Strengthening Oversight and Accountability of Police Amendment Act of 2021. Provisions that expose MPD and D.C. Housing Authority Police Department disciplinary records to public scrutiny, that allow individuals to make anonymous complaints to the new Office of Police Accountability, and that allow investigations of the Office of Police Accountability to continue while the United States Attorney's Office investigates the same conduct, have the potential to

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[17] *Id*.

[18] *State v. Carty*, 170 N.J. 632, 790 A.2d 903 (N.J. 2002).

[19] *Minnesota v. Mustafaa Naji Fort*, 660 N.W.2d 415 (Minn. 2003).

[20] Rhode Island Statute § 31-21.2-5(b) "No operator or owner-passenger of a motor vehicle shall be requested to consent to a search by a law enforcement officer of his or her motor vehicle, that is stopped solely for a traffic violation, unless there exists reasonable suspicion or probable cause of criminal activity."

increase oversight of police. Nationwide, there have been more than 140 police oversight laws passed in 30 states aimed at "restricting the use of force, overhauling disciplinary systems, installing more civilian oversight and requiring transparency around misconduct cases."[21] The Strengthening Oversight and Accountability of Police Amendment Act of 2021 is one step in what should be a deep overhaul of policing in the District. PDS continues to believe that broad reform will require the Council to enact many of the changes included in the report of the Police Reform Commission and those that have been outlined by the community and advocates in hearings before the Council. With respect to the Strengthening Oversight and Accountability of Police Amendment Act of 2021, PDS makes a number of suggestions.

It is promising that the Act is establishing a Deputy Auditor for Public Safety. However, the search committee for the deputy auditor should, by statute, also include community-based organizations from communities that are most impacted by aggressive policing and police violence, a member from a civil rights organization, and a member who has represented individuals who are accused of criminal offenses in the District. Police violence often happens to clients in the criminal legal system and that perspective should be added. As written, the Department of Corrections and MPD may have an outsized role in selecting the deputy auditor. These same additional members should be added to the newly formed District of Columbia Police Accountability Commission.

Further, the qualifications of the deputy auditor should require that the deputy auditor have not worked in law enforcement, jails, or prisons for the prior 10 years. In order to play an independent oversight role, the deputy auditor should have sufficient

[21]https://www.nytimes.com/2021/04/18/us/police-reform-bills.html

distance from law enforcement, jails, and prisons, and should not be someone who is coming directly from an internal oversight role within MPD or the Department of Corrections. The deputy auditor's authority and responsibility as described in section 6(a) should include investigation of the Department of Corrections and should include all use of force, rather than only "serious use of force" by the MPD. As drafted, the deputy auditor "shall have the authority and responsibility to" review "other issues by officers of the Metropolitan Police Department, the D.C. Housing Authority, or a District-licensed security company." The broad language allows a deputy auditor to potentially address a range of issues, but it fails to create a responsibility to do so. The required investigative topics of the deputy auditor should include all alleged violations of constitutional rights, all alleged abuse, and all alleged discriminatory conduct by the entities under its purview. The powers of the deputy auditor should also include a right to access all body worn camera, audio, and video possessed by the entities under its supervision. Finally, section (g) of the bill would create a duty to for the deputy auditor to conduct regular outreach to the public and to "provide updates, reviews or investigations where applicable." There should be a much broader duty of public disclosure including regularly making reports available to the public on line.

The entities under the investigative authority of the renamed Office of Police Accountability should include the Department of Corrections. Currently, the Office of the Inspector General, the D.C. Auditor, and the Corrections Information Council have some ability to review the conduct of the Department of Corrections. However, the D.C. Auditor and the Office of the Inspector General both have broad missions and lack the authority over the Department of Corrections to impose or recommend discipline for

wrong-doing. The CIC also lacks the power to directly effectuate change within DOC. Individuals held at the D.C. Jail and at the Central Treatment Facility are some of the District's most vulnerable. They do not have a clear way of asserting their rights or having the abuse that is perpetuated against them investigated. Aside from going through their lawyers, they also lack a way of raising issues about unconstitutional conditions of confinement. The Office of Police Accountability should provide the same oversight and accountability over DOC as it does for MPD and provide a direct way for incarcerated individuals to demand investigations of the conduct of DOC staff.

A positive reform in the bill is that it allows the new Office of Police Accountability to receive anonymous complaints. The bill should also require the Office of Police Accountability to provide an easy way to upload video that can serve as the entirety of the complaint. The provisions of the bill that require a complaint to be "reduced to writing" and that allow the filing of a complaint by anyone with "personal knowledge," may discourage the submission of video which nationally has been the best way of exposing police misconduct. These requirements should be removed.

In order to maximize its oversight capability, and not rely on a complaint-based system, the Office of Police Accountability should also have the right to access all body worn camera or video feeds from the agencies that it investigates. The Office should be able to pull body worn camera of particular officers in order to search for a pattern of conduct and to examine the conduct of problematic police units, even in the absence of a complaint. The Office should be required to examine a certain percentage or amount of randomly chosen body worn camera footage each year and report any adverse findings.

The bill should also require the Office to recommend discipline when a violation

is substantiated. As currently drafted, the legislation contemplates that MPD will receive recommended disciplinary action from the Office, but the Office is not under a direct obligation to provide it. Further, MPD should be required to impose the discipline that is recommended by the Office. Otherwise, there will be little accountability for police misconduct, and the process of substantiated complaints receiving absolutely no disciplinary consequence or a minimal disciplinary consequence through MPD will continue.

The bill's changes to the Freedom of Information Act (FOIA) are positive and would allow for more records to be released through that process, but FOIA is not a sufficient means to ensure transparency and accountability for MPD. The FOIA process still requires requests, is time consuming, and is difficult for the public to navigate. There are also significant delays in FOIA document production by MPD; FOIA requests to MPD can drag on for years. In order to make the FOIA provisions more conducive to accountability, the bill should clarify that the only redactions that the responding agency can make relate to the items listed in section 3 of the FOIA amendments in the bill. The bill should specify that these limitations on redactions exist notwithstanding any other laws or provisions that may shield personnel records. Thus, section 3 should read: "Notwithstanding any other provision of the law, when providing records pursuant to subsection (d-1)(1), the responding agency may redact only…"

The information that the responding agency should be required to produce in section 2 of the bill's FOIA amendments should be expanded to include instances when police officers act as witnesses and additional information such as the terms or resolution after any mediation. PDS recommends modifying the definition of "disciplinary records"

in section (d-1)(2) as follows:

(A) The complaints, allegations, and charges against an officer;

(B) The name and agency identifier including badge number of the officer complained of, ~~or~~ charged, or who is a witness;

(C) The transcript of any trial or hearing, including any exhibits at such trial or hearing, and all transcripts, exhibits, and documents related to matters that were resolved without a trial board process;

(D) The disposition or findings from ~~of~~ any disciplinary proceeding, conciliation, mediation process, or other review conducted by the Office of Police Accountability or MPD.

(E) The final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the officer;

Finally, with respect to FOIA, the Council needs to consider enforcement mechanisms that will require District agencies to make disclosures consistent with the law.[22] The Council could do so by tightening time limits within FOIA, imposing financial penalties for unreasonable delays, and through oversight hearings that address agency compliance with FOIA. Given MPD's pattern of delay and refusal to comply with even basic search requirements in response to FOIA requests the Council should hold

[22] Delay and non-disclosure also plague the federal FOIA provisions, leading to calls for enforcement. *See* Nate Jones, *How to Ensure we Have a More Open, Accountable Government*, Washington Post, March 13, 2019. Available at: https://www.washingtonpost.com/outlook/2019/03/13/how-ensure-we-have-more-open-accountable-government.

oversight hearings focusing on MPD's FOIA response practice.[23] The Council must find a way to hold agencies accountable when they fail to disclose information for years and violate the timelines and open government purpose established in FOIA.

In part to address the delays and limitations of FOIA, the bill should also require extensive public disclosure of documents directly by the Office of Police Accountability. The bill should mandate that the Office of Police Accountability make the records of all complaints and investigations available on its website. Pending complaints and sustained findings that include officers' names and narratives of incidents should be readily accessible.[24] The Office of Police Accountability should also disclose: the discipline recommended by the Office of Police Accountability, the discipline imposed by MPD, and any mediation or settlements. Counsel for a criminal defendant should have even greater access to Office of Police Accountability files. The Act should require the Office of Police Accountability to provide to defense counsel upon request: the entire case file including but not limited to any written or recorded statements made in the case, body worn camera, investigative summaries, memoranda, recordings and other video including body worn camera video used during the course of the Office's investigation. Defense counsel should not have to rely on subpoenas to evidentiary hearings to receive this information. Defense access to this information early in the case creates a fairer trial and

[23] *See* discussion of ACLU-DC's lawsuit of MPD for failure to turn over NEAR Act data after a FOIA request. Available at: https://www.acludc.org/en/cases/aclu-dc-v-district-columbia-challenging-dc-polices-failure-release-stop-and-frisk-data

[24] Other jurisdictions including New York have increased the accessibility of police complaint and investigation information. *See* Ashley Southall, 323,911 Accusations of N.Y.P.D. Misconduct Are Released Online, New York Times, August 20, 2020. Available at: https://www.nytimes.com/2020/08/20/nyregion/nypd-ccrb-records-published.html.

court process by allowing judges and jurors to use this information in making credibility determinations on issues of guilt or pretrial detention and it allows clients to consider this information during plea negotiations. Expanding access to this information is a critical part of police reform and accountability, and waiting for the information to be released through FOIA will be in many instances too late to inform decisions about pretrial release and trial outcomes.

PDS thanks the Council for its work in advancing important reforms to policing and hopes to work with the Committee as these bills move forward.

Testimony of Eduardo R. Ferrer
Policy Director, Georgetown Juvenile Justice Initiative
Visiting Professor, Georgetown Juvenile Justice Clinic

Committee on the Judiciary and Public Safety Public Hearing on
B24-0254, THE "SCHOOL POLICE INCIDENT OVERSIGHT AND ACCOUNTABILITY AMENDMENT ACT OF 2021"
B24-0306, THE "YOUTH RIGHTS AMENDMENT ACT OF 2021"
B24-0356, THE "STRENGTHENING OVERSIGHT AND ACCOUNTABILITY OF POLICE AMENDMENT ACT OF 2021"
Thursday, October 21, 2021

Good morning, Chairperson Allen and members of the Committee on the Judiciary and Public Safety. My name is Eduardo Ferrer. I am a Ward 5 resident, the Policy Director at the Georgetown Juvenile Justice Initiative, and a Visiting Professor in the Georgetown Juvenile Justice Clinic.[1] Thank you for the opportunity to testify today.

While I generally support the aims of B24-0254 and B24-0306, I will focus my testimony on my support for the Youth Rights Amendment Act of 2021. The Youth Rights Amendment Act is a critical and necessary next step in the progression of recent and pending reforms making our laws and practices in the District more developmentally responsive. I want to acknowledge and thank Councilmember Robert White and his staff for drafting and introducing this important and necessary bill.

As this committee is well aware, for far too long, our approach to policing in the District has ignored the unique developmental differences and needs of youth. This is true, in part, because the law of criminal procedure – particularly 4th and 5th amendment jurisprudence, which forms the backbone for many of the constraints on police power – is based upon the constitutional floors set by the Courts, not by optimal, developmentally-responsive social policy set by legislatures. As a result, the courts have often developed one-size-fits-all policies that fail to account for the research-based and common-sense material differences between youth and adults. To remedy this failure, the Council must pass the Youth Rights Amendment Act which would guarantee youth the right to consult with counsel prior to waiving their constitutional right to remain silent and make inadmissible the fruits of any such search involving a youth that is premised *solely* on the basis of their alleged "consent."

The Need for a More Mature Miranda Policy

First, the District's approach to youth interrogations is one example where policing is out of step with adolescent development, social science, and fundamental fairness. Although most people probably could not describe any of the facts of *Miranda v. Arizona* from TV shows and movies, many people would recognize the warnings that police are supposed to give someone

[1] My testimony is informed by our work at the Georgetown Juvenile Justice Initiative and delivered on its behalf only. The opinions expressed herein do not represent a position on the issue taken by Georgetown University as a whole.

before they start interrogating them.[2] The point of these now-familiar warnings is to inform someone that they have certain rights before they talk to the police.[3] However, merely informing someone of their rights does not mean they actually understand those rights, understand the implications of waiving those rights, or feel like they can actually avail themselves of those rights. This is particularly true when it comes to young people being interrogated by police. It is here where DC is failing to provide for the youth of DC, and why it is time to enact a more mature *Miranda* policy in the District.

The *Miranda* framework of reading a suspect his or her *Miranda* rights and asking for a waiver was designed with *adults* in mind. To understand standard *Miranda* warnings someone must have the working memory capable of holding all the warnings in his or her mind at once, processing their meaning, and also formulating a response.[4] He or she has to understand what an attorney is, what kinds of questions the police will be expected to ask, and what it means to have their responses "used" against them (which further requires general knowledge of the criminal legal system).[5] Studies have found that some warnings, such as the right to be appointed an attorney and the right to silence, require a post-high school reading ability in order to read and comprehend.[6] In order to make a knowing, intelligent, and voluntary waiver, someone has to possess the requisite cognitive ability (if they are under 16 years old), knowledge base, and psycho-social maturity.

In DC, MPD officers are supposed to read to all suspects a standard set of Miranda warnings before interrogating them, whether they are an adult or a child. But this ignores advancements in our understanding of adolescent development, which have demonstrated that young people as a class cannot effectively waive their *Miranda* rights just by being informed of them by the police. In the decades since 1965, when *Miranda* was decided, study after study has confirmed what we have long intuitively understood about children: they are different than adults. The research shows that youth undergo dramatic changes during adolescence. Indeed, we now know that adolescence is the second-most important period of brain development, after the first three years of life.[7] For instance, in adolescence, pathways of the brain that are not used as often are pruned back while the pathways of the brain that are being used are reinforced, resulting in a period of increased malleability and capacity for change.[8] Additionally, the limbic system – the part of the brain that controls emotions – develops during the earlier part of adolescence whereas the prefrontal cortex – which is situated at the front of the brain and

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[2] *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[3] *See id.* at 445.

[4] *See* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 432 (2006).

[5] *See id.* at 432–33.

[6] Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White, *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 14 (2012).

[7] *See* Kerstin Konrad, et al., *Brain Development During Adolescence*, 110(25) DEUTSCHES ARZTEBLATT INT'L 425, 426–27.

[8] *See id.*

controls reasoning, decision-making, and impulse control – does not fully develop until the end of adolescence.[9]

As a result of this differential in the timing of development of the different parts of the brain, youth as a class lack the psycho-social maturity that adults possess. Specifically, adolescents are not as capable in making well-reasoned decisions, especially under intense stress or fear such as in an interrogation setting.[10] Moreover, adolescents tend to focus on short-term rewards rather than long-term risks, which makes them especially vulnerable to waiving their *Miranda* rights without considering the long-term consequences.[11] For example, if an officer tells an adolescent during interrogation that if they waive their rights they can go home, the short-term reward of going home can induce an adolescent to waive their *Miranda* rights no matter what the long-term consequences may be.[12] Youth still lack the tools to truly evaluate the impact of that choice on the rest of their life.[13] Thus, the current *Miranda* framework is ineffectual for youth as it less likely that they can execute a truly knowing, intelligent, and voluntary waiver under the circumstances typical to most custodial interrogation situations.

In addition to adolescents' psycho-social immaturity, there is also the fact that adolescents may lack the cognitive ability to even understand the *Miranda* warnings. In one study, a researcher asked 400 delinquent youth and 200 criminally and non-criminally involved adults a series of questions designed to gauge the participant's understanding of *Miranda* rights. Controlling for age, IQ, and other variables, what he found was that *fifty-five percent* of youths clearly misunderstood one or more of the *Miranda* warnings, compared to just twenty-three percent of adults.[14] Youths in this study misunderstood that the right to remain silent meant they could choose to not speak with the police officer, which was at odds with their experience that they need to talk to adults if asked.[15] Some youths understood that if they have an attorney the attorney is supposed to be "on their side," but believed that the attorney will help them only if they are innocent.[16] Even though after age 15 adolescents generally have the same cognitive abilities as adults,[17] because of their lack of familiarity with the *Miranda* rights and psycho-social maturity they still "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[18]

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[9] *See* Jennifer Woolard, *Adolescent Development*, 19.

[10] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 9 (2006).

[11] *Id.* at 8–9.

[12] Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004).

[13] *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011).

[14] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 10 (2006).

[15] *Id.*

[16] *Id* at 11.

[17] *Id.* at 11–12.

[18] *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

Demanding a more mature *Miranda* policy for the District is also critical as a matter of racial justice. Black youths have their views of police officers and law enforcement shaped by historical police violence and contemporary coverage of police brutality against Black people.[19] Their views are also shaped by their own experiences of police harassment with police officers, as well as those of their friends and families.[20] Too often, Black youth feel compelled to be deferential to police officers to avoid risking more severe harassment, injury, or death.[21] The backdrop of police violence against Black people, their own experiences of police harassment, and the developmental immaturity of youth previously describe create a powerful force undermining the voluntariness of any *Miranda* waiver Black youths may make. They may waive their *Miranda* rights just so they could get out of the interrogation room. In this respect, for Black youth *Miranda* warnings do not serve as an effective deterrent against the coerciveness of police interrogation.

To illustrate the futility of the current *Miranda* doctrine as it applies to DC youth, consider the following recent case. This young man was taken into the police station and read his *Miranda* rights. When asked if he wanted an attorney, he said that he already had an attorney and that he would like to talk to her. The police told him that this meant they would have to leave, which was true. They then remained in the room, staring at him, until he said he would talk to them. The police continued reading him his rights, and he again said he wanted an attorney. They stopped again and waited again until he had agreed to talk to them. Then, upon being read his *Miranda* rights and invoking his right to silence, he was told by the detective that he marked the wrong box. While on paper, this whole charade may have observed the niceties of the *Miranda* warning and waiver system, in no way could this be a model of justice. This is not just a fault of the police officers that day, but of the system that did not take into consideration the developmental stage of the youth being interrogated and how that affected any waiver he could give.

Miranda represents the bare minimum of what is required under the Constitution to advise a child of their rights; but that does not make it sound policy. It is time that DC goes beyond the bare minimum, uses the advances in adolescent development research over the last 30 years, and creates a legal framework that is developmentally appropriate when it comes to adolescents being interrogated by police officers. The way to do this is change the law so that statements in custodial interrogation made by youth under 18 are inadmissible unless 1) the youth is read their *Miranda* rights by a law enforcement officer in a developmentally appropriate manner; 2) the youth has the opportunity to consult with counsel before making a waiver; 3) and, in the presence of their attorney, the youth makes a knowing, intelligent, and voluntary waiver of their rights.[22] Studies show that having the opportunity to consult with counsel before making any decision about waiving *Miranda* rights helps adolescents make a more informed choice,

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[19] Kristin Henning & Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. 883, 901 (forthcoming December 2020).

[20] *Id.*

[21] *Id.*

[22] Katrina Jackson & Alexis Mayer, *Demanding a More Mature Miranda for Kids*, D.C. Justice Lab & Georgetown Juvenile Justice Initiative, at bit.ly/mature-miranda.

even if they are particularly young or have poor cognitive abilities otherwise.[23] A more mature *Miranda* doctrine for youths in DC that includes the right to counsel before they make a waiver decision preserves the rights of children, cuts down on coerced confessions, and protects the purpose that animated *Miranda* in the first place.

The Need for Consent Search Reform for Youth in Particular

The District's approach to "consent" searches of youth is another example where policing is out of step with adolescent development, social science, and fundamental fairness. While we applaud the important step taken by the proposed legislation to provide *Miranda*-like warnings prior to "consent" searches, these warnings will not be sufficient to protect youth from the effects of police coercion (and may not be sufficient to protect adults either). Requiring law enforcement officials to deliver *Miranda*-like warnings to individuals before they consent to a search represents an improvement from a baseline of no protections for adults. However, expecting these *Miranda*-like warnings to improve a youth's ability to consent to be searched invokes the same issues as expecting the current *Miranda* doctrine to protect youth from the coercive atmosphere of custodial interrogation.[24] Holding youth and adults to the same standard ignores decades of research confirming what experience and common sense tell us[25] – that the differences between children and adults in experience, susceptibility to peer pressure, and perception of authority[26] require different treatment under law. It further ignores that children are conditioned to obey adults, particularly adults in positions of authority, and that children of color are often taught by their parents to comply with the demands of police officers to avoid being the next child whose death or disability is caught on camera.[27] Thus, as the proposed legislation recognizes, unconstrained "consent" searches may be constitutional, but they are not good policy given their inherent power imbalance and the reasonable fear that many people of color have of the police.[28] For youth, this imbalance cannot be corrected with warnings alone. Therefore, we endorse that the bill's prohibition on the admission into evidence of the fruits of *any* "consent" searches of youth.

The legal standard for consent invites the consideration of age in both its objective and subjective analyses. Consent must be "freely given," meaning that it is not valid if it's the result of express or implied coercion, or if the person searched did not know they could refuse.[29] The

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[23] Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29(6) LAW AND HUMAN BEHAVIOR 723, 737 (2005).

[24] *See J.D.B.*, 564 U.S. at 273.

[25] *Id.* at 272.

[26] *Id.* at 273.

[27] *See, e.g.* Sam Sanders & Kenya Young, A Black Mother Reflects On Giving Her 3 Sons 'The Talk' ... Again And Again, NATIONAL PUBLIC RADIO (June 28, 2020), https://www.npr.org/2020/06/28/882383372/a-black-mother-reflects-on-giving-her-3-sons-the-talk-again-and-again.

[28] *See, e.g. Dozier v. United States,* 220 A.3d 933*,* 944 (D.C. 2019) ("An African-American man facing armed policemen would reasonably be especially apprehensive… fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant to whether there was [consent]")

[29] *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048 (1973).

government must prove that the person's consent was valid under the totality of the circumstances, analyzing both objective and subjective factors.[30] More than the facts of the incident, the consent analysis requires the court to consider the facts of the person, their knowledge of their rights, and their personal and cultural experiences with law enforcement.

The importance of considering age is rooted in precedent such as *Roper* and its progeny, which held that children are less culpable for their actions and choices due to the decades of research which show that they are less mature and capable of making informed decisions.[31] From this research, we know adolescents are more impulsive, sensation-seeking, likely to make decisions based on "immediate" rather than "long-term" consequences, and sensitive to social pressure than adults.[32] Adolescents are also less aware of their "legal rights" than adults.[33] These factors create the perfect storm for consent searches predicated on implicit coercion. Youth are both more likely not to know that there are no legal consequences for refusing to be searched, and more sensitive to extralegal, short-term consequences.[34] They are also more likely to answer the officer impulsively and change their answer in response to cues in the officer's body language, tone, and demeanor.[35]

Other factors affecting youth such as race and personal and cultural experience with policing intensify our concerns with the proposed remedy to the fundamental power imbalance in consent searches. A study on the effects of police interactions on adolescents found that youth with more exposure to law enforcement officials report more emotional distress after each interaction.[36] This trauma is aggravated if the encounter took place in public due to feelings of "embarrassment" and "stigmatization,"[37] and if the youth is African American or Latine.[38] Similarly, African American youth who live in neighborhoods with a greater police presence report more trauma and anxiety symptoms.[39] The severity of these symptoms is associated with the number and intrusiveness of their interactions with police.[40] Young Black males living in highly-policed areas who have watched friends, family members, or even complete strangers get

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[30] *Id.* at 229.

[31] *See Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1195 (2005)

[32] Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop'*, 64 AM. PSYCHOL. 583, 592 (2009).

[33] Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513, 1536-1537 (2018).

[34] *See id.* at 1537.

[35] *See id.*

[36] *See* Dylan B. Jackson et. al, *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 Journal of Adolescent Health 627, 629,

[37] *Id.*

[38] Dylan B. Jackson et. al, *Low self-control and the adolescent police stop: Intrusiveness, emotional response, and psychological well-being*, 66 Journal of Criminal Justice, 2020, at 1, 8.

[39] Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 Am. Journal of Pub. Health 2321, 2324 (2014).

[40] *Id.*

searched by police officers report symptoms consistent with secondary trauma.[41] Exposure to these incidents on social media had a similar effect.[42] Further studies have found that these feelings of fear, embarrassment, and helplessness affect how young people develop into young adulthood; injuring their self-concept and permanently damaging their trust in law enforcement.[43]

Informing a young person that they can refuse to be searched with no legal consequences will not address these concerns. The proposed policy asks youth to weigh the type of long-term consequences they have the most difficulty judging, particularly when under stressful conditions, and does not address the short-term concerns that inform their decisions. It also tests a youth's attention and ability to learn a legal concept in a high-stress situation that adults find difficult to navigate. For African American and Latine children, it contradicts the warnings of their parents not to resist the requests of police officers and often their lived experience that saying no to them is dangerous and futile.[44]

In the District of Columbia, consent searches are the second most common type of search by MPD's NSID.[45] Although the number of consent searches was tracked along with the number of stops after the implementation of the NEAR Act, the reasons for those consent searches have not been as closely analyzed. We do know that between July and December 2019, 90% of the people and 89% of the adolescents searched by police officers in the District were African American.[46] And our African American clients report the same feelings of fear and powerlessness when interacting with the police as documented on a national scale.[47] In fact, our clients have reported that they will often lift up their shirts and display their waistbands unprompted when they see an officer to avoid harassment. Police officers have literally conditioned them to "consent" without even being asked. This conditioning is something that an officer in the Seventh District bragged about on a t-shirt just a few years ago.[48]

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[41] Nikki Jones, "The Regular Routine": Proactive Policing and Adolescent Development Among Young, Poor Black Men, *in* Pathways to Adulthood for disconnected young men in low-income communities. New Directions in Child and Adolescent Development, 33, 45 (K. Roy & N. Jones 2014).

[42] B.M. Tynes et al., Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color, 65 Journal of Adolescent Health 371, 376 (2019).

[43] Jones, *supra* at 52.

[44] *See, e.g.* Ben Crump (@AttorneyCrump), TWITTER (October 6, 2020), https://twitter.com/attorneycrump/status/1313681956870205441?s=21, Virginia Bridges, *City council members 'disturbed' by video of NC police officer searching Black teen*," THE NEWS & OBSERVER (July 28, 2020), https://www.newsobserver.com/news/local/counties/durham-county/article244437062.html, and *The Guardian, Exclusive: police fail in attempt to tase Ahmaud Arbery during 2017 incident*, YOUTUBE (May 18, 2020), https://www.youtube.com/watch?v=1v7o_6uI9R0&ab_channel=GuardianNews.

[45] National Police Foundation, Metropolitan Police Department Narcotics and Specialized Investigations Division: A Limited Assessment of Data and Compliance from August 1, 2019 - January 31, 2020, 17 (2020).

[46] Katrina Jackson & Alexis Mayer, Demanding a More Mature Miranda for Kids, D.C. Justice Lab & Georgetown Juvenile Justice Initiative, at bit.ly/mature-miranda.

[47] ACLU-DC & ACLU Analytics, *supra* at 8.

[48] Monique Judge, *DC Cop Under Investigation for Wearing Shirt With KKK Symbol While on Duty*, THE ROOT (July 28, 2017), https://www.theroot.com/d-c-cop-under-investigation-for-wearing-a-shirt-with-a-1797354445

As the legislation recognizes by proposing Miranda-like warnings prior to "consent" searches, the current legal framework for "consent" is merely a constitutional floor. D.C. can and should implement a policy that further protects adults and youth from police coercion in the "consent" search context. For youth, the protection should make any evidence seized as the result of the consent search of any individual under the age of eighteen inadmissible in criminal or delinquency proceedings. Excluding evidence obtained through searches justified by the consent of a minor in court would also address the reality acknowledged by the Supreme Court and operationalized by jurisdictions such as California and West Virginia[49] that minors "lack the experience, perspective and judgment," [50] to interact with the criminal justice system as adults and therefore require special legal protections.

Conclusion

As we consider policing reform in the District, it is critical that we account for the differences between youth and adults in our new policies and practices. As a result, the Council should pass the Youth Rights Amendment Act of 2021.

Thank you for the opportunity to testify today. I am available to answer any questions.

Attachment:

Katrina Jackson & Alexis Mayer, *Demanding a More Mature Miranda for Kids*, D.C. Justice Lab & Georgetown Juvenile Justice Initiative, at bit.ly/mature-miranda.

[49] Henning & Omer, *supra*.

[50] *J.D.B.*, 564 U.S. at 273 (2011) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

MORE THAN A PLAZA

DC JUSTICE LAB +
GEORGETOWN JUVENILE JUSTICE INITIATIVE

DEMANDING A MORE MATURE MIRANDA FOR KIDS

October 2020

Katrina Jackson • Alexis Mayer

Demanding a More Mature *Miranda* for Kids

I. Introduction

In *Miranda v. Arizona*, the Supreme Court held that statements made by an adult during custodial interrogation are inadmissible unless law enforcement officers first administer warnings before questioning and the adult validly waives those rights.[1] Pursuant to the Fifth and Sixth Amendments, *Miranda* warnings inform individuals of: (1) the right to remain silent, (2) that any statement can be used against them, (3) the right to obtain an attorney and to have counsel present during questioning, and (4) the right to be appointed an attorney.[2] To waive these rights, a person must make a voluntary, knowing, and intelligent waiver based on the totality of the circumstances.[3] The Supreme Court emphasized that any statement or confession obtained through an uninformed, coerced, or compelled waiver of these rights must be excluded from any judicial proceeding.[4]

A year later, in *In re Gault*, the Supreme Court recognized that the procedural Constitutional safeguards outlined in *Miranda v. Arizona*, apply to children as well.[5] However, in deciding *Gault*, the Supreme Court extended *Miranda*'s adult framework to youth without the benefit of the wealth of adolescent development research that has been conducted since *Miranda* and *Gault* were decided.[6] As a result, the *Miranda* framework is not a robust, research-driven approach for protecting the rights of youth. Indeed, in *J.D.B. v. North Carolina*, the Supreme Court recognized this shortcoming and held that a child's age is relevant to *Miranda*'s custody analysis because children as a class are different than adults.[7] Notably, *Miranda*, *Gault*, and *J.D.B.* describe only the Constitutional floor of protections that must be afforded to youth in an interrogation context.

These bare minimum *Miranda* protections fail to fully protect children because they do not accommodate for a child's high susceptibility to pressure and limited cognitive ability. Furthermore, Black children are disproportionally affected by the grave insufficiencies of the *Miranda* Doctrine. The current Doctrine fails to consider the unique vulnerabilities of Black youth experience when interacting with the police. As residents, law students, attorneys, and members of the community, we respectfully urge the DC Council to protect children from *Miranda*'s shortcomings by requiring, prior to any custodial interrogation, that (1) law enforcement provide youth with expanded warnings; 2) youth be provided a reasonable opportunity to consult with counsel; and (3) waivers will only be valid if they are knowing, intelligent, voluntary, and made in the presence of counsel.

II. The Insufficiencies of the *Miranda* Doctrine

Although children only account for about 8.5% of arrests, nationally, they account for about one-third of false confessions.[8] This often leads to wrongful convictions and severe dispositions because those who falsely confess are treated harshly throughout the rest of the juvenile or criminal legal process.[9] Youth have difficulty understanding the *Miranda* rights, largely contributing to this high rate of wrongful convictions.

Because children's cognitive abilities are still developing, most children cannot meaningfully understand their *Miranda* rights.[10] More specifically, only 20% of youth adequately understand their *Miranda* rights.[11] Empirical evidence illustrates that adequately comprehending *Miranda* requires at least a tenth-grade reading level.[12] Moreover, understanding two of the *Miranda* warning

protections, the right to remain silent and the right to have an attorney present, requires a college or graduate reading ability.[13] As high as 85% of the youth in the juvenile legal system have disabilities, and children with disabilities inherently have difficulties in understanding the complexity of the *Miranda* doctrine.[14] Due to economic, social, and educational disparities, these necessary reading levels are far beyond the majority of individuals, including adults, who are targets of custodial interrogations.[15]

Furthermore, "[o]verwhelming empirical evidence shows that [youth] do not understand their Constitutional protection against self-incrimination or the consequence of waiving their rights."[16] In particular, many children do not understand that they will not incur consequences or court sanctions if they invoke their rights, such as the right to remain silent.[17] Due to no fault of their own, children do not understand the purpose of an attorney or that an attorney will support them even if they are guilty.[18] Additionally, many children often confuse the term, "interrogation," with an adjudication hearing and, therefore, do not understand that the right to have an attorney present during an interrogation means that they have the right to have an attorney present during questioning.[19] Thus, because youth do not understand *Miranda*'s protections, they cannot fully understand or appreciate the rights they are giving up when they waive them.[20]

In addition to not fully understanding their rights or the consequences of waiving them, children also "lack the psychosocial maturity and cognitive capacity to waive *Miranda* rights."[21] Because a child's prefrontal cortex has not yet matured,[22] children focus on short-term rather than long-term consequences,[23] especially in moments of stress.[24] Thus, children are especially at risk of waiving their rights without considering the consequences in the inherently stressful setting of an interrogation.[25] For example, when an officer tells a child that they can go home if they waive their *Miranda* rights and answer questions, the child is likely to waive their rights based on the short-term reward of going home.[26] Furthermore, even if they could consider the long-term consequences, youth "'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'"[27] As a result, children as young as ten years old waive their *Miranda* rights about 90% of the time without understanding the rights they are giving up,[28] often leading to false confessions and wrongful convictions.[29]

III. Race Implications and Disproportionate Effects of the *Miranda* Doctrine

For decades, tensions have existed between the Black community and the police. In the District of Columbia, police disproportionately stop, search, and arrest Black youth. Black youth are "ten times more likely to get stopped than their white peers," and between July and December of 2019, police searched 738 Black youth and only four White youth.[30] In 2018, 98% of youth committed to the Department of Youth and Rehabilitation Services were Black.[31] In 2015, Black youth made up just under 70% of the District's youth population, but accounted for over 95% of those arrested in the District.[32] Black people continue to be disproportionally arrested, not just in heavily policed, predominantly Black neighborhoods, but also in areas with high concentrations of White people.[33] Furthermore, Black youth's view of the police is often learned and shaped at a very young age.[34] Therefore, "[d]istrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of Miranda waivers."[35]

Moreover, Black men are more likely than White men to feel anxiousness and fearfulness during police encounters and , as a result, engage self-regulatory behavior to counteract any formed stereotypes regarding their guilt.[36] For example, Black men are hyper aware to engage in eye-contact and remain mindful of their body language and word choice.[37] But, despite a Black man's true intentions, "these self-regulatory efforts are interpreted as suspicious by police." Researchers have referred to this phenomenon as "stereotype threat."[38] Although the study was limited to Black men, it can be reasonably inferred that Black youth engage in similar attempts to conform their behavior to the perceived expectations of the officer. As a result, Black youth experience substantially different interactions with the police than their White counterparts, which leaves greater exposed to the shortcomings of the *Miranda* Doctrine.

IV. The Impact on the District of Columbia

The involuntary waiver of *Miranda* rights remains an issue within Washington, D.C.'s juvenile legal system. In 2012, the Metropolitan Police Department ("MPD") arrested a 15-year old child and brought him to a police station, where an MPD detective questioned him around midnight.[39] During the interview, the child's foot was cuffed to the floor, so he was unable to move freely.[40] Before reading the child his *Miranda* rights, the detective said:

> "I know you know why you're up here, so I ain't gonna play the 'I don't know' crap, all right? I'm gonna give you an opportunity to give your version of what happened today, because ... I stand between you and the lions out there .... [W]e have a lot of things going on out there, and they're gonna try and say that you did it all. Okay? And I think what happened today was just a one-time thing. But before I came out here everybody said ... you did a whole bunch of stuff, but in order for us to have a conversation, I have to read you your rights and you have to waive your rights. If you answer no to any of the questions I ask you after I read you your rights, that's all, I mean, I can't have the interview, okay?"[41]

After the officer made these coercive statements to the child, he read the child his *Miranda* rights.[42] The child then waived his rights and confessed.[43] Because the officer's statements implied that invoking his *Miranda* rights would make the situation even worse, the officer made the boy feel helpless, as if he had no choice but to waive his *Miranda* rights and confess. [44] The District of Columbia Court of Appeals found that the officer's statements did not give the child a real choice and that his waiver was, therefore, involuntary.[45] This is just one of many examples that illustrates a child's susceptibility to waiving *Miranda* rights during an inherently coercive police interrogation.

V. A New Approach

To better protect children from the current inadequacies of the *Miranda* doctrine, the District of Columbia should make any statement made by a minor in a custodial interrogation inadmissible unless (1) the minor was advised of their rights by the interrogating law enforcement official,[46] (2) the minor was given an opportunity to confer with an attorney regarding the waiver of those rights, and (3) the minor knowingly, intelligently, and voluntarily waived those rights in the presence of counsel. D.C. should not permit any child to waive any *Miranda* right without assistance from counsel.

These protections would ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions.

Other jurisdictions have already codified protections for youth in custodial interrogations, including (1) requiring children to consult with a counsel during police questioning, (2) not allowing children to waive *Miranda* rights without consulting with an attorney, and (3) making inadmissible any statement made outside the presence of counsel. Specifically, New Jersey requires the assistance of counsel before a child can waive any right, including a *Miranda* right.[47] Additionally, California recently passed legislation that requires all minors to consult with an attorney before waiving any *Miranda* right.[48] Furthermore, Illinois requires counsel at all custodial interrogations for children under 15 who are suspected of committing homicide or another serious offense.[49] Similarly, in West Virginia, statements made by children under 14 during custodial interrogations are not admissible in court unless counsel was present during the interrogation.[50]

States and cities across the United States continue to codify further protections for youth in custodial interrogations. For example, in New York, there is a bill that, if it becomes law, will mandate that children are only interrogated when necessary and only *after* consulting with an attorney.[51] Baltimore City has also taken steps to ensure that a child's constitutional rights are preserved. Specifically, the Maryland State's Attorney's Office has explicitly expressed its plans to develop policy that will make statements made by a minor outside the presence of counsel inadmissible.[52]

Although some states require parents to be present during custodial interrogations as a way to potentially guard against coerced waivers or confessions, this "protection" has proven to be inadequate. Instead, attorneys are best positioned to explain *Miranda* rights to children. Generally, parents do not have the necessary legal knowledge to represent their child's best interest.[53] In fact, "[i]n 24 out of 25 interrogations, the parents either did nothing or affirmatively aided the police" by advising their children to confess or to tell the truth.[54] One notable example of a case where children were wrongfully convicted based on false confessions is the Exonerated Five, where the children's parents encouraged the boys to waive their right to remain silent and further encouraged them to cooperate with the police.[55] The parents, like their children, felt helpless and powerless to resist police pressure during the interrogations. Thus, merely having a parental or custodial guardian present would not adequately preserve *Miranda*'s Constitutional protections.[56]

Moreover, providing minors a more expansive explanation of their *Miranda* rights alone would not be enough to protect youth from involuntarily waiving their rights. To create a fully comprehensive explanation of *Miranda*'s protections that most youth could factually and rationally understand would be both impractical and ineffective. For example, England and Wales created a comprehensive 44-page "easy read" letter of rights for people in custody.[57] However, because it is so unlikely that a child could understand and internalize such a lengthy document under the conditions often associated with custodial interrogation, England and Wales also requires counsel and an appropriate adult when youth are in police custody.[58] "On average, custodial suspects are expected to comprehend 146 words with a range from 49 to 547," and longer pieces are especially challenging.[59] Thus, a comprehensive resource would not effectively communicate the *Miranda* doctrine to youth and would, therefore, not adequately protect against involuntary waivers.

Providing further *Miranda* protections would not only protect youth from falsely confessing but also save the District money that could be allocated to social programs. Detaining a young person can cost upwards of $621 per day and $226,665 per year.[60] These numbers do not account for the long-term indirect costs of detaining youth, including less tax revenue, increased public assistance, and increased crime costs.[61] Additionally, "[b]etween lawsuits and state statutes that award fixed compensation for wrongful convictions, state and municipal governments have paid out $2.2 billion to exonerees."[62]

The District of Columbia should make any statement made to law enforcement officers by any person under eighteen years of age inadmissible in any court of the District of Columbia for any purpose, including impeachment, unless:

- **The child is advised of their rights by law enforcement;**
- **The child is given an opportunity to confer with an attorney; and**
- **The child knowingly, intelligently, and voluntarily waives their rights in the presence of counsel.**

References

[1] *See* 384 U.S. 436, 444 (1966).
[2] *See generally id*.
[3] *Miranda*, 384 U.S. at 444-45; *Fare v. Michael C.*, 442 U.S. 707, 725-26 (1979).
[4] *Miranda*, 384 U.S. at 462.
[5] 387 U.S. 1, 44-55 (1967).
[6] *Id.*
[7] *J.D.B. v. North Carolina*, 564 U.S. 261,272 (2011) (recognizing that "[t]ime and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults; and so on.")
[8] Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 920 (2017).
[9] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920 (2004).
[10] Lapp, *supra* note 8, at 914.
[11] Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1152-53 (1980) (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[12] Anthony J. Domanico et al., Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations, 49 IDAHO L. REV. 1,3 (2012). It is important to note that DC uses the same Miranda Rights Card with both adults and youth. *See* Metropolitan Police Department PD-47 form.
[13] *Id.*
[14] Taryn VanderPyl, *The Intersection of Disproportionality in Face, Disability, and Juvenile Justice*, 15 JUST. POL'Y J. 1, 2 (2018).
[15] *Id.*
[16] Lapp, *supra* note 8, at 914.
[17] Richard Rogers, et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCH., PUB. POL'Y, & L. 63, 67 (2008).
[18] Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 11 (2006).
[19] Grisso, *supra* note 11, at 1154 (finding, in a study of 431 youth, only 20.9 percent of those youth adequately understood all four *Miranda* rights).
[20] Grisso, *supra* note 18, at 11.
[21] Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 431 (2006).
[22] Marco Luna, *Juvenile False Confessions: Juvenile Psychology, Police Interrogation Tactics, and Prosecutorial Discretion*, 18 NEV. L.J. 291, 297 (2017).
[23] Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 405 - 06 (2013).
[24] Grisso, *supra* note 18, at 9.
[25] *J.D.B.*, 564 U.S. at 269 (quoting *Miranda*, 384 U.S. at 467); Grisso, *supra* note 18, at 9.
[26] Grisso, *supra* note 18, at 11. Oftentimes, when officers interrogate a child, they give the child two options: "(1) you did it and if you do not confess I cannot help you so you are going to be punished harshly, or (2) you did it and if you do confess, you are a good person and I can help you." Steven A. Drizin & Beth A. Colgan, *Interrogation Tactics Can Product Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 136 (G. Daniel Lassiter ed., 2004). Based on these limited options and the short-term reward of going home, children almost always waive their *Miranda* rights and confess even if they are innocent. *See generally id.* at 138.
[27] *J.D.B.* 564 U.S. at 272 (quoting *Bellotti v. Baird,* 443 U.S. 622, 635 (1979)).
[28] Lapp, *supra* note 8, at 914 (2017); Barry Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 12 (2013) (finding, in a study of 307 16 through 18-year olds, 92.8 percent of youth waived their *Miranda* rights)

[29] Elizabeth Vulaj, *From the Central Park 5 to the Exonerated 5: Can It Happen Again?*, N.Y. ST. B.J. (2019), at 24-25.
[30] ACLU-DC, RACIAL DISPARITIES IN STOPS BY THE D.C. METROPOLITAN POLICE DEPARTMENT: REVIEW OF FIVE MONTHS OF DATA 8 (2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (last visited Sept. 13, 2020).
[31] Youth Population Snapshot, DEP'T YOUTH REHABILITATION SERV.S, https://dyrs.dc.gov/page/youth-snapshot (last visited Sept. 2, 2020).
[32] *Racial Disparities in D.C. Policing: Descriptive Evidence from 2013-2017*, ACLU DISTRICT OF COLUMBIA, https://www.acludc.org/en/racial-disparities-dc-policing-descriptive-evidence-2013-2017 (last visited Sept. 13, 2020).
[33] *Id.*
[34] Kristin Henning, Rebba Omer, *Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation*, 52 ARIZ. STATE L. J. ___ (expected December 2020).
[35] *Compare* Puzzanchera, C., Sladky, A. and Kang, W., "Easy Access to Juvenile Populations: 1990-2019," at https://www.ojjdp.gov/ojstatbb/ezapop/ (reporting 29,321 Black youth ages 10 to 17 and 42,234 total youth ages 10 -17) *with* MPD FOIA Request Response 2016-05463 (reporting 2928 arrests of Black youth out of 3073 total arrests in 2015) (on file with the Georgetown Juvenile Justice Initiative).
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *In re S.W.*, 124 A.3d 89, 93 (D.C. Ct. App. 2015).
[40] *Id.*
[41] *Id.* at 94.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id*. at 104-05.
[46] These rights include but are not limited to: (a) the right to remain silent, (b) anything they say can be used against them, (c) the right to an attorney, (d) the right to have someone else pay for the attorney, (e) the right to talk to an attorney *immediately* before continuing to answer questions, (f) the refusal to give a statement cannot be used as evidence of guilt, (g) making a statement does not mean they will be released from custody or that they will not be charged, (h) they can be held in pretrial detention for the most minor offenses, and (i) they can be committed until age 21 for the most minor offenses.
[47] N.J. STAT. ANN. § 2A:4A–39(b)(1).
[48] S. 203, 2020 (Cal.)
[49] 705 ILL. COMP. STAT. § 405 / 5-170.
[50] W. VA. CODE § 49-4-701(l).
[51] A6982B, 2019 Leg., Reg Sess. (N.Y. 2019). Emily Haney-Caron & Sydney Baker, *Protecting Youth from Interrogation*, NEW YORK DAILY NEWS, (Aug. 5, 2020), https://www.nydailynews.com/opinion/ny-oped-protecting-youth-from-unfair-interrogation-20200805-yzg33mie6vhkvkmmrfz7jagrwy-story.html, (last visited Sept. 27, 2020).
[52] Marilyn Mosby & Miriam Aroni Krinsky, *The Baltimore Exonerees' Cases Shed Light on the Need for Reforming Youth Interrogations*, WASH. POST (Nov. 27, 2019), https://www.washingtonpost.com/opinions/local-opinions/the-baltimore-exonerees-cases-shed-light-on-the-need-for-reforming-youth-interrogations/2019/11/27/e7e22570-1099-11ea-b0fc-62cc38411ebb_story.html; Jennifer Egan, *Baltimore State's Attorney Should Refuse to Use Child Confessions Taken Without an Attorney Present*, BALT. SUN, Dec. 6, 2019, https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-1208-mosby-kid-confession-20191206-jsdhcnsocrcrflo7m2hdkygzui-story.html.
[53] Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions (Winner of American Constitution Society's National Student Writing Competition)*, 20 U. PA. J. CONST. L. 1211, 1232 (2018).
[54] Molly Knefel, *'Making a Murderer,' and the Huge Problem of False Youth Confessions*, ROLLING STONE (Jan 8, 2016), https://www.rollingstone.com/tv/tv-news/making-a-murderer-and-the-huge-problem-of-false-youth-confessions-51948/, (last visited Sept. 27, 2020); Rogers, *supra* note 17, at 66.
[55] Drizin, *supra* note 9, at 896.
[56] Rogers, *supra* note 17, at 66.

[57] HERTFORDSHIRE CONSTABULARY, RIGHTS AND ENTITLEMENTS EASY READ BOOKLET (2009).
[58] *See* Rogers, *supra* note 17, at 185.
[59] *Id.* at 186.
[60] JUSTICE POLICY INSTITUTE, STICKER SHOCK 2020: THE COST OF YOUTH INCARCERATION 3 (2020).
[61] *Id.* at 1.
[62] Radley Balko, *Report: Wrongful Convictions Have Stolen at Least 20,000 years from Innocent Defendants*, WASH. POST: OPINIONS (June 10, 2019), https://www.washingtonpost.com/news/opinions/wp/2018/09/10/report-wrongful-convictions-have-stolen-at-least-20000-years-from-innocent-defendants/.

Appendix: Proposed Amendments

§ 16–2316. Conduct of hearings; evidence.

(g) A statement made by a person under 18 years of age to a law enforcement officer during a custodial interrogation shall be inadmissible for any purpose, including impeachment, in a transfer hearing pursuant to section 16-2307, in a dispositional hearing under this subchapter, or in a commitment proceeding under Chapter 5 or 11 of Title 21, unless the person under 18 years of age:

(1) Is advised by a law enforcement officer in a developmentally appropriate manner of:

(A) The person has the right to remain silent;

(B) Anything the person says can be used against them in court;

(C) Refusing to make a statement cannot be used as evidence that they were involved in a crime;

(D) Making a statement does not mean they will be released from custody or that they will not be charged with a crime;

(E) The person has the right to an attorney;

(F) The person has the right to have someone else pay for the attorney at no cost to them;

(G) The person has the right to privately speak with an attorney, immediately, before continuing to speak with a law enforcement officer;

(H) The person has the right to be advised by an attorney regardless of whether they committed a crime; and

(2) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and

(3) Through an attorney, knowingly, intelligently, and voluntarily waives their right to remain silent.

Council for Court Excellence
Improving Justice for the Community

Statement of the Council for Court Excellence
Before the Committee on Judiciary and Public Safety
and the Committee of the Whole
of the Council of the District of Columbia

Hearing on B24-0356: Strengthening Oversight and Accountability of Police Amendment Act of 2021

October 21, 2021

Good afternoon, Chairman Allen and members of the Committee. My name is Emily Tatro and I am the Deputy Director for the Council for Court Excellence (CCE). CCE is a nonpartisan, nonprofit organization with the mission to enhance justice in the District of Columbia. For nearly 40 years, CCE has worked to improve the administration of justice in the courts and related agencies in D.C. through research and policy analysis, facilitating collaboration and convening diverse stakeholders, and creating educational resources for the public. Please note that in accordance with our policy, no judicial member of CCE participated in the formulation or approval of this testimony. This testimony does not reflect the specific views of, or endorsement by, any judicial member of CCE

Today, I am here to testify in support of the Strengthening Oversight and Accountability of Police Amendment Act of 2021 (SOAPAA). The Council for Court Excellence has long been a facilitator of conversations among and between people with all kinds of experience with D.C.'s complex justice system, including people who have experienced police violence and been arrested and incarcerated, survivors of crime, system actors and administrators, researchers, and advocates. The topic of police reform has consistently occupied these conversations and

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remains far more than just a debate for many residents of the District; it has real consequences on individuals' lives and impacts the broader community's perceptions of safety and justice. The public knows all too well the harm that police can cause communities of color, and recent publicity of police violence both nationwide and in the District has brought to the forefront the structural flaws in our law enforcement systems. Violent police responses to last summer's racial justice protests in the District serve as just one example of the behavior that so many wish to see changed.[1]

The District is also notoriously over-policed and officers' law enforcement actions have racially disparate impacts. D.C. has the highest per capita rate of law enforcement officers per resident of any large U.S. city. As of 2016, the Metropolitan Police Department (MPD) had 20% more police officers per resident than the next most heavily-policed city, Chicago.[2] This high rate of law enforcement presence does not even account for the more than two dozen independent law enforcement agencies that have limited jurisdiction around the District, including the D.C. Housing Authority Police, the Metro Transit Police, the U.S. Park Police, and the U.S. Capitol Police.[3] According to the District Task Force on Jails & Justice, between 2013 and 2017, Black people composed 47% of D.C.'s population but 86% of its arrestees; during this period, Black people were arrested at 10 times the rate of white people in D.C.[4] The SOAPAA makes several important

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[1] *See* Elliot C. Williams, Maragaret Barthel, "D.C. Police Used Tear Gas, Arrested More Than 40 People During Black Lives Matter Protests In Adams Morgan", *The DCist,* August 14, 2020, https://dcist.com/story/20/08/14/black-lives-matter-blm-protest-kettle-adams-morgan-dc-arrest/

[2] The Council for Court Excellence, *D.C.'s Justice Systems Overview 2020,* http://www.courtexcellence.org/uploads/publications/DCs_Justice_Systems_Overview_2020.pdf

[3] Ibid.

[4] District Task Force on Jails and Justice, *Jails & Justice: Our Transformation Starts Today, Phase II Findings and Implementation Plan,* February 2021, *http://www.courtexcellence.org/uploads/publications/TransformationStartsToday.pdf*

steps towards a future in which we reduce the harm that law enforcement creates in D.C.'s Black communities by improving transparency, oversight, and accountability.

On May 4, 2021, CCE hosted a discussion titled "The Future of Policing in the District, A Roundtable Discussion on Reform", in partnership with the Office of the District of Columbia Auditor.[5] Moderated by Auditor Patterson, the panelists included an activist, a Government Affairs professional, the D.C. Police Reform Commission Co-Chairs, the Executive Director of ACLU-DC, and the Executive Director of the D.C. Police Foundation. Throughout the course of the conversation, panelists noted that mental health problems caused by over-policing receives insufficient attention. They also discussed how the trauma that police brutality has inflicted upon communities of color is real and generational.

In order to begin to repair the harm caused by problematic policing, the panelists explored how police should play a protective, community-based, preventative role, not an aggressive, intimidating, and ineffective one. The panel also discussed the traumatizing effects that police interactions can have on children, agreeing that police should not be present for conflicts involving any children, or in school situations at all. After identifying these specific issues, the panel discussed what they believed were necessary measures in order to begin addressing detrimental policy practices, including proving better services for returning citizens, hiring non-police personnel to respond to domestic violence calls, and increasing in transparency from the MPD

[5] The Council for Court Excellence, *The Office of the District Auditor, The Future of Policing in the District, A Roundtable Discussion on Reform,* July 21, 2021, http://www.courtexcellence.org/digital-library&srch=roundtable&cat=&from=&till=

generally, and concluded that the MPD needs to have more accountability for its actions.[6] This will require transparency from the department about the implementation of reforms.

Transparency and improved communication by the police department were also the most prominent suggestions made by D.C. residents, in response to CCE's 2015 survey on perceptions of public safety.[7] Our analysis identified a disconnect between the problems that residents believe are most impactful in their neighborhood and the problems that police focus on, with only one third of all surveyed individuals believed that police focused on the right problems.[8] Young people in particular stood out as having the worst relationship with their local police in many categories, including during street interactions. 74% of participants did not know a single local officer by name. This data is in alignment with the conclusions drawn by the Future of Policing roundtable discussion.[9] Even though we conducted our survey six years ago, we heard similar sentiments and concerns with policing in our 2021 roundtable discussion.

Renaming the Complaints Board to the Police Accountability Commission and expanding its role to allow more review of police behavior decisions, as contemplated by this bill, is directly responsive to the demands of the public that we have heard through our discussions. As members of the community have demonstrated, the public deserves transparency and accountability from their local police department. The administrative changes proposed in this bill could help promote

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[6] Ibid.
[7] Community Preservation and Development Corporation, The Council for Court Excellence, Local Initiatives Support Corporation, *Perceptions of Public Safety: Report on the 2015 DC Public Safety Survey, May 2016, http://www.courtexcellence.org/uploads/publications/Perceptions_of_Public_Safety_ExecSummary.pdf*
[8] Ibid.
[9] The Council for Court Excellence, *The Office of the District Auditor, The Future of Policing in the District, A Roundtable Discussion on Reform,* July 21, 2021, https://dcauditor.org/report/the-future-of-policing-in-the-district-a-roundtable-discussion-on-reform/

those values in the MPD from the top down. CCE seeks to improve the D.C. justice system using fact-based, consensus driven reforms. The SOAPAA provides measures that can be taken to raise the standard of police behavior in the District, and to foster an environment where abuse and misconduct will no longer be tolerated. The Strengthening Oversight and Accountability of Police Amendment Act of 2021 is the beginning of a series of changes that are required for the Metropolitan Police Department to reform in a meaningful, and long overdue, way.

That concludes my testimony, thank you for your time and I look forward to answering any questions you may have.

Testimony Before the District of Columbia Council
Committee on the Judiciary and Public Safety
October 21, 2021

Public Hearing:
B24-0254, "School Police Incident Oversight and Accountability Amendment Act of 2021"
B24-0306, the "Youth Rights Amendment Act of 2021"
B24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021"

Danielle Robinette
Policy Attorney
Children's Law Center

Introduction

Thank you, Chairperson Allen, and members of the Committee, for the opportunity to testify. My name is Danielle Robinette. I am a policy attorney at Children's Law Center and a resident of Ward 6. Additionally, prior to law school, I was a public-school teacher. I am testifying today on behalf of the Children's Law Center which fights so every DC child can grow up with a stable family, good health, and a quality education. With almost 100 staff and hundreds of pro bono lawyers, Children's Law Center reaches 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year.[1]

Children's Law Center represents children and youth in foster care and, through our medical-legal partnership, families facing barriers to healthy housing or special education for their children. In support of this work, we have long emphasized the importance of fair access to school for all students across the District. Barriers to access are most prevalent for students who have experienced trauma and students with complex special education needs. In both our *guardian ad litem* and special education work, we have had clients who experienced concerning interactions with police at school.

As we have testified before, the presence of police in schools has a disproportionate negative impact on Black and Brown students and students with disabilities.[2] The cumulative effect of these interactions contributes to school pushout for these groups of students. We therefore support the bills presently before the Committee

and consider them to be a good initial step towards minimizing the harmful impacts of policing on Black, Brown, and/or disabled young people in DC. My testimony today will focus on B24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021" and B24-0306, the "Youth Rights Amendment Act of 2021.

Strengthening Oversight & Accountability of Police on School Grounds

We support the School Police Incident Oversight and Accountability Amendment Act because it will provide the Metropolitan Police Department (MPD), this Committee, and the Council detailed information needed to conduct effect oversight of police activity in schools, as well as some level of increased transparency through public reporting and Council oversight hearings. Further, the bill broadly defines "law enforcement" to encompass not only School Resource Officers (SROs), but also civilian MPD employees, special police officers, campus police officers, employees of the Department of Corrections or Department of Youth Rehabilitation Services, and employees of the Court Services and Offender Supervision Agency, Pretrial Services, and Family Court Social Services.[3] By relying on a more inclusive concept of "law enforcement" in the context of school, the bill will continue to serve a meaningful purpose even after SROs are phased out of DC schools.

Transparency does not on its own, however, ensure accountability. In its current form, this bill will not capture the full scope of student interactions with law enforcement and other school security personnel. Instead, the bill relies on schools and MPD to report

incidents in which law enforcement interact with students. Schools are required to report when they call law enforcement, recover a weapon or contraband, or involve law enforcement in a school action or activity.[4] MPD is required to report school-based events involving MPD officers who "stop, detain, or arrest" individuals on school grounds.[5]

Children's Law Center is concerned that by relying only on reports from schools and MPD, the data collected under this bill will not encompass the full range of concerns that students have regarding misconduct or harassment by law enforcement in their schools. The data required by this bill will reflect the perspectives of schools and MPD, but not those of students. Further, the data required to be reported may not capture informal interactions between students and law enforcement that may feel coercive or inappropriate to students as the law enforcement officer would have to report their own misbehavior. Such incidents create opportunities for police interactions with students that could escalate into coercive exchanges or improper conduct but would not be captured by the data reporting required by this bill.

Therefore, we encourage this Committee to work with the Committee of the Whole to explore ways in which students can report concerns regarding their experiences with law enforcement at school without fear of retaliation. Additionally, we have heard from students that they often do not know whether a law enforcement officer is an SRO, a contracted security guard, or an employee of another District agency. Any reporting mechanism, therefore, should be able to receive complaints from students regardless of

the specific type of law enforcement or school security officer involved and regardless of whether the student is able to correctly identify the particular type of officer involved. Finally, we encourage the Committee to engage directly with youth to ensure that any complaint or reporting mechanism developed meets students' needs.

Advancing Developmentally Appropriate Policing

As we have testified before, MPD practices affect young people differently that adults and can contribute to school avoidance and the school-to-prison pipeline.[6] We therefore support the Youth Rights Amendment Act ("the Act") because it requires MPD to use developmentally appropriate policing tactics when interacting with young people.[7] Following the release of the Police Reform Commission's (PRC's) report, we testified in support of their recommendations that minors be granted special protections from unjust police practices that fail to account for normal adolescent behaviors and the neuroscience of adolescence.[8] The Act is a step in the right direction towards codifying the PRC's recommendations.

The Act makes two important changes to the DC Code to protect young people during interactions with law enforcement. First, the Act requires MPD to ensure that minors are provided with developmentally appropriate *Miranda* warnings and that youth knowingly, intelligently, and voluntarily agree to waive their rights.[9] A recent report by the DC Justice Lab and the Georgetown Juvenile Justice Initiative clearly outlines the insufficiencies of the current *Miranda* doctrine when applied to minors.[10] The report

notes, "Because children's cognitive abilities are still developing, most children cannot meaningfully understand their *Miranda* rights. More specifically, only 20% of youth adequately understand their Miranda rights."[11] Because most children do not understand their rights under the *Miranda* doctrine, they should have extra protections in protect them from police coercion. Further, this report demonstrates how Black youth and youth with disabilities are disproportionately impacted by the current coercive practices employed by MPD.[12]

Second, the Act prohibits the use of consent searches on anyone under the age of 18.[13] For many of the same reasons that current *Miranda* warnings are insufficient for children, the use of consent searches on minors takes advantage of the inherently unjust power dynamic between youth and police. This power imbalance means that youth cannot freely consent to searches by police.

Neuroscience tells us that adolescents are more likely than adults to be impulsive and sensation-seeking, to make decisions based on "immediate" gains rather than long-term consequences, and to be susceptible to peer pressure.[14] Moreover, race and disability can intensify the fundamental power imbalance between a young person and a police officer. For all DC youth, the use of developmentally appropriate policing practices will lessen the likelihood that an interaction between a young person and the police escalates into a dangerous situation. For our clients specifically, namely youth in foster care and children with disabilities, we are hopeful that this change will also limit

the instances in which manifestations of trauma and/or disability in youth are often misread as noncompliance or involuntary consent by law enforcement.

Conclusion

Thank you for this opportunity to testify, and I welcome any questions.

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[1] Children's Law Center fights so every child in DC can grow up with a stable family, good health, and a quality education. Judges, pediatricians, and families turn to us to advocate for children who are abused or neglected, who aren't learning in school, or who have health problems that can't be solved by medicine alone. With almost 100 staff and hundreds of pro bono lawyers, we reach 1 out of every 9 children in DC's poorest neighborhoods – more than 5,000 children and families each year. And we multiply this impact by advocating for city-wide solutions that benefit all children.

[2] *See, e.g., School Security in the District of Columbia and Public Charter Schools*, Public Roundtable Before the Comm. of the Whole, D.C. Council, (April 21, 2021) (testimony of Danielle Robinette, Policy Attorney, Children's Law Center), *available at*: https://childrenslawcenter.org/wp-content/uploads/2021/07/CLC-Testimony_School-Security-in-the-District-of-Columbia-and-Public-Charter-Schools.pdf

[3] *See* B24-0254 "School Police Incident Oversight and Accountability Amendment Act of 2021," Sec. 2(a).

[4] *See id*., at Sec. 2(b) (amending DC Code § 38-236.09).

[5] *See id*., at Sec. 3 (amending DC Code § 5-113.01).

[6] *See, e.g., School Security in the District of Columbia and Public Charter Schools*, Public Roundtable Before the Comm. of the Whole, D.C. Council, (April 21, 2021) (testimony of Danielle Robinette, Policy Attorney, Children's Law Center), *available at*: https://childrenslawcenter.org/wp-content/uploads/2021/07/CLC-Testimony_School-Security-in-the-District-of-Columbia-and-Public-Charter-Schools.pdf

[7] *See* B24-0306 "Youth Rights Amendment Act of 2021" (amending DC Code § 16-2316(b) and § 23-256).

[8] *See The Recommendations of the Police Reform Commission*, Joint Public Roundtable Before the Comm. on Judiciary and Public Safety and the Comm. of the Whole, D.C. Council, (May 20, 2021) (testimony of Danielle Robinette, Policy Attorney, Children's Law Center), *available at*: https://childrenslawcenter.org/wp-content/uploads/2021/07/CLC-Testimony_Joint-Hearing-on-PRC-Recommendations_Revised.pdf

[9] *See* B24-0306 "Youth Rights Amendment Act of 2021" Sec. 2(b).

[10] *See* Katrina Jackson & Alexis Meyer, "Demanding a More Mature Miranda for Kids," at 1-2 (Oct 2020), *available at*: https://www.defendracialjustice.org/wp-content/uploads/toolkit-files/Policy-Advocacy/Sample-Policy-Reports/More-Mature-Miranda.pdf

[11] *Id*., at 1.

[12] *Id*., at 2.

[13] *See* B24-0306 "Youth Rights Amendment Act of 2021" Sec. 3.

[14] *See* J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011); *see also* Laurence Steinberg, et. al., "Are Adolescents Less Mature than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA 'FlipFlop'," 64 AM. PSYCHOL. 583, 592 (2009), *available at*: https://pubmed.ncbi.nlm.nih.gov/19824745/#:~:text=Simmons%20(2005)%2C%20which%20abolished,are%%2020as%20mature%20as%20adults

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October 15, 2021

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

Council of the District of Columbia
Committee on the Judiciary & Public Safety
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Strengthening Oversight and Accountability of Police Amendment Act of 2021

Dear Councilmembers:

I am writing as Chairman of the Fraternal Order of Police, Metropolitan Police Department Labor Committee, D.C. Police Union ("D.C. Police Union") and on behalf of the nearly 3,200 members of the D.C. Police Union regarding the proposed legislation entitled the Strengthening Oversight and Accountability of Police Amendment Act of 2021 (the "Act"). The Act proposes sweeping changes to many of the laws, rules, and regulations that govern police officers in the District, and will have a significant negative impact on current D.C. Police Union members and the ability of the Metropolitan Police Department to recruit new officers. This comes at a time when our membership and the number of police officers who protect and serve the citizens of the District is at an historic low. While I have concerns about many of the proposed amendments contained in the Act, I have focused my comments on three specific proposals that are most troubling.

1. Creation of a Publicly Accessible Database for Disciplinary Records and Expansion of D.C. FOIA

Section 7 of the Act proposes to create a public "Officer Disciplinary Records Database" that will contain "Disciplinary history and records of each sworn officer." To establish this public database, the Act drastically amends the D.C. Freedom of Information Act ("FOIA") for police officer records only. Specifically, the Act adds a new subsection to FOIA (D.C. Code § 2-534(d-1)), for the express purpose of making MPD police officer disciplinary records subject to public disclosure. The Act broadly defines disciplinary records to include "**any record** created in the furtherance of a disciplinary proceeding," which includes mere "allegations" made against an officer without any distinction drawn for sustained disciplinary violations or completely unfounded allegations. The Act also irresponsibly permits the public disclosure of an officer's

"medical history," "mental health service," and "substance abuse treatment service," if such documents are "relevant to the disposition of the investigation" or "mandated by a disciplinary proceeding." The Act also amends D.C. Code § 2-534(a)(12) to allow the name of the police officer contained in the disciplinary record to be publicly revealed. Significantly, this amendment to FOIA would make MPD officers the only District employees whose names would be publicly disclosed in the production of disciplinary records.

The proposed amendments in the Act make clear that the intent of the Act is not to increase police accountability, but is instead aimed at publicly shaming and humiliating District police officers. Indeed, FOIA has a specific exemption from disclosure for: "Information of a personal nature where public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." D.C. Code § 2-534(a)(2). The Act disposes of this long-standing exemption for police officers only, and explicitly permits the public disclosure of highly personal medical history records, mental health service records, and substance abuse treatment service records. The Act further allows the public disclosure of the officer's name associated with these highly personal records, thereby destroying the officer's legitimate expectation of privacy in their medical and mental health records. Indeed, the D.C. Court of Appeals has specifically recognized that "MPD employees have a cognizable privacy interest in the nondisclosure of their names and other identifying information." *District of Columbia v. Fraternal Order of Police*, 75 A.3d 259, 268 (D.C. 2013). The Court of Appeals has further held as follows:

> [T]here is no dispute that police officers subject to departmental disciplinary proceedings have far more than a *de minimis* privacy interest in not being publicly identified. The propriety of redactions reasonably necessary to ensure their anonymity is not in doubt. "[E]ven with names redacted," the disclosure of other personal information may result in an invasion of their privacy because individuals "can often be identified through other, disclosed information" and the "later recognition of identifying details."

Fraternal Order of Police/Metro. Police Labor Comm. v. District of Columbia, 124 A.3d 69, 77 (D.C. 2015). The Act abolishes this recognized, cognizable privacy interest. In addition, after stripping D.C. Police Union members of all legitimate expectations of privacy that they had when joining the Department, the Act provides no mechanism for D.C. Police Union members to contest or attempt to prevent the public disclosure of these highly personal records. During the past year, suicides among D.C. Police Union members have increased and mental health issues and PTSD has spiked. Some have speculated that members' involvement in violent unrest maybe one of the causes of this tragic development. Unfortunately, the PTSD and mental health issues caused by members' involvement in dealing with unrest can, and often does, manifest itself in disciplinary matters often caused by a lack of counseling and self-medicating. The insensitive nature in which the Council intends to make personnel records, medical records, and mental health records publicly available is appalling and disrespects the brave and honorable service that D.C. Police Union members provided the nation over the past year and a half.

The Act further requires the production of disciplinary records in which the underlying allegations were completely unfounded or that result in the officer being exonerated. Thus, officers against whom false or frivolous disciplinary allegations were made will still be placed in

the Act's public database and wrongly identified as an officer who has committed an act warranting discipline. This singles-out D.C. Police Union members for disparate treatment compared to all other District government employees and creates disclosure obligations that no other regulated profession experiences. For example, attorneys practicing law in the District, with whom the highest levels of trust and fiduciary obligations are imposed, do not have disciplinary allegations made public by D.C. Bar Counsel unless and until the attorney has been served with a petition instituting formal charges or the attorney has agreed to be formally disciplined. Similarly, health care professionals in the District of Columbia are investigated by the D.C. Health Regulation and Licensing Administration ("HRLA"). Notably, the HLRA is permitted to resolve complaints informally if there is no violation of the law or regulation or if the HLRA otherwise deems such informal resolution appropriate. It is only when the HLRA takes formal disciplinary action that the matter is publicly disclosed. In stark contrast, through the Act, the Council is establishing a public database through which D.C. Police Union members will be publicly listed by name in a disciplinary database, even for completely meritless disciplinary matters that were not sustained. This does nothing to improve accountability or relations between the police and the public and instead gives false credence to frivolous complaints of misconduct. The Council completely overlooks the fact that, in defending against these claims, officers are frequently required to rely on highly personal and private information in order to clear their names of the charges, all of which will become public information.

In addition, the Act's sweeping amendments to FOIA are not in any way tailored to any specific police reform. Instead, all disciplinary records concerning any type of allegation or misconduct must be produced. The recent police reform acts passed by the Council were precipitated by a use of force incident involving George Floyd. However, the creation of the public disciplinary database and amendments to FOIA are not tailored to require the disclosure of sustained discipline involving the use of force. Instead, the Act casts a broad net to encompass all disciplinary allegations, no matter how frivolous, to publicly disparage D.C. Police Union members and force them to publicly defend themselves and their reputations against unfounded allegations.

Furthermore, it would be fundamentally unfair to make the Act retroactive and applicable to past disciplinary records that were created prior to the passage of the Act. All current D.C. police officers were hired by the MPD with the legitimate and reasonable expectation of privacy in their personnel and medical records. The Act's proposed abolition of these privacy rights cannot be imposed on current D.C. police officers who were induced to accept their employment with the MPD under these expectations of privacy. Similarly, former D.C. police officers who have retired from the MPD worked their entire careers and retired with an expectation of privacy in their personnel records. Moreover, D.C. Code § 1-631.05 requires certain information to be removed from an employee's personnel file, including information that "concerns an event more than 3 years in the past upon which an action adverse to an employee may be based." To the extent that the MPD has failed to remove these documents from D.C. Police Union members' personnel files, public production of these documents would violate D.C. Code § 1-631.05 and expose the MPD and the District to liability.

2. Drastic Expansion of the Office of Police Complaints

One year after making substantial revisions to the Office of Police Complaints, the Council is again attempting to overhaul the Office of Police Complaints. After expanding the OPC Board to include nine members comprised of one member from each Ward in the District, the Council proposes to completely overhaul the OPC to include nine voting members comprised of: "at least three members between the ages of 15 and 24;" two members from immigrant communities; two members from the LGBTQIA community; and two members with disabilities. *See* Act at Section 5. In doing so, the demographic with the largest representation amongst the nine voting members of the OPC Board could be juveniles who are not even permitted to vote in District of Columbia or Federal elections. This composition of individuals is not representative of the general population in the District of Columbia and is not best suited to perform the functions of the OPC Board.

The Act also permits complaints to be filed "anonymously." This proposal completely undermines and abolishes the defined purpose for establishing the OPC, which is as follows:

> The purpose of this subchapter is to establish an effective, efficient, and **fair system** of independent review of citizen complaints against police officers in the District of Columbia, which will:
> (1) Be visible to and easily accessible to the public;
> (2) Investigate promptly and thoroughly claims of police misconduct;
> (3) **Encourage the mutually agreeable resolution of complaints through conciliation and mediation where appropriate**;
> (4) **Provide adequate due process protection to officers accused of misconduct**;
> (5) **Provide fair and speedy determination of cases that cannot be resolved through conciliation or mediation**;
> (6) **Render just determinations**;
> (7) **Foster increased communication and understanding and reduce tension between the police and the public**; and
> (8) Improve the public safety and welfare of all persons in the District of Columbia.

D.C. Code § 5-1102 (emphasis added). The defined purpose of OPC of encouraging agreeable resolutions through conciliation and mediation and fostering increased communication and reducing tension between the police and public is not possible when the complainant is anonymous. Equally important, the defined purpose of providing adequate due process to officers accused of misconduct, fair and speedy determinations, and just determinations, cannot possibly be accomplished when the complainant is anonymous and police officers are precluded from confronting their accusers in an evidentiary hearing. Similarly, D.C. Code § 5-1111(b) permits the Executive Director of OPC to dismiss a complaint if the complainant refuses to participate in the investigation. This D.C. Code section recognizes that cooperation from the complainant is necessary to properly adjudicate an OPC complaint, but is rendered meaningless when the complainant is anonymous.

The Act also irresponsibly expands the authority of the OPC's Executive Director to complete administrative OPC investigations while criminal prosecution is being considered by the U.S. Attorney. *See* Act at Section 10(d). Significantly, the Act states: "The Executive Director may complete an administrative investigation, **including conducting interviews of subject officers**, in cases where the public interest weighs against delaying the completion of the administrative investigation until after the United States Attorney decides whether to prosecute." *See* Act at Section 10(d)(2)(emphasis added). Through this provision, the Council has made clear that it is no longer interested in having the OPC "render just determinations" that "provide adequate due process protection to officers accused of misconduct." Instead, the Council is endorsing and encouraging the OPC to conduct one-sided investigations as quickly as possible, without waiting for the U.S. Attorney to make a reasoned determination on potential criminal prosecution. While the decision on whether to criminally prosecute a police officer is pending, any police officer interviewed by OPC will undoubtedly invoke their Fifth Amendment Right even in cases in which the officer believes they did nothing wrong. Thus, OPC will be left with a rushed, one-sided investigation that fails to provide due process to the officer involved, fails to result in a just determination, and forecloses any chance of mediation or conciliation. Moreover, D.C. Code § 5-1031 (the "90-day rule") was adopted to address and avoid the constitutional issues created when an agency conducts an administrative investigation while potential criminal prosecution is pending. As such, the Act disregards the wisdom of prior Councils in passing the 90-day rule in favor of rough justice that swiftly punishes D.C. Police Union members whether warranted or not. The information gained from members who are interrogated by OPC who provide any information that is then used by a prosecutor will jeopardize the prosecution. The Council needs to look no further than a case last week in one of our neighboring jurisdictions to see how reckless this provision would be.[1]

3. Expanding the Authority of the D.C. Auditor to Make MPD Policy

The Act proposes to create within the Office of the D.C. Auditor a new position of Deputy Auditor for Public Safety. The Deputy Auditor for Public Safety position does not require any actual law enforcement experience as a qualification for the position, but nonetheless provides the Deputy Auditor with the authority to: "Review, analyze, and make findings and recommendations on any policy, practice, or program within the Metropolitan Police Department." *See* Act at p. 3. Without any practical law enforcement experience, the Deputy Auditor for Public Safety does not have the requisite knowledge or expertise to make recommendations concerning MPD policies and practices. Instead, the MPD's policies and practices have been developed over decades of policing experience and through bargaining between the D.C. Police Union and MPD management. An inexperienced auditor's involvement in recommending policies and practices for policing could result in ineffective policies or in placing D.C. Police Union members at risk of harm.

The 3,300 men and women of the cannot urge the Council strenuously enough to take no action on this bill.

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[1] *See* https://www.capitalgazette.com/news/crime/ac-cn-annapolis-police-misconduct-dismiss-20211005-wcqi5i7p45aingqtr3qnqxdadi-story.html.

During these difficult times, the nearly 3,200 members of the D.C. Police Union remain steadfastly committed to serving and protecting the citizens of the District of Columbia. I welcome the opportunity to address the Council on these issues and answer any questions it may have.

Very Truly Yours,

Greggory Pemberton
Chairman
D.C. Police Union

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RE: B24-0306 Youth Rights Amendment Act of 2021

October 21, 2021

Chairperson Allen and members of the Committee,

My name is Naïké Savain. I am a former guardian ad litem for children in foster care in the District, a former member of the District's Police Reform Commission, a resident of Ward 7, and Policy Counsel at the DC Justice Lab.[1] The DC Justice Lab is grateful to Councilmember Robert White for introducing this crucial piece of legislation based on work that helped launch the DC Justice Lab.[2] The Youth Rights Amendment Act of 2021 is a necessary step toward ensuring the District's laws are developmentally responsive, evidence-based, and racially just. Although we fully support the passage of this bill, there are two minor amendments that we propose to ensure it works as intended (attached). We also propose including an explanation of "developmentally appropriate," written by Isabella Todaro during an internship with the DC Justice Lab, in the committee report to guide judges in applying a uniform analysis of fact patterns (attached). Interactions with police have the potential to derail children's entire lives, and Black and brown children are almost exclusively the ones affected by the damaging lack of protection available in the District of Columbia. The Youth Rights Amendment Act of 2021 is essential to protecting young Black and brown residents who make up the District's entire juvenile system despite only being approximately half of the population.

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[1] DC Justice Lab is a Black-led policy advocacy organization that fights to create a District that recognizes the humanity in each and every one of us regardless of identity or past mistakes. This means advocating for policies in policing, prosecution, and punishment that are evidence-based, community-driven, and racially just. I am here to testify today in favor of the Youth Rights Amendment Act of 2021 as a policy that fulfills all three of those requirements.

[2] In May 2020, Alexis Mayer and Katrina Jackson, who were GW Law students at the time, wrote a proposal with the Georgetown Juvenile Justice Initiative calling for more Mature Miranda protections for children. Their report is included below and is available at https://static1.squarespace.com/static/5edff6436067991288014c4c/t/5f7cb311f1089b28400d4ad5/1602007825403/More+Mature+Miranda.pdf.

The Youth Rights Amendment Act of 2021 is effective and developmentally appropriate policy.

Developments in neuroscience over the past three decades have made clear that humans' brains do not fully develop until our twenties. Specifically, scientists have determined that adolescence is "one of the most dynamic events of human growth and development, second only to infancy in terms of the rate of developmental changes that can occur within the brain" and that "the brain undergoes a "rewiring" process that is not complete until approximately 25 years of age."[3] During adolescence, a period of approximately fifteen years (generally between ages 10-25), we humans are more impulsive, prioritize short-term benefits, and are less capable of understanding long-term consequences. Adolescents are also less capable of understanding complex legal warnings such as the right to remain silent or refuse consent to a search, much less what a waiver entails or what the consequences of said waiver might be.[4] Moreover, children involved in the juvenile system have a higher rate of learning disabilities and other cognitive impairments[5] making them even less able to understand their rights and the consequences of waiving them than typical adolescents. In 2020, Dr. Shameka Stanford, an Associate Professor at Howard University who specializes in "Juvenile Forensic Speech-Language Pathology and the Impact and Confluence of cognitive-communicative disorders on academic success, criminal thinking and behavior, and criminal recidivism in at-risk minority youth," testified that she studied the relationship between children's cognitive and communication impairments and the heightened risk of system involvement in Black youth in DC, and she found that *90% of participants were unable to define 70% of the words presented in Miranda warnings*. It is nearly impossible for waivers or consent to be knowing, voluntary, and intelligent when nine out of ten children involved in the juvenile system do not understand the language used to provide warnings about their rights and the consequences of waiving them.

In addition to misunderstanding their rights, children are significantly more likely to confess falsely in the hopes of securing short-term benefits, such as their immediate release, without appreciating the potential long-term consequences. In 2020, the National Registry of Exonerations found that false confessions made up about 12% of all cases but 36% of the

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[3] Mariam Arain et al., *Maturation of the Adolescent Brain*. Neuropsychiatric Disease and Treatment v. 9, 449–461 (2013); available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/.

[4] Katrina Jackson, Alexis Mayer, Demanding a More Mature Miranda for Kids, October 2020, 2; available at https://static1.squarespace.com/static/5edff6436067991288014c4c/t/5f7cb311f1089b28400d4ad5/1602007825403/More+Mature+Miranda.pdf.

[5] Taryn VanderPyl, The Intersection of Disproportionality in Race, Disability, and Juvenile Justice, 15 JUST. POL'Y J. 1, 2 (2018).

cases in which the defendant was a child at the time of the alleged offense.[6] That means children are three times more likely to give a false confession than adults. These findings have been consistent for years. In 2014, an article published by the American Psychological Association evaluated 328 exoneration cases and found that "44 percent of juveniles falsely confessed, compared to 13 percent of adults. Among the youngest cases, involving 12- to 15-year-olds, 75 percent falsely confessed (Gross, Jacoby, Matheson, Montgomery, & Patil, 2005). In laboratory experiments with mock crimes (Redlich & Goodman, 2003), self-report studies of confession behavior (Gudjonsson, Sigurdsson, Sigfusdottir, & Young, 2012), and hypothetical vignettes (Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003), adolescents are consistently more likely to falsely confess than adults."[7]

Children are not capable of giving knowing and voluntary consent to a search for the same reasons they are more likely to falsely confess: they don't understand their rights, they are intimidated, and they cannot fully appreciate long-term consequences.[8] Furthermore, children who have witnessed the mistreatment of their communities have no reason to believe it would be safe to withhold consent. In fact, DC's Black youth are conditioned to "consent" to searches whenever they see MPD in an effort to avoid further harm. Yet our current legal systems operate in a world of legal fiction by allowing children to be treated as though they were adults who are fully capable of performing complex risk-reward analyses in stressful and high-risk situations.[9] This practice of treating children as something they are not and penalizing them for cognitive immaturity that is typical of a period of normal human development is cruel, unjust, and serves no legitimate purpose given the high rate of false confessions.

Judges will need guidance on what is considered developmentally appropriate.

The phrase "developmentally appropriate" will be the basis on which judges determine whether warnings were provided consistent with this bill. However, neither this bill nor the DC Code offer guidance on how that phrase should be interpreted. Consequently, we recommend

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[6] Age and Mental Status of Exonerated Defendants Who Confessed, available at https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf.

[7] Jason Mandelbaum and Angela Crossman, No illusions: Developmental considerations in adolescent false confessions, December 2014; available at https://www.apa.org/pi/families/resources/newsletter/2014/12/adolescent-false-confessions#.

[8] See DC Justice Lab Report: Eliminate Consent Searches, October 2020 by Kaylah Alexander, Josephine Ross, Leah Wilson, Patrice Sulton (examining the lack of "consent" involved in consent searches); available at https://static1.squarespace.com/static/5edff6436067991288014c4c/t/5f81728032d45901b878f85f/1602318977141/Eliminate+Consent+Searches.pdf.

[9] During his testimony on October 21, 2021, Chief Robert Contee explained that police read the same warnings to children and adults at the start of interrogations in the District.

this Committee include such guidance for judges in its committee report. Isabella Todaro, an intern with the DC Justice Lab, drafted a report we've attached to this testimony that we hope will ensure each child receives an individualized determination of the appropriateness of the warnings they were given. Per our report, the DC Justice Lab recommends the phrase "developmentally appropriate" be explained in the Committee Report as:

> behaving in a way that respects, acknowledges, and understands the developmental differences that come with each child's distinct phases of cognitive, communicative and psychological development, including thoughtful consideration of the child's chronological age, environmental exposure, the circumstances surrounding the child's custody (e.g., physical restraint, isolation,duration of questioning), and the language (content, context, tone,and structure) used in communicating with the child.[10]

No two children of the same age are exactly the same. Their environments, personal experiences, and cognitive development all affect their ability to understand and exercise their rights. And treating all children of the same age as though they had the same exact understanding would allow the continuation of a legal fallacy. Incorporating the definition we propose would allow for judges to account for the differences between the chronological and cognitive ages of each child, which is essential to fully implementing the Youth Rights Amendment Act of 2021 and achieving more just outcomes for the District's children.

DC's Black children are disproportionately harmed by allowing protections to remain at the constitutional floor set by the Supreme Court.

Black children in the District are even more vulnerable than their peers to police coercion due to decades of witnessing and experiencing firsthand the over-policing of their communities. According to the American Civil Liberties Union of DC's analysis of MPD stop data in 2020, Black children are ten times more likely than their white peers to be stopped by police in the District.[11] These disparities are not limited to stops. The Department of Youth Rehabilitation Services data every year for the last decade shows 99% of committed youth are Black or Latine[12] despite making up less and less of the total population. The statistics are similar in the

[10] See attached memorandum by Isabella Todaro for the DC Justice Lab.
[11] ACLU-DC, RACIAL DISPARITIES IN STOPS BY THE D.C. METROPOLITAN POLICE DEPARTMENT: REVIEW OF FIVE MONTHS OF DATA 8 (2020), https://www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (last visited Sept. 13, 2020).
[12] Department of Youth Rehabilitation Services, Youth Population Snapshot, *available at* https://dyrs.dc.gov/page/youth-snapshot. Chart demonstrating racial demographics of newly committed youth from 2010-2020 included in appendix.

District's adult criminal system where 94% of individuals sentenced for felony offenses are Black.[13] There are countless studies, articles, and books that show us the myriad ways this country adultifies and punishes Black children for the same behaviors all children exhibit.[14] That Black children are disproportionately charged as adults and nine times more likely than white children to receive adult prison sentences is well documented.[15] The fact is, not much has changed throughout our history. Black children are seen as disposable, and once they make a mistake, they're seen as irredeemable. That is the only way to justify the willingness to blame and punish them for what are our collective failures and to do so in a way that denies their childhood and their humanity.

The District has been harming almost exclusively Black children for generations. Until 2015, we were still indiscriminately shackling Black children in juvenile court.[16] And until 2017, we were sending those same children to juvenile jail for things like running away, missing school, and violating curfew, otherwise known as status offenses. These negative interactions cause long-term harm and are actually criminogenic.[17] One study performed over years found that Black youth who have early interactions with police are 11 times more likely to be arrested by age 20 than Black youth who do not have that early contact.[18] The researchers tied this to the fact that Black youth who have early interactions with police are treated as "usual suspects" and evoke a "system response" that is unique to the treatment of Black children.[19] The study also found that early interactions were not similarly predictive of later arrest for white youth and that Black youth were 2 times more likely to be arrested by age 20 than their white peers despite white youth reporting more criminal behavior.[20]

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[13] See DC Sentencing Commission, 2020 Annual Report; available at https://scdc.dc.gov/sites/default/files/dc/sites/scdc/service_content/attachments/Annual_Report_2020.pdf.
[14] See e.g. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526 (2014); Rebecca Epstein, et. al., *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, Center on Poverty Law & Inequality, Georgetown Law (2017).
[15] Children's Defense Fund, The State of America's Children 2020; available at DC Sentencing Commission, 2020 Annual Report; available at https://scdc.dc.gov/sites/default/files/dc/sites/scdc/service_content/attachments/Annual_Report_2020.pdf
[16] Editorial Board, *District juveniles will no longer be routinely shackled in court*, The Washington Post, April 5, 2015; available at https://www.washingtonpost.com/opinions/district-juveniles-will-no-longer-be-routinely-shackled-in-court/2015/04/05/b7fb68b0-da40-11e4-8103-fa84725dbf9d_story.html
[17] Kim Eckhart, How a police contact by middle school leads to different outcomes for Black, white youth, UW News, December 2020, https://www.washington.edu/news/2020/12/03/how-a-police-contact-by-middle-school-leads-to-different-outcomes-for-black-white-youth/ (citing Anne Mcglynn-Wright et al, The Usual, Racialized, Suspects: The Consequence of Police Contacts with Black and White Youth on Adult Arrest, *Social Problems*, 2020;, spaa042, https://doi.org/10.1093/socpro/spaa042).
[18] Id.
[19] Id.
[20] Id.

The long-term and criminogenic effects of early negative interactions harm not only the youth who are directly impacted, but entire communities that then funnel millions of dollars into policing and carceral infrastructure rather than preventing the harm to children in the first place. Focusing our communal efforts on harm reduction and prevention will have long-term benefits for both individuals and the District as a whole, making us all more safe and creating an environment in which young Black residents can thrive rather than merely attempt to survive.

Concerns shared regarding the potential impact of this bill raise unnecessary alarm.

During his testimony on October 21, 2021, before the Committee on Judiciary and Public Safety, Chief Contee expressed several concerns that might needlessly cause alarm, and we hope to address some of them here. First, Chief Contee stated that the broad interpretation of custodial interrogation would make it impossible to use any statements made by young people spontaneously or outside of questioning, and thereby make it impossible to prosecute children or "hold them accountable" for any crimes they may have committed. However, statements made outside of custodial interrogation, including spontaneous statements, would still be admissible. Additionally, by the time a child is brought in for a custodial interrogation, the police should have at least established probable cause, which means they have evidence that points to the commission of a crime and to that child as the perpetrator. Any evidence legally obtained would be admissible in the prosecution of that child. This bill prohibits neither the interrogation nor search of children; it simply adds protections to ensure their vulnerabilities are not taken advantage of in an effort to cut corners during the investigative process. If officers are establishing probable cause and diligently investigating allegations, this bill would not impede any prosecutions. That said, if a case is solely dependent on a statement by a minor made in violation of this bill or evidence found in violation of this bill, it would not and should not proceed.

Second, Chief Contee stated that children understand their rights because some invoke their right to remain silent. However, the science tells us that the vast majority of young people have only a paltry understanding at best. As stated above and thoroughly explained in the 2020 testimony of Dr. Shameka Stanford and the October 21, 2021, testimony of Eduardo Ferrer of the Georgetown Juvenile Justice Initiative and Katya Semyonova of the Public Defender Service of the District of Columbia, the children who are the most vulnerable to interactions with the police in the District do not have the capacity to understand the intricacies of invoking their rights or the consequences of waiving them. This is why it is essential that the person a child has the opportunity to speak with be a juvenile defense attorney. No other adult would be able to appropriately explain the child's rights, the consequences of waiver, the legal process, the

tactics the police are legally permitted to engage in, and actually assert the child's rights to the police without fear. Furthermore, attorneys are also the only adults who would have the privilege of confidentiality and could not be called as a witness against the child if the case went to trial. Some people have proposed that parents be allowed to counsel their children; however, having a parent there may make matters worse and lead to false confessions.[21]

Finally, Chief Contee expressed significant concern around children who have allegedly engaged in criminal acts in the community. However, these arguments are meant to push this body to make decisions based on an emotional response rather than what the neuroscience and MPD's own data tell us. During his testimony, the Chief acknowledged that juvenile arrests are significantly lower than they have historically been. In fact, they have consistently decreased over the past several years; according to MPD's Open Data, there were approximately 2700 arrests of children in 2018 and 2019 and approximately 1500 in 2020.[22] According to MPD's biannual report, there were approximately 600 arrests of children from January 1 to June 30, 2021.[23] Although there have been concerns about a rise in violence and car thefts, those trends are national and are related to the effects of the global pandemic we have been in since March 2020.[24] Given the police play a central role as the entity responsible for public safety and these offenses continue to occur, relying on the status quo will continue to result in harm as young people remain in desperate situations.[25] As a community, we must turn to prevention, which centers around support and respect for our shared humanity instead of cutting corners to more easily incarcerate DC's Black and brown children.

Multiple jurisdictions have already recognized the need to make such a shift and increase protections for young people. California's Senate Bill 203, which was enacted in 2020, requires anyone under 18 have the opportunity to consult with counsel prior to custodial

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[21] Jackson and Mayer, 4.
[22] Open Data DC, https://opendata.dc.gov/datasets/DCGIS::juvenile-arrests/explore?filters=eyJBUlJFU1RfREFURSI6WzEyOTM4NDAwMDAwMDAsMTYwOTM3MjgwMDAwMF19. Data for 2021 was not available as of November 3, 2021.
[23] https://mpdc.dc.gov/node/1561311.
[24] Why carjackings have skyrocketed in parts of the country during the pandemic, December 2020; available at https://abcnews.go.com/US/carjackings-skyrocketed-parts-country-pandemic/story?id=74674597.
[25] Jonas Gilham's story provides an example of how young people in desperate situations make desperate choices. Mr Gilham was convicted of carjacking and sexual assault in DC at the age of 16 and spent 17 years behind bars; when asked to reflect on the situation, he explained that young people are doing what they see to have their needs met. Carjackings Are On The Rise. What Drives Youth to Commit These Crimes? June 20, 2021, available at https://www.npr.org/2021/06/20/1008568106/carjackings-are-on-the-rise-what-drives-youth-to-commit-these-crimes.

interrogation.[26] Maryland, New York, and Washington State were considering similar legislation this year.[27] All of these states still have functioning juvenile legal systems and continue to prosecute children as needed. It stands to reason that DC could do the same.

Conclusion

The Youth Rights Amendment Act of 2021 makes clear that the constitutional floor is not sufficient to protect our children; the bill requires that those who enforce our laws recognize and account for the vulnerabilities inherent in adolescence during interactions that have the potential to derail children's entire lives. There are two technical amendments that need to be made to the bill, to ensure it operates correctly in practice. A redlined version of the bill demonstrating the changes is attached. Although it is clear that children are some of the most vulnerable among us when it comes to interactions with the police, everyone is susceptible to the authority of the state as represented by law enforcement officers. The DC Police Reform Commission recommended that everyone, regardless of age, receive the assistance of counsel prior to interrogation[28] and be protected from consent searches[29]. DC Justice Lab supports the passage of this bill and further encourages the Council to consider increasing protections for everyone, regardless of age, during custodial interrogations and attempts to perform consent searches in the community.

[26] https://www.hrw.org/news/2020/09/30/california-new-law-protects-children-police-custody#
[27] https://theappeal.org/juvenile-right-to-attorney-police-interrogation-maryland-state-legislation/
[28] Decentering Police to Achieve Public Safety, DC Police Reform Commission, Recommendation §5-2(c).
[29] Recommendation §5-8.

Proposed Amendments

"(2) A statement made by a person under 18 years of age to a law enforcement officer or any individual working at the direction of or as an agent of a law enforcement officer during a custodial interrogation shall be inadmissible **against that person**[30] for any purpose, including impeachment, in a fact finding hearing, in a dispositional hearing, in a transfer hearing pursuant to Section 16-2307 of the District of Columbia Official Code, ~~**or**~~ in a commitment proceeding under Chapter 5 of Title 21 of the District of Columbia Official Code, **or in a criminal trial,**[31] unless the person under 18 years of age prior to making any statements sought to be admitted:

"(A) Is advised by a law enforcement officer in a developmentally appropriate manner using plain and simple language delivered in a calm demeanor, at a minimum, that the person has the right to remain silent, that any statement made can be used against them, and that the person has a right to consult with an attorney, and that if the person cannot afford and attorney, one will be appointed for them;

"(B) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and

"(C) Through an attorney, knowingly, intelligently, and voluntarily waives their right to remain silent.".

Sec. 3. Section 23-526 of the District of Columbia Code is amended by adding new subsections (b-1) and (b-2) to read as follows:

"(b-1) Evidence obtained in the course of the search based solely on the subject's consent to that search and not executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement shall be inadmissible in any criminal or delinquency proceedings if the subject of the search is under 18 years of age.

"(b-2) The requirements of subsection (b-1) of this section shall apply whether or not the age of the person searched was known at the time the of the search.".

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[30] This rephrasing is required, to ensure that a child can make reference to their own statements in their own criminal cases and in other cases.

[31] This rephrasing is required, to ensure that a child will enjoy the same protections, if they are charged as an adult.

MORE THAN A PLAZA

DC JUSTICE LAB + STAAND

ELIMINATE CONSENT SEARCHES

October 2020

Kaylah Alexander • Josephine Ross • Patrice Sulton • Leah Wilson

Eliminate Consent Searches

In passing the "Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020,"[1] the D.C. Council recognized that often when police obtain "consent" to search, the cooperation is not truly consensual. Rather, civilians waive their rights because they believe they do not have a choice.[2] DC Justice Lab and the Howard law student members of STAAND[3] applaud the Council's recognition of the problem but propose an alternate solution to ensure that consent searches are, in fact, voluntary.[4] (*See* Appendix for proposed amended statutory language.)

Consent searches are a widespread problem. **Nationwide, over 90% of police searches are accomplished through the use of the consent exception to the Fourth Amendment.**[5] In the District of Columbia, the Metropolitan Police Department (MPD) officers reported approximately 1,093 consent searches of an individual's property and approximately 1,714 consent searches of an individual's person in only five months in 2019.[6] That is well **over 500 times per month** that a single department recorded searching people without a warrant or probable cause. There may be many more encounters that are unreported.[7]

Normally, police need a warrant or a good reason—what the law calls "probable cause"—before they may rummage through an individual's possessions. But, call it a "consent" search and police don't need a shred of evidence to search people's homes, bodies, or possessions. In this way, consent creates an end run around people's fundamental right to privacy and dignity.

"It is easy for the police to get consent from citizens…[L]aw enforcement takes advantage of the fact that citizens are generally honest and want to be law abiding citizens…they want to cooperate, they feel obliged to give consent to the police officer…The police are preying on the public."

– Ronald Hampton, Retired MPD Officer and former Executive Director of the National Black Police Association[8]

Race, "Consent," and Police Brutality

The District of Columbia Court of Appeals (DCCA) has recognized that people—especially Black people—have reason to fear police.

> As is known from well-publicized and documented examples, an African-American man facing armed policemen would reasonably be especially apprehensive. The fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant…because feeling 'free' to leave or terminate an encounter with police officers is rooted in an assessment of the consequences of doing so.[9]

Social media has made it possible for countless people to watch and share videos of the police killing citizens like George Floyd, Eric Garner, and Philando Castille. The world watched Georgia police officers fatally shoot Rayshard Brooks even after he consented to a search that proved he was unarmed.[10] Viewers saw Sandra Bland's minor traffic stop turn into arrest when she refused a police request to put out her cigarette.[11] Through these examples and countless others, people learn that when officers politely ask for consent, there may be an underlying threat of physical punishment.

While watching the videos of deadly police encounters may affect anyone's perception of police, the violent images and videos are especially disturbing to the African American community. Black people see themselves and the ones they love in these encounters, and are fearful.[12] Social scientists have labeled a concept known as "linked fate" that means that "those who identify with a group label accepts the belief that individual life chances are inextricably tied to the group as a whole."[13] When African Americans saw graphic pictures of Michael Brown, an unarmed teenager who was shot down by a police officer and left in the street for hours,[14] it generated "a collective confirmation that Black lives truly do not matter" to police.[15] Consequently, for many Black individuals, **consenting is a survival tactic, not a choice**.

While still in middle-school, many Black children are given "the talk" by loving parents or guardians, to minimize the chance that they will trigger an officer's violent response during an encounter.[16] Black teenagers are taught to make no sudden movements and comply with whatever the officer asks.[17] Black people who follow this advice will not be able to exercise their rights in an encounter with police; at least not without a lawyer present.

Consent hits the Black community harder on two fronts. Not only are Black people more likely than white people to give consent to avoid angering an officer, they are also more likely to be asked for their consent. Black people made up over 90% of searches in Washington, D.C. in 2019, were more than six times as likely to undergo a pat-down or search of their person, and were more than five times as likely to undergo a search of their property. [18]

Consent Searches and Harassment

The Office of Police Complaints recommended consent search reform in 2017, noting that the number of complaints involving searches was large enough to "indicate a pattern of police-community engagement that warrants further attention."[19]

> The Office of Police Complaints (OPC) has received a number of complaints concerning searches of a person, vehicle, or home that were conducted without consent. In fact, in fiscal years 2015, 2016 and 2017 so far, OPC received 112 cumulative separate complaints for harassment related to searches. Analysis of the complaints indicates that 76% of the complainants were African-American. Further, 44% of the complaints are related to incident in the 6th or 7th Districts. **This disproportionate use of consent searches causes concern for the Police Complaints Board that the practice is undermining community trust in the police, especially in areas with substantial minority populations.[20]**

"[L]ike many Black men and youth my daily regimen—demeanor, appearance, socialization, and driving routes—were largely shaped, informed, and even controlled by probable confrontation with police. This made life extremely stressful; sadly, my experience reveals that many Black men are more concerned with unprovoked and hostile police encounters than with violent criminal elements."[21]

Warnings will Not Suffice

The warning requirement in the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020[22] does not adequately ensure that consent searches are voluntary. Consider what we have learned in the 50 years since the Court decided that suspects must be given *Miranda* warning in custody.[23] Under the emergency legislation, the police must inform individuals that they have a right to withhold consent, similar to the way *Miranda* warnings operate. And, courts must determine if the consent was given knowingly, intelligently, and voluntarily, the same standard judges apply when evaluating *Miranda* waivers. However, the *Miranda* experiment revealed that most people waive their rights because the power imbalance between officer and civilian still exists despite oral or written warnings.

There is a growing consensus among scholars and social scientists that *Miranda* warnings do not deliver on their promise. Despite the fact that *Miranda* warnings are ubiquitous on television, four out of five people waive their rights after hearing them.[24] It is generally understood that **the most vulnerable individuals—those most in need of protection from police overreach—are the most likely to waive their rights**.[25] There is "a growing scientific understanding of brain science and forensic science about problems with *Miranda* waivers, especially involving vulnerable suspects such as people with intellectual disabilities, mental illness, and juveniles."[26] These groups are more susceptible to authority figures, less likely to fully grasp the import of the warnings and fail to think about long-term implications.[27] For example, when the teenagers in the Central Park Jogger case were asked why they waived their Miranda rights, they explained that they did so because they thought the police would then allow them to leave.[28]

Miscomprehension thrives even among people who do not fit into those categories. One study reported that 70% of people who had never been convicted of a crime misunderstood the right to silence.[29]

Women represent another group with heightened risk of waiving rights, in both the *Miranda* and consent search contexts.

> Studies in psychological reactance—a measure of people's responses to threats to their liberty—as well as studies on confidence and risk-taking, confirm that gender contributes to an individual's compliance with or defiance of authority. These studies suggest that men may be more willing to challenge authority and terminate a police-citizen encounter, whereas women are more likely to feel compelled to submit to authority and to continue participating in the interaction even when it is against their best interests.[30]

While this may be a question of personal psychology, it may also stem from societal pressures such as the pressure on women and girls to be nice or the pressure on Black men to defeat anti-Black stereotypes.

In fact, social scientists have recently examined the role of "stereotype threat" to explain *Miranda*'s failure among Black civilians.[31] Because Black people know that society stereotypes Black people as dangerous criminals, this creates pressure to prove to officers that they are compliant and innocent.[32] This additional pressure makes it more likely that Black suspects will waive their right to silence despite warning. The same rationale applies to consent searches. **Stereotype threat increases the likelihood that Black civilians will agree to searches** even when they really want police to simply walk away and leave them alone.

In addition, "many people believe that police may ignore or penalize a suspect for asserting rights."[33] Whether true or false, researchers suggest that this viewpoint creates a "unique vulnerability" for African Americans.[34] Without a lawyer to guide them, many people will be too timid to stand on their rights.

We cannot turn a blind eye to the reality that not all encounters with the police proceed from the same footing, but are based on experiences and expectations, including stereotypical impressions, on both sides.
– The District of Columbia Court of Appeals[35]

In a forthcoming book about consent searches, Howard Law Professor Josephine Ross writes about working with law students to teach teenagers their rights at Youth Court, a former diversion program in D.C. Even after the teens learned to say "I don't consent to searches" and ask "Am I free to leave?" they had difficulty actually standing up to police officers during role-plays. They worried about retaliation. One of the participants phrased it as a question that was difficult to answer: "What if the police think I'm a smart-ass if I ask am I free to leave [and retaliate by hurting or arresting me]?"[36]

Although the emergency legislation requires proof that individuals waive their rights knowingly, intelligently, and voluntarily, courts will not necessarily treat these terms as the Council intended. As one group of scholars put it, *Miranda* "waivers are rarely invalidated by reviewing courts. Once the warnings are given, 'courts find waiver in almost every case. *Miranda* waiver is extraordinarily easy to show.'"[37] For example, "courts regularly find that juvenile suspects as young as ten years old validly waive constitutional rights that research establishes they do not understand, and with profound consequences that they do not foresee."[38] The unintended result of *Miranda v. Arizona*'s warning requirements is that "courts may tolerate more coercion."[39] In sum, warnings alone will not provide sufficient protection when police lack warrants or any justification to search someone's home, body, or possessions.

It is not easy to say no to an officer.[40] After all, police have the badge, the gun and the authority to arrest. In addition to controlling every situation, police have a reputation for punishing individuals who are uncooperative or not sufficiently submissive. In every officer-civilian encounter, officers hold all the power. **Consent searches are never really consensual.**

DC Justice Lab and STAAND urge the Council to eliminate the primary mechanism police use to harass and racially profile and to allow consent searches only if the person who consents had an opportunity to speak to a lawyer. (*See* Appendix for proposed amended statutory language.)

References

[1] Bill 23-0825.

[2] *Jones v. United States*, 154 A.3d 591, 595-96 (D.C. 2017) (citing *Guadalupe v. United States*, 585 A.2d 1348, 1361 (D.C. 1991):

> The officer, however well-intentioned and polite, initiates the meeting with an undeniable air of authority that ordinary persons do not presume to possess when interrupting strangers on the street. Where, as here, the questioning is at least implicitly accusatory (if not explicitly so), a reasonable person's natural reaction is not only to show respect for the officer's authority, but also to feel vulnerable and apprehensive. The circumstances are more intimidating if the person is by himself, if more than one officer is present, or if the encounter occurs in a location that is secluded or out of public sight. This court accordingly has recognized that a police officer's "questioning d[oes] not have to assume an intensity marking a shift from polite conversation to harsh words to create an intimidating atmosphere." In such an atmosphere, a reasonable person who can tell from the inquiries that the officer suspects him of something, and who cannot know whether the officer thinks there is sufficient reason to detain him, may well doubt that the officer would allow him to avoid or terminate the encounter and just walk away.

Jones v. United States, 154 A.3d 591, 595-96 (D.C. 2017) (citing *Guadalupe v. United States*, 585 A.2d 1348, 1361 (D.C. 1991).

[3] Founded by Howard Law students in May 2020, Students Taking Action Against National Discrimination (STAAND) is a student-led organization building power on campuses and in communities to support the movement for racial justice. Through the coordination of legal support, advocacy, research, mobilization, electoral justice, and social media tools, STAAND is building an organizing platform to support students' rising up for justice and against racism.

[4] Under the Fourth Amendment, the Supreme Court envisions that "consent" would be both free and voluntary, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), and not the mere "acquiescence to a claim of lawful authority." *Bumper v. North Carolina,* 391 U.S. 543, 549 (1968); *see also (Lisa) Oliver v. United States*, 656 A.2d 1159, 1179 (D.C. 1995). "[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *(James) Oliver v. United States,* 618 A.2d 705, 709 (D.C. 1993) (quoting *Schneckloth*, 412 U.S. at 229).

[5] Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches,* 2018 U. Ill. L. Rev. 1759, 1760 (2018). Other writers believe the number is higher than 95%. In 1986, one expert wrote that "most searches are actually conducted pursuant to the consent of the person searched. In Mountain City, [Tennessee] we were told that 98 percent of searches were by consent. Indeed, listening to law enforcement officials there, one would think consent was the easiest thing in the world to come by." Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 415 (1986).

[6] Metropolitan Police Department Washington D.C., Stop Data Report (Feb., 2020), available at https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Report.pdf.

[7] For an example of a "consent" search that will not be counted in the statistics, consider the video of a police officer in a cruiser repeatedly requesting that a young man lift his shirt even after the individual said he did not consent to searches: @Soup Visions, *White Washington Dc Police Harassing Me Again*, YOUTUBE (Nov. 15, 2017), available at https://www.youtube.com/watch?feature=youtu.be&v=cghtBX19cjA.

[8] Interview September 18, 2020 (notes on file with the author).

[9] *Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019). S*ee also Miles v. United States*, 181 A.3d 633, 641-642 (D.C. 2018):

> A person who reasonably is apprehensive that walking away, ignoring police presence, or refusing to answer police questions or requests might lead to detention and, possibly, more aggressive police action, is not truly free to exercise a constitutional prerogative — 'to be secure in their persons,' even if they do not submit—in the same manner as a person who is not viewed with similar suspicion by police and, as a result, largely unafraid of triggering an aggressive reaction.

[10] Rev blog Political Transcripts, *Rayshard Brooks Shooting Police Body Cam Footage Transcript*, REV (June 14, 2020), available at https://www.rev.com/blog/transcripts/rayshard-brooks-death-police-body-cam-footage-transcript.
[11] Sophia Bollag and Terri Langford, *Video: DPS Officer Became Enraged Over Cigarette*, THE TEXAS TRIBUNE (July 22, 2015), available at www.texastribune.org/2015/07/21/video-officer-became-enraged-bland-over-cigarette/.
[12] Kia Gregory, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, THE NEW REPUBLIC (February 13, 2019), available at www.newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice.
[13] Evelyn M. Simien, *Race, Gender, and Linked Fate*, *Journal of Black Studies*, Vol. 35, No. 5, 529 (2005).
[14] Frances Robles and Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, NEW YORK TIMES (August 18, 2014).
[15] Bridgette Baldwin, *Black, White, and Blue: Bias, Profiling, and Policing in the Age of Black Lives Matter*, 40 *Western New England Law Rev.*, 431, 432 (2018).
[16] *See, e.g.,* Khama Ennis, *In black families like mine, the race talk comes early and it's painful. And it's not optional.,* WASHINGTON POST (June 5, 2020).
[17] Rhea Mahbubani, *As police violence comes under more scrutiny, Black parents say they're still giving their kids 'The Talk' about dealing with cops*, INSIDER (June 27, 2020).
[18] "Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data," *ACLU D.C.*June 16, 2020, www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (data from July 22, 2019 through December 31, 2019).
[19] Police Complaints Board Office of Police Complaints, *PCB Policy Report #17-5: Consent Search Procedures* (2017) available at https://policecomplaints.dc.gov/node/1276396.
[20] *Id*. The *PCB Policy Report* also addresses Body Worn Cameras (BWC) and consent:

> This increase in volume of complaints indicates that a body-worn camera recording of an officer interacting with a complainant regarding a search does not ensure that officers act properly, nor that the complainant had a full understanding of the consent search, and BWC does not proactively protect the constitutional rights of the complainant to decline the search.

Id (emphasis added). For a critique of consent law, *see* Josephine Ross, *Can Social Science Defeat a Legal Fiction?: Challenging Unlawful Police Stops Under the Fourth Amendment*, 18 Was. & Lee J. of Social Justice. 315 (2012) (discussing a case in the Superior Court of the District of Columbia where police claimed that both the stop and the search were consensual.)
[21] *See* Jeremy I. Levitt, *'Fuck Your Breath': Black Men and Youth, State Violence, and Human Rights in the 21st Century*, Washington University Journal of Law and Policy, Vol. 49, 87, 96 (2015).
[22] Bill 23-0825.
[23] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[24] Kiera Janzen, *Coerced Fate: How Negotiation Models Lead to False Confessions*, 109 J. Crim. L. & Criminology 71, 82–83 (2019).
[25] *See generally,* William J. Stuntz, "Miranda's Mistake," 99 Mich. L. Rev. 975 (2001).
[26] Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. Rev. 1157, 1176 (2017); Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 Am. Crim. L. Rev. 1437, 1454 (2012).
[27] *See* Kenneth King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, And Involuntary Waivers of Miranda Rights*, Wis. L. Rev. 431, 478 (2006); Abigail Baird and Jonathon A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 Phil. Transactions Royal Soc'y B: Biological Scis. 1797, 1798-99, 1800 (2004); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 356-57 (2003).
[28] Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 *Law & Psychology Review*. Vol. 31, pg. 53, 68 (2007).
[29] "One study showed that forty-three percent of adult offenders and seventy percent of adult non-offenders misunderstand the right to silence in court. Similarly, twenty-one percent of adult offenders and thirty-

five percent of adult non-offenders do not understand the right to silence in an interrogation." Andrew Guthrie Feguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 Am. Crim. L. Rev. 1437, 1455–56 (2012).

[30] Jesse-Justin Cuevas and Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 Cardozo L. Rev. 2161, 2163 (2016); *see also* Janet E. Ainsworth*, In A Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L.J. 259, 318 (1993).

[31] C. J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, Psychology, Public Policy, and Law, 17(4), 562–591 (2001).

[32] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Re. 946 (2002), available at https://resopsitory.law.umich.edu/mlr/vol100/iss5/3.

[33] B. Matthew Johnson, Kimberly Citron-Lippmann, Christina Massey, Chitra Raghavan & Ann Marie Kavanagh, *Interrogation Expectations: Individual and Race/Ethnic Group Variation Among an Adult Sample,* Journal of Ethnicity in Criminal Justice. Vol. 13, Iss. 1. 16, 29 (2015).

[34] *Id*.

[35] *Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019); *see also Miles v. United States*, 181 A.3d 633, 641-642 (D.C. 2018).

[36] Josephine Ross, A Feminist Critique of Police Stops at 98 (forthcoming with Cambridge University Press). For a discussion of how MPD officers sometimes claim both a consent stop and a consent search, see Josephine Ross, *Can Social Science Defeat a Legal Fiction?: Challenging Unlawful Police Stops Under the Fourth Amendment*, 18 WASHINGTON & LEE JOURNAL OF CIVIL RIGHTS & SOCIAL JUSTICE 315 (2012).

[37] Morgan Cloud et. al. "Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects," 69 U. Chi. L. Rev. 495, 497–98 (2002) (citing George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 Mich. L. Rev. 1081, 1082 (2001)).

[38] Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. Rev. 902, 905 (2017).

[39] William J. Stuntz, "Miranda's Mistake," 99 Mich. L. Rev. 975, 988 (2001).

[40] *See, e.g., Sharp v. United States*, 132 A.3d 161 (D.C. 2016) ("While theoretically an officer might ask a vehicle's occupant if he would consent to getting out of a car in a way that gave the occupant a 'realistic right to decline,'" under the circumstances, a reasonable person would not have felt that he had that right. *Id.* at 167) (quoting *Gomez v. United States*, 597 A.2d 844, 891 n. 16 (D.C. 1991).

Appendix: Proposed Amendments

SUBTITLE G. LIMITATIONS ON CONSENT SEARCHES
Sec. 107. Limitations on consent searches.

(a) In cases where a search is based solely on the subject's consent to that search, and is not executed pursuant to a valid warrant or conducted pursuant to **another** exception to the warrant requirement, **the search is invalid and any evidence seized as a result of that search is inadmissible against any person in a criminal trial, unless the subject:**
   (1) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and
   (2) Through an attorney, knowingly, intelligently, and voluntarily waives their right to decline the search in writing.

(b) **It shall be unlawful for a law enforcement officer to knowingly conduct an invalid search and the Police Complaints Board shall promulgate rules to implement the provisions of this section, pursuant to D.C. Code § 5-1106(d).**

(c) **Any civilian or class of civilians who suffer one or more violations of section (a) of this section may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following:**
   (1) A declaratory judgment;
   (2) Injunctive relief;
   (3) Reasonable attorney's fees and costs;
   (4) Actual damages;
   (5) Punitive damages; and
   (6) Any other equitable relief which the court deems proper.

Memorandum

To: Councilmember Charles Allen, Chair, Committee on the Judiciary and Public Safety
From: Isabella Todaro, Intern, DC Justice Lab
Date: August 11, 2021
Re: Understanding and defining the phrase "developmentally appropriate"

The Youth Rights Amendment Act of 2021 will require that people under age 18 are informed of their rights in a "developmentally appropriate" manner. The term "developmentally appropriate" appears in numerous statutes[1], but has not yet been defined or interpreted by the District of Columbia Court of Appeals. Without a definition or guidance to help with interpretation, simply using the term "developmentally appropriate" may not provide children caught in the District's criminal system the protection of an individualized approach this bill intends. Consequently, DC Justice Lab recommends the Committee on the Judiciary and Public Safety include in its Committee Report guidance for courts to interpret this phrase.

Defining "Developmentally Appropriate"

Courts have repeatedly acknowledged the limitations youth's ongoing development places on their capacity to waive their Miranda rights.[2] However, while developmental limitations have led some courts to demand certain conditions of children's waiver of Miranda, the courts maintain these conditions mostly under a vague, abstract recognition of developmental immaturity. Moreover, there exists no set of standards in the District of Columbia that law enforcement may look to as a guide in their interactions with youth. For these reasons, we believe it is essential to include a clear definition of 'developmentally/age appropriate'. We recommend understanding the phrase 'developmentally appropriate manner' in the context of this statute as:

> behaving in a way that respects, acknowledges, and understands the developmental differences that come with each child's distinct phases of cognitive, communicative and psychological development, including thoughtful consideration of the child's chronological age, environmental exposure, the circumstances surrounding the child's custody (e.g., physical restraint, isolation, duration of questioning), and the language (content, context, tone, and structure) used in communicating with the child.

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[1] *See* Youth Rehabilitation Amendment Act of 2018 and Student Fair Access to School Amendment of 2018.

[2] *See Commonwealth v. A Juvenile,* 499 N.E. 2d 654 (1983)*; In Re K.W.B,* 500 S.W.2d 275 (1973)*; In Re B.M.B.*, 955 P.2d 1302 (1998)*; Haley v. Ohio*, 68 S. Ct. 302 (1948); *People v. King*, 183 N.W. 2d 843 (1970); *Commonwealth v. Darden*, 271 A.2d 257 (1970)*; West v. United States*, 399 F.2d 467 (1968)*; Vaughn v. State*, 456 S.W.2d 879 (1970); *Lewis v. State*, 288 N.E.2d 138 (1972); *Riley v. State*, 226 S.E.2d 922 (1976); *Commonwealth v. Macneil*, 502 N.E.2d 938 (1987); *State v. Presha*, 163 N.J. 304 (2000); *Gallegos v. Colorado*, 82 S. Ct. 1209 (1962); *State v. Benoit*, 490 A.2d 295 (1985); *In Re Gault*, 387 U.S. 1 (1967).

When determining whether warnings were given in a developmentally appropriate manner, the court must consider the following non-exhaustive list of factors:

- **Who:** the distinct needs of the individual child; chronological and cognitive age; development; special needs; education resources and literacy level, cultural and linguistic diversity;
- **What:** the complexity of the language utilized, the manner in which law enforcement explains *Miranda* rights, the content of what they were told about their rights, the manner in which any right is explained to youth, the implications of waiving their rights, and what happens if they decline to waive; consequences including maximum penalty and potential transfer to adult court[3]; and
- **Where and how:** whether the environment is one in which a person who understands their rights would nonetheless waive them, considering environmental distractors (e.g., background noise, recording devices), the duration of interrogation, the psychological experience of the setting, previous experience with law enforcement, physical and mental health and restraint; extended periods of social and physical isolation.

The goal of the Youth Rights Amendment Act of 2021 is not only to ensure the child understands the content of their Miranda rights, but also grasps 1) their agency and genuine freedom to waive or not waive and 2) the consequences, or lack thereof, of the decision to waive or not waive their rights. By engaging in this analysis, DC Courts can ensure the children of the District are treated in a way that acknowledges and respects their youth and vulnerability.

It is important to acknowledge that the use of cognitively developmentally appropriate language is not sufficient on its own to protect children in police custody. Studies have shown that even when *Miranda* rights are communicated in a manner better suited to youth, minors still do not show marked improvement in the understanding of certain rights[4]. The presence of an attorney is therefore critical to adequately protect youth in legal custody.[5]

The Need for Inclusion in the Committee Report

Although our courts have begun to recognize the differences between adults and children, those differences are poorly defined and understood. For example, courts have established the necessity of protecting children "from the consequences of their own immaturity"[6], however, a comprehensive definition of immaturity has yet to be outlined. In dozens of cases, the courts infer

[3] *State v. Burrell*, 697 N.W.2d 579 (2005).
[4] Douglas, Alan C. and Ferguson, Bruce, *A Study of Juvenile Waiver* (1969).
[5] *In Re K.W.B.*, 500 S.W.2d 275 (1973). "[T]here is evidence that even when given 'in terms that reflect the language and experience of today's juveniles'" the *Miranda* warnings do not, without adult advice, convey to juveniles a working understanding of the consequences of confession or the services a lawyer could provide." (internal citations omitted.); *see also In Re Dennis M*, 105 Cal. Rptr.2d 705 (1969).
[6] *Commonwealth v. A Juvenile*, 499 N.E. 2d 654 (1983).

a discrepancy between the cognitive and emotional abilities of youth and adults. In *Gault*, this inference is present in the court's definition of a voluntary admission:

> If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but *also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.* (emphasis added).

In *K.W.B.*, the inference of juvenile immaturity leads the courts to question the language used in Miranda warnings:

> Gardner testified that he explained K.W.B.'s rights to him, but we are not told what that explanation was. He testified also that K.W.B. understood those warnings, *but we do not know whether the warnings were in language suitable to a person of K.W.B.'s experience and obvious learning disabilities or was merely an oral rendition of the boilerplate printed recitation of rights signed, but not read, by the juvenile.* (Emphasis added.)

In a 2005 study on youth competence to waive interrogation rights, authors Vijoen and Roesch well articulate differences in development found in youth of the same chronological age:

> IQ scores judge intelligence by comparing an individual to his or her same-age peers, therefore concealing important developmental differences in cognitive abilities. For instance, a 13-year old with an IQ score of 100 has lower absolute cognitive abilities than a 17-year old with an IQ score of 100. Therefore, even if a 13-year is not developmentally delayed, his/her cognitive abilities' are, on average, significantly poorer than that of older adolescents and adults.[7]

While the courts have acknowledged the need for distinct approaches to juvenile and adult justice, the degree of variance in maturity, understanding, and education between individual children has not been adequately recognized. By defining "developmentally appropriate," the Committee can draw attention to the important distinction between the chronological (birthdate) and cognitive (developmental) age of a child, and highlight the ways in which this distinction affects youth interaction with the criminal justice system.

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[7]Vilojoen, Jodi and Roesch, Ronald, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms (*2005) at page 739.

Conclusion

> The purpose of the *Miranda* warnings is to convey information to the suspect. Plainly, one who is told something he does not understand is no better off than one who is told nothing at all.[8]

There are important developmental differences between children of varying chronological ages (e.g., a 17 year old versus a 13 year old versus an 11 year old) and between youth of the same chronological age (e.g., two 13 year olds with varying degrees of cognitive development). Instead of relying solely on a child's chronological age as a metric of competence to waive, courts need a framework to determine whether *each individual child* has the capacity to understand and exercise their Miranda rights. Through the use of the definitions and recommendations above, the criminal justice system can shift away from a one-size-fits-all approach to juvenile justice.

[8] *United States v. Frazier*, 476 F.2d 891, 900 (D.C.Cir., 1973), Bazelon, C.J. dissenting.

kind of risk taking that is part of the developmental process of identity formation, and most adolescents mature out of these tendencies."[487]

With both scientific evidence and justice in mind, the Commission echoes the recommendations of the District's Task Force on Jails and Justice in calling for the definition of "child" to include any person under 21 years of age.[488] Adapting the District's understanding of who constitutes a child will ensure that 18- to 21-year-olds are able to access age-appropriate services, including when interacting with the police. Age cannot be the only consideration for police when interacting with an individual, but it is an important one. Children take risks, act impulsively, and engage in poor judgment—and responding with severe sanctions, prosecution, or punishment "may actually increase recidivism and jeopardize the development and mental health of juveniles."[489]

The Commission urges the DC Council to align policies and practices with the latest consensus among social scientists, medical professionals, and child development experts. The age of 18, though a major social milestone for many young people, does not represent the end of cognitive or behavioral development. Although the brain continues to develop until the age of 26, the Commission recognizes the challenges and complexities of aligning policy to both protect youth and ensure the rights granted by reaching the age of legal adulthood. The Commission therefore urges the Council to amend DC Code 16-2301 to define a child as a person under 21 years of age.

> Even as the MPD creates more youth-focused programs like the Officer Friendly program and the Youth Advisory Council, individual officers continue to over-police and punish youth of color. …It's time to transform the District into a city where all young people feel safe, supported, and valued. Changing policing is part of building that city…

The Commission recognizes the great nuance and care that must be taken in moving forward legislation of this scope and gravity. The Commission endorses this recommendation only if it can be implemented so as to ensure the following: (1) the parents or guardians of children age 18 years or older should not be brought into the abuse/neglect system; (2) the juvenile justice system must continue to recognize that the needs of young children (17 years and younger) may differ from those of older youth, and should provide tailored and age-appropriate responses; and (3) the implementation of this recommendation should in no way impede upon the rights and privileges granted to individuals at the age of 18.

2. **Recommendation: Adopt more robust protections and procedures when applying *Miranda* rights to children.**

   2(a) Recommendation: MPD should amend the "Interacting with Juveniles" General Order and the Council should amend DC Code § 16–2304 to include an outline detailing police interrogation procedures for youth, including the requirement for an attorney to be present for the waiving of their *Miranda* rights. The amendment should also include a requirement that police use the following, developmentally appropriate language when reading youth their *Miranda* rights: "[Your] rights include but are not limited to: (a) the right to remain silent, (b) anything you say can be used against you, (c) the right to an attorney, (d) the right to have someone else pay for the attorney, (e) the right to talk to an attorney immediately before continuing to answer questions, (f) the refusal to give a statement cannot be used as evidence of guilt, (g) making a statement does not mean you will be released from custody or that you will not be charged, (h) you can be

held in pretrial detention for the most minor offenses, and (i) you can be committed until age 21 for the most minor offenses."[490]

2(b) Recommendation: The Council should amend DC Code § 16-2316 so that statements made by youth under the age of 21 in police interrogation will not be admissible unless the youth: (1) are read their *Miranda* rights by a law enforcement officer in a developmentally appropriate manner as defined in recommendation 1(a) and with counsel; (2) have the opportunity to consult with counsel before making a waiver; and (3) in the presence of their attorney, they make a knowing, intelligent, and voluntary waiver of their rights.

2(c) Recommendation: The Council should work with the Public Defender Service for the District of Columbia and the MPD to institute legal counsel in police stations. Both youth and adults should be guaranteed legal counsel upon their arrest, prior to any questioning by the police. Public defenders or private counsel should be allowed access to police stations 24 hours a day to communicate with and otherwise represent their clients and to sit in on interviews between police and individuals suspected of a crime.

Discussion

More robust *Miranda* rights protections and procedures are necessary for young people because they are particularly vulnerable to police coercion. This vulnerability is due to their propensity to not fully understand and exercise their *Miranda* rights and to be more easily intimidated by police. This recommendation would both create tighter boundaries around the circumstances under which youth may waive their rights and also improve the language used to communicate their rights and the potential consequences for waiving them.

According to the DC Justice Lab and the Georgetown Juvenile Justice Initiative, most youth do not adequately understand their *Miranda* rights.[491] In her presentation to the Commission, Professor Kristin Henning states that "[y]outh are not mentally or emotionally equipped to provide informed consent. [They are] less likely to know their rights, [and] less able to make decisions which weigh short-term gains against longer term rewards."[492] In fact, young people disproportionately make false confessions because of their difficulty understanding their rights and because of their psychosocial immaturity. These false confessions may lead to wrongful convictions. Furthermore, disabilities and economic, social, and educational disparities are all prevalent factors for a large proportion of system-involved youth. Even though these factors diminish youths' ability to make well-informed decisions about their rights, the current practice for *Miranda* rights waivers for youth does not take these factors into consideration. Therefore, the Commission's recommendations should be adopted to "ensure that waivers are actually knowing, intelligent, and voluntary; prevent false confessions; and reduce wrongful convictions."[493]

Additionally, there are racial implications for the policies that guide police interactions with youth in DC. Black youth are disproportionately arrested in the District, and are therefore most negatively impacted by the lack of MPD procedures that reflect the developmental differences between youth and adults.[494] This recommendation seeks to protect these youth who are not only vulnerable due to their age, but also due to historical tensions between the police and the Black community, which can manifest in anxious responses caused by "stereotype threat:" "awareness of stereotypes associating race with criminality [that] can instill hopelessness in minority suspects, undermining confidence that their claims of innocence will be believed . . . [they] will do anything to end the interrogation—even confess falsely."[495] The compulsion of Black youth to be deferential to police, coupled with the

still-developing cognitive abilities of adolescents, makes it critical for DC to implement a more robust *Miranda* that will diminish the impact of these social and psychological factors contributing to potentially negative outcomes for suspected youth.

Other jurisdictions have adopted more robust *Miranda* rights protections for youth, indicating that support for these reforms goes beyond advocacy in DC In 2020, the California legislature adopted SB-203, which includes the following provision: "Prior to a custodial interrogation, and before the waiver of any *Miranda* rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived."[496] With California and other states, including Illinois[497] and West Virginia, as pioneers in this area of reform, DC should move forward with policies that go even further to ensure that the system is truly just for young people in the District, and pave the way for other jurisdictions that look to DC as a model of reform.

3. **Recommendation: MPD should institute policies and practices that would require police officers to prioritize referring youth to community resources.**

   3(a) Recommendation: The District should provide annual trainings to the public on local community-based resources available and appropriate for serving young people, and the referral processes for those resources. MPD officers should be required to attend these trainings.

   3(b) Recommendation: MPD should create performance evaluation structures or metrics that encourage police officers' use of referrals to community resources for youth and young adults as the first resort (with arrests as a last resort if an officer can demonstrate the inability to make a community referral).

   3(c) Recommendation: Adequately fund community resources to ensure that they are able to provide youth, families, and caregivers across all wards with 24-7 access to culturally and linguistically competent opportunities.

Discussion

Broad criminal and juvenile justice reform trends moving away from punishment and toward prevention have led to a proliferation of diversion programs, especially in juvenile justice settings. Although diversion can happen at various points before, during, or after the trial process, police-led diversion may be especially beneficial as it keeps individuals out of the criminal legal system as much as possible, which can mitigate the collateral consequences of system involvement.[498] The Department currently utilizes various diversion programs and methods, for both youth and adults, in a limited capacity.

MPD launched the DC Pre-arrest Diversion Pilot Program in April 2018 to divert adults who would otherwise be arrested for a non-violent misdemeanor charge and who exhibit either a mental health condition or a substance use disorder.[499] The program is limited in that only officers trained in Pre-Arrest Diversion (PAD), assigned to specific patrol service areas, and operating during pre-specified time periods are authorized to implement PAD. In addition, PAD can only be utilized for adults who would otherwise be arrested for a non-violent misdemeanor and who exhibit either a mental health condition or substance use disorder. This drastically limits the potential for a police encounter with an adult to lead to diversion, rather than to an arrest.

The Department's current practices regarding juvenile diversion offer a strong foundation upon which to develop and revise policy to ensure that youth in DC have opportunities to succeed. MPD's juvenile diversion policies are far

[497] Fair Trials, "Station House Counsel: Shifting the Balance of Power Between Citizen and State," (October 2020), https://www.fairtrials.org/sites/default/files/Station%20house%20counsel.pdf.

[498] Jennifer A. Talone, Melissa Labriola, and Joseph Spadafore, "Creating Off-Ramps: A National Review of Police-Led Diversion Programs," *Center for Court Innovation* (2018).

[499] MPD GO-PCA-502.04 (Pre-Arrest Diversion Pilot Program), effective April 24, 2018, https://go.mpdconline.com/GO/GO_502_04.pdf.

[500] MPD GO-OPS-305.01 (Interacting with Juveniles), effective January 28, 2020, https://go.mpdconline.com/GO/GO_305_01.pdf.

[501] MPD GO-OPS-309.06 (Child Abuse and Neglect), effective November 18, 2010, https://go.mpdconline.com/GO/GO_309_06.pdf.

[502] Current MPD guidance regarding juvenile diversion reads, "Whenever possible, members shall consider alternatives to formal arrest while considering the safety of the community, MPD members, and the juvenile involved in the incident." (GO-OPS-305.01.) It is therefore critical for MPD officers to be aware of all community programs and alternatives to which youth may be diverted in lieu of arrest.

[503] MPD Standard Operating Procedures (Investigative Case Tracking and UCR Classification), effective April 8, 2003, https://go.mpdconline.com/GO/SOP_investigative_case_tracking.pdf.

[504] DC Code § 22-1321.

[505] DC Code § 22-405.01.

[506] 18 DCMR 2000.2.

[507] DC Code § 37-131.08(b).

[508] DC Code § 22-404.

[509] DC Code § 22-3302(b).

[510] DC Code § 16-2320.

[511] DC St. § 16-2301, et. Seq.

[512] MPD GO-OPS-305.01 (Interacting with Juveniles), effective January 28, 2020, https://go.mpdconline.com/GO/GO_305_01.pdf (accessed February 28, 2021).

[513] Id.

[514] Mahsa Jafarian and Vidhya Ananthakrishnan, "Just Kids: When Misbehaving is a Crime," (Vera Institute of Justice, 2017), https://www.vera.org/when-misbehaving-is-a-crime#understanding-adolescence-acting- out- (accessed September 2018); Coalition for Juvenile Justice, "SOS Project," http://www.juvjustice.org/our-work/safety-opportunity-and-success-project/national-standards/section-ii-efforts- avoid-court-2 (accessed September 2018).

[515] Id.

[516] District of Columbia Juvenile Justice Advisory Group, *Create New Opportunities for "Persons In Need of Supervision" (PINS) to Succeed Without Legal System Intervention* (2020), 9.

[517] Id.

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Statement on behalf of the
American Civil Liberties Union of the District of Columbia
before the
D.C. Council Committee on the Judiciary and Public Safety
Hearing on
Bill 24-356 – "Strengthening Oversight and Accountability of Police Amendment Act of 2021"
by
Ahoefa Ananouko, Policy Associate
October 21, 2021

Hello Chairperson Allen and members of the Committee. My name is Ahoefa Ananouko and I am a Policy Associate at the American Civil Liberties Union of the District of Columbia (ACLU-DC). I present the following testimony on behalf of our more than 15,000 members and supporters across the District.

It is our strong belief that a robust system of public safety cannot be successful without mechanisms to ensure police are not abusing their powers. The ACLU-DC has consistently testified over the years about the need for stronger oversight of the Metropolitan Police Department (MPD) and greater accountability for officer misconduct. We have also recommended expansion of the Office of Police Complaints' (OPC) authority and resources, so that it may carry out some of these oversight functions.

We commend efforts the Council has made to bring about these changes, such as passing the Temporary Comprehensive Policing and Justice Reform Amendment Act and introducing this bill, the Strengthening Oversight and Accountability of Police Amendment Act (Bill 24-356).

Bill 24-356 was introduced by Chairman Mendelson in July of this year. Among other things, the bill would establish a Deputy Auditor for Public Safety within the Office of the D.C. Auditor; rename and expand the authority of the Police Complaints Board and the Office of Police Complaints; amend the FOIA statute to increase access to police disciplinary records; and create a public database of disciplinary records of MPD officers and D.C. Housing Authority Police Department (HAPD) officers.

The ACLU-DC generally supports the bill's intent to make MPD's disciplinary process more meaningful and to expand the authority and role of the Office of Police complaints. Unfortunately, the bill language lacks clarity and specificity in parts, and needs strengthening in others, to ensure real accountability rather than simply achieving transparency. Our testimony will focus primarily on the accountability and disciplinary systems the bill aims to address.

Establishment of the Deputy Auditor for Public Safety

The ACLU-DC does not oppose the creation of a new Deputy Auditor of Public Safety. The Auditor's reports are a useful and important tool in helping the public and the Council understand the strengths and shortcomings of District agencies, and in identifying areas for improvement. However, after conversations with officials from both the Auditor's office and the Office of Police Complaints, it appears to us that the

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duties and responsibilities of the Deputy Auditor, as contemplated by this legislation, are largely already within the powers of the D.C. Auditor, and in some cases are duplicative of functions that OPC and the Police Complaints Board currently perform. We urge the Council to work with both agencies to ensure that the legislation substantively furthers the goals of increasing MPD accountability without duplicating government functions.

Oversight and Accountability of Special Police Officers

We appreciate the intent of Bill 24-356 to achieve greater oversight and accountability of the District's special police officers (SPOs). The ACLU-DC strongly supports greater oversight of SPOs, but before expanding the jurisdiction of the OPC to conduct this oversight, the Council must first create clear and uniform guidelines for all SPOs operating in the District.

Currently, the Department of Consumer and Regulatory Affairs (DCRA) holds licensing of special police officers. As far as we know, there are no standardized rules governing how SPOs operate in the District For example, there are no general orders or uniform list of offenses and penalties like there exists for MPD.[1] If OPC is given oversight of the current system, the only penalty they could possibly impose is recommend that an SPO's license be taken away—an appropriate action for certain violations but certainly not all. OPC would also not be able to hold accountable the private companies that contract out SPOs.

While the ACLU-DC believes that OPC would be well positioned (given an increase in budget and capacity) to receive and investigate complaints against special police, a major rehaul of the current training and licensing standards for SPOs needs to take place before a properly functioning oversight and accountability structure can be put in place.

Police Accountability Commission

Composition of the PAC

As we noted in our October 2020 testimony for the Comprehensive Policing and Justice Reform Amendment Act of 2020, ACLU-DC supports expansion of the Police Complaints Board (the Board).[2] One of the changes the Council made in that bill was removal of the serving member of the MPD from the Board once the term of the current MPD member expires.[3] That bill also states that no member of the Board should have affiliation with any law enforcement agency.[4] However, B24-356 would reinstate the

[1] According to the OPC, there are currently 7,000 SPOs in the District. Some carry firearms and are allowed to arrest and detain individuals, while others are not. Some are D.C. government employees, while others are not. SPO training is conducted by private entities with varying requirements, no system to verify their trainings, and no identifiable disciplinary system.

[2] ACLU-DC testimony on Bill 23-882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020." October 15, 2020. Available at https://www.acludc.org/en/legislation/aclu-dc-testifies-dc-council-committee-comprehensive-police-and-justice-reform-amendment.

[3] We are aware that this provision has not actually been implemented since the bill has not been made permanent.

[4] Subtitle C of the Comprehensive Policing and Justice Reform Bill, first passed in June 2020, states: *"(a) Section 5(a) (D.C. Official Code § 5-1104(a)) is amended by striking the phrase 'There is established a Police Complaints Board ("Board").*

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MPD as an ex-officio member of the renamed and reconfigured Police Accountability Commission ("PAC" or "the Commission").[5]

The legislation does not define what "ex-officio" means so, while it is clear the person would automatically assume a position on the PAC as a result of the position they hold within MPD, it is unclear whether they would be a non-voting member. Regardless of whether this person would be a voting or non-voting member, the ACLU-DC does not support including a member of the MPD on the PAC, and we encourage the Council to adopt the changes made in the Comprehensive Police Reform bill.

Additionally, we support the intent of B24-356 to ensure meaningful representation on the PAC from community members most directly impacted by policing and incarceration. The Comprehensive Police Reform bill included language to expand the Board to have a representative from each Ward. Bill 24-356 specifies what that representation should look like, including that young people aged 15-24 from neighborhoods impacted by policing, immigrants, LGBTQIA communities, and those with disabilities must have representation on the board. We strongly support the bill's intention with this language to ensure that those most impacted by policing serve on the Commission, and also recognize that the proscriptive nature of the bill language may pose a challenge in identifying members who want to or are able to serve on the Commission.

Powers of the Police Accountability Commission

The bill intends to expand the authority of the reconfigured PAC, but it's unclear if any of the changes in the bill are substantive or simply reiterate duties the Police Complaints Board already has. Pursuant to Bill 24-356, the Commission would review and make recommendations regarding MPD policies, procedures, and trainings before they are finalized and binding on MPD officers.[6] The legislative text, however, seems to suggest that the Commission will only have this power when the Police Chief submits updates for review. It is important for the legislation to clarify that the Commission has the power to initiate reviews of MPD policies, procedures, and trainings *sua sponte*, as this would ensure that MPD does not circumvent the law by simply deciding not to submit them for review.

It is also unclear whether the Commission's recommendations would be binding, as the legislation does not address what happens if the Police Chief disagrees with the recommendations, and the department refuses to incorporate the Commission's changes. A similar problem currently exists with MPD largely ignoring OPC recommendations regarding its use-of-force policies.[7] The proposed bill does not directly address this issue and does not create an avenue for real accountability.

The Board shall be composed of 5 members, one of whom shall be a member of the MPD, and 4 of whom shall have no current affiliation with any law enforcement agency.' and inserting the phrase 'There is established a Police Complaints Board ("Board"). The Board shall be composed of 9 members, which shall include one member from each Ward and one at-large member, none of whom, after the expiration of the term of the currently serving member of the MPD, shall be affiliated with any law enforcement agency.' in its place." Available at https://lims.dccouncil.us/Legislation/B24-0320.

[5] B24-356, Section 3, Subtitle (c) discusses the composition of the Police Accountability Commission. Page 6.

[6] B24-356, Section 3(c)(f)(2). Page 7.

B24-356, Section 3, Subtitle (c) discusses the composition of the Police Accountability Commission. Page 6.

7 Report and three recommendations in 2018. By December 2020, MPD had only fully implemented six of OPC's recommendations, partially implemented three, and not implemented two. See Office of Police Complaints. "Report on

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Office of Police Accountability

We strongly support recommendations in B24-356 to expand the authority of the Office of Police Complaints, renamed the Office of Police Accountability ("OPA" or "the Office"), to accept anonymous complaints and to include additional allegations of police misconduct that the OPA discovers in the course of an investigation of a complaint.

For the anonymous complaints provision to be workable, the legislation must include a separate process for filing anonymous complaints. The bill currently requires the OPA to send various notices to complainants, but does not state how to proceed if an individual is not available to give additional information or receive notices from the OPA. Without clear guidance on how to contact and engage anonymous complainants, the OPA will not be able to conduct these investigations.

Furthermore, the Council should also authorize the OPA to give complainants the option of having their personal identifying information removed prior to case information being shared with MPD.[8] We have heard from community members time and again that many simply do not file complaints about MPD officers due to fear of threats and retaliation against them or their family members. Providing this option would allow individuals who want to be fully cooperative in an investigation to do so without fear.

B24-356 also gives the OPA authority to make disciplinary recommendations to MPD following a sustained allegation of misconduct, which the ACLU-DC strongly supports. But it is not evident in the legislation that the OPA's recommendations would be binding. Without clear language that the disciplinary recommendations of the OPA are binding on MPD officers, this legislation lacks teeth, and leaves the door open for MPD to simply refuse to impose the recommended discipline.

The OPC's October 2020 report[9] on MPD discipline revealed that the current system of MPD serving as the sole arbiter of disciplinary decisions is not working. The report found that the majority (about 60%) of sustained complaints of misconduct resulted only in minor disciplinary sanctions. OPC's report noted that MPD not only tended to go outside the realms of its table of penalties, but that the education-based development to which officers were typically referred was merely additional training. These trainings are often basic things that are taught extensively at the police academy and should be clearly understood by officers—hence why they are not listed in the table of penalties. The report also notes that OPC would not consider education-based development a form of discipline, because this type of action is usually not the appropriate response to the sustained misconduct.

Use of Force by the Washington, D.C. Metropolitan Police Department 2020." Released April 26, 2021. Available at https://policecomplaints.dc.gov/node/1534781.

[8] Currently, misconduct allegations, particularly regarding use of force, must go through a complaint examination in order to be sustained. Once at that stage, all information regarding the case, including personal identifying information. is shared with the officer under investigation so that they can exercise their right to defend themselves.

[9] Office of Police Complaints. "PCB Policy Report #21-2: Discipline." Released October 14, 2021. Available at https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Discipline.FINAL_.PDF.

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As stated in the report, low-level reprimands "allow officers to believe that complaints from community members are unimportant and that MPD tolerates, or endorses, behaviors likely to produce complaints."[10] OPC's October 2020 report offered a framework for improving the disciplinary procedure, and that could help enhance community trust.[11] Other jurisdictions, such as Oakland, CA.,[12] Milwaukie, WI.,[13] and Maryland [14] can also serve as helpful models of police accountability mechanisms.

Increasing Transparency of Disciplinary Records Through FOIA

The ACLU-DC strongly supports B24-356's amendment to the District's Freedom of Information Act (FOIA) to increase the public's access to MPD disciplinary records. As previously stated, access to police records is critical in police accountability.

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[10] *Id*. Page 2.

[11] OPC and the PCB's recommended framework for a disciplinary process:

1. Complaint Examiner sustains an OPC complaint,
2. OPC transmits this finding to MPD or the DC Housing Authority Police Department (DCHAPD)22 along with a discipline recommendation from the Executive Director for the misconduct, MPD or DCHAPD is permitted time to review the case and either accept the discipline recommendation or find a more severe penalty and impose it, or oppose the OPC recommendation with a written explanation,
4. If MPD or DCHAPD opposes the OPC recommendation and wants a less severe penalty then the written explanation is sent to OPC for review,
5. MPD or DCHAPD and OPC discuss their positions on discipline determinations and work toward a mutual agreement,
6. If MPD or DCHAPD and OPC cannot agree, then the case is forwarded to a panel comprised of three members of the PCB for review,
7. The PCB panel can accept the discipline recommendation of either OPC, MPD/DCHAPD, or reach a decision on a compromise discipline,
8. MPD or DCHAPD imposes the discipline decision approved by the PCB panel. *Id. Page 5.*

[12] "Under Oakland's system of police accountability, OPD's internal affairs unit investigates allegations of misconduct and reports its findings to the chief who decides whether to discipline an officer. At the same time, [Community Police Review Agency, a body composed of community members] CPRA conducts a separate and parallel investigation of the same case and recommends discipline to the Police Commission. If internal affairs and CPRA disagree on findings, then the Police Commission sets up a special committee of commissions to make a final decision about discipline." BondGraham, D. "Oakland police officers are facing discipline for last year's protest crackdown." Oaklandside, June 1, 2021. Available at https://oaklandside.org/2021/06/01/oakland-police-officers-are-facing-discipline-for-last-years-protest-crackdown/.

[13] In Milwaukie, the Fire and Police Commission has the power to hire and fire officers, including the police chief. This Commission also has the authority to assume control over internal affairs investigations, investigate civilian complaints, and set department policy. The mayors of other Wisconsin cities also have the authority to appoint civilians to local police and fire commissions. These commissions have the exclusive power to hire and fire police chiefs and review internal affairs investigations to impose serious discipline against officers. PBS Wisconsin Here and Now Broadcast. July 24, 2020. Available at https://pbswisconsin.org/watch/here-and-now/police-union-contracts-wb0xjq/.

[14] Maryland's HB670, passed in April of this year, also outline a useful example. Under the Maryland model, the police chief can either impose the same discipline recommended by the administrative charging committee or a higher degree of discipline within the applicable range of the disciplinary matrix. They may not, however, impose a lesser form of discipline than that recommended by the charging committee. If the officer accepts the chief's offer of discipline, then it is imposed. If not, the matter then goes to a trial board. See Chapter 50, House Bill 670. Available at https://legiscan.com/MD/text/HB670/id/2373225.

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However, what this legislation does not address are the many ways that MPD delays or prevents public access to records, about which we have testified in the past. We have made recommendations in previous testimony and encourage the council to implement these changes in addition to the ones made in B24-356.

First, MPD regularly abuses the discretion given agencies to provide documents free of charge or at a reduced rate—where the information being sought is considered to primarily benefit the public. Leaving fee waivers at the discretion of the agency has allowed MPD to adopt what we believe to be a standard practice of denying fee waiver requests to anyone except media members and individuals depicted in the recording—an approach that denies the public access to critical information. The Council should update D.C.'s FOIA law to address this.

Additionally, MPD often invokes the personal privacy exception to deny access to public records and charge exorbitant fees to redact body-worn camera (BWC) recordings. This continues to be a significant barrier to transparency and accountability. We recommend the Council includes provisions in the FOIA amendment section of B24-356 to fix this issue.

The Council should also amend the FOIA statute to increase access to BWC footage. BWC footage provides critical details about events involving officers, and can help us better understand why an officer acted the way they did, and whether those actions were justifiable. This was also one of the recommendations of the Police Reform Commission.[15]

And finally, given MPD's poor history of responding to FOIAs in a timely manner, the Council should consider required reporting of MPD's timeliness to FOIA requests that details the type of requests, who made them, whether the request was approved and when, and the grounds for denial.

Establishment of an Officer Disciplinary Records Database

We strongly support the creation of an officer misconduct database. D.C. would not be the first to establish a police misconduct database. Jurisdictions such as Massachusetts,[16] Pennsylvania,[17] and Oregon[18] have passed legislation expanding access to police records through some sort of public database.

The ACLU-DC believes police disciplinary and internal affairs records are vital tools for assessing individual officers' histories. They are also critical for determining a police agency's patterns of behavior, especially when confronted with cases of police violence or other egregious misconduct. One can find information on licensing, misconduct, decertification, and license revocation for a countless number of

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[15] D.C. Police Reform Commission. "Decentering Police to Improve Public Safety: A Report of the Dc Police Reform Commission." Released April 1, 2021. Available at https://dccouncil.us/police-reform-commission-full-report/.
[16] House Bill 4794 Available at https://malegislature.gov/Bills/191/HD5143.
[17] House Bill 1841 approved by the governor on July 14, 2020. Available at https://www.legis.state.pa.us/cfdocs/billInfo/BillInfo.cfm?syear=2019&sind=0&body=H&type=B&bn=1841.
[18] House Bill 3145 passed on September 25, 2021. Available at https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB3145/Introduced.

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occupations including doctors, lawyers, and even barbers and cosmetologists. It is unacceptable that the same cannot be said for law enforcement agents—individuals who have the power to take lives.

Until the recent Disciplinary Actions, Grievances, and Equal Employment Opportunity (EEO) Report (Misconduct Report)[19] submitted to the Council, neither the Council nor the public had much information, if any, on officer misconduct or MPD's investigations and grievance processes. Though this report is an important first step, like MPD's NEAR Act stop and frisk data releases, there are gaps in the data presented in the report. For one, it does not show criteria for the different dispositions (with EEO complaints for example, how does the EEO office determine that there are insufficient facts to proceed with a case or that an officer should be exonerated from an allegation?). The report also does not list names of officers. This could allow officers who were terminated or chose to resign before a termination could occur to seek employment in law enforcement agencies in other jurisdictions.[20]

One concern we have with the current legislation as written is that it does not lay out a plan for enforcement of database reporting requirements. An on-going issue we have seen with MPD is the willful flouting of reporting requirements in other areas like the NEAR Act,[21] and even the Misconduct report.[22] To strengthen this section of B24-356, we recommend that the Council include a provision providing that each officer be assigned a unique identifier to track certification and misconduct history. This would assists with database accessibility, as officer ID and badge numbers may change throughout their career.

We also urge the Council to establish clear guidelines for reporting, including a set schedule of regular reporting and penalties for when that requirement is not met. The point on penalties *cannot* be overstated, and applies to every aspect of accountability, including FOIA requests and disciplinary processes, we have covered over the course of this testimony. MPD has deliberately ignored reporting requirements and recommendations from agencies such as the OPC for many years. Not including penalties for not reporting in a timely manner would not only ensure that MPD does not continue to

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[19] MPD's Disciplinary Actions, Grievances, and EEO Report was transmitted to the Council by the Mayor on September 16, 2021. The report covers 2016-2020. Preliminary analysis shows that time frame, 45 MPD officers were terminated for misconduct including for personal criminal activity and unnecessary or wanton force. Available at https://lims.dccouncil.us/Legislation/RC24-0075.

[20] Lalwani, N. and Johnston, M. "What happens when a police officer gets fired? Very often another police agency hires them." The Washington Post, June 16, 2020. Available at https://www.washingtonpost.com/politics/2020/06/16/what-happens-when-police-officer-gets-fired-very-often-another-police-agency-hires-them/. See also: Santos, M. "Despite credibility issues, WA cops find police jobs elsewhere." Crosscut, August 10, 2021. Available at https://crosscut.com/politics/2021/08/despite-credibility-issues-wa-cops-find-police-jobs-elsewhere.

[21] The NEAR Act, which requires the MPD to publish data on its stops and frisks every six months, was passed in March of 2016. MPD did not begin collecting the data until July 2019, and finally published the first set of data in June 2020 after being compelled by a FOIA lawsuit by the ACLU-DC. It was the same case for the second set of data published in March of this year.

[22] The D.C. Code requires the Police Chief to deliver an annual report to the Mayor and the Council concerning misconduct and grievances filed by or against members of the police department. This requirement was established in 2006. MPD did not submit the first report until March of 2013. Meaning eight years lapsed between the first report and the recent report. See D.C. Code § 5–1032, "Report on misconduct allegations and grievances." Available at https://code.dccouncil.us/dc/council/code/sections/5-1032.html.

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contravene the law, as it has historically done, but also lets the Department know that the Council is serious in fulfilling its oversight duties.

One way of doing this would be to tie MPD's annual budget to its compliance with reporting requirements and other laws (this is something the Council has the authority to do both through the annual performance oversight and budget oversight processes).

We recognize that a database alone will not change policing, but having a publicly accessible record of officer misconduct will go a long way in ensuring that officers with patterns of misconduct do not continue to move through the ranks[23] or escape culpability. There must also be stronger reforms and bolder efforts to place limitations on police practices, particularly with regards to use of force. And we hope this will be addressed in the permanent version of the Comprehensive Policing and Justice Reform bill.

Selection of the Police Chief

The proposed bill authorizes the Police Accountability Commission to provide input on the job description and qualifications of a Chief of Police, but there are no details about how the Commission would provide this input or what the selection process would entail. Nor are there improvements to how the community can engage in this process.

As we testified at Chief Contee's confirmation hearing, that D.C community members were not engaged at all in the selection process of the police chief is a serious misstep for the District at a critical moment in discussions about public safety and police reform. There was no public input into the selection of Chief Contee as the nominee. No public discussion of the values and principles that the District would be seeking in a candidate for chief of police, no consulting the communities most impacted by both crime and over policing to gather information on the commitments that residents wanted to hear from a law enforcement leader, and no search beyond existing MPD leadership.

By the time the confirmation hearing was held, a decision had been more or less solidified by the Mayor and the Council. The chief of police is not only accountable to the Council and the mayor, but especially to the residents they are sworn to protect. To stand firm in its commitment to police reform and racial equity, the Council should provide for a more meaningful community-informed process before confirmation of the police chief.

Conclusion

We are at a critical juncture where D.C. communities are no longer satisfied with the status quo when it comes to public safety. Trust and confidence in law enforcement have long been lost in some

[23] Prior to killing George Floyd, there were 22 misconduct complaints or internal investigations that named Derek Chauvin. Subramanian, R. and Arzy, L. "State Policing Reforms Since George Floyd's Murder." Brennan Center, May 21, 2021. Available at https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder.

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communities, and for others, these are words that have never been used to describe the relationship they have with the police they encounter in their neighborhoods. D.C. cannot continue to accept the opacity and resistance to accountability the MPD has historically exhibited. The District must demand not just transparency, but real accountability from its policing infrastructure. That begins with instituting mechanisms that hold police and police departments accountable for their actions.

Bill 24-356 takes some meaningful steps in this direction. We hope that the Council will incorporate our recommendations to strengthen the impact and realize the intent of this legislation.

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Testimony of the
D.C. Open Government Coalition

by

Fritz Mulhauser
Co-Chair, Coalition Legal Committee

Before the
Council of the District of Columbia, Committee on the Judiciary & Public Safety
on
Bill B24-0356, "Strengthening Oversight and Accountability of Police Amendment Act of 2021"

October 21, 2021

Thank you for the opportunity to offer comments on the proposal in Bill B24-0356 to improve transparency in policing. Two of the bill's sections will enhance public access to records of complaints, investigation of complaints and discipline imposed as a result—by means of amendments removing roadblocks in the Freedom of Information Act (FOIA) and by establishing a new public database.

Police face the dual demands of fighting crime while also obeying the law (a complex set of mandates in the Constitution, statutes and policies). Accountability for police departments and individual officers requires internal and external attention to setting sound policy, managing the work to be sure it conforms, and evaluating the results including close study of problem incidents. Public trust rests on solid information demonstrating policing is both effective and lawful. Unfortunately, full and accurate information is always at risk given the high political stakes involved for elected officials, police leadership, and individual officers.

Today's bill builds on recommendations of the Police Reform Commission in its April 2021 report. The Open Government Coalition briefed the commission on our past decade of work and recommendations.[i] We also submitted materials and held numerous follow-up discussions. Improved public reporting and attention to all kinds of transparency are in many segments of the bill that add a deputy auditor and strengthen the complaint review agency with expanded authority to review police policy, investigate a wider set of police conduct problems, and play a greater role in discipline.

The Coalition thus welcomes this important bill and particularly the initiative to correct longstanding MPD policies that conceal complaints, investigations and discipline. The Police Complaints Board called the present system "opaque" and MPD withheld its details even from the commission.[ii] Our points address Sections 5 and 7 of the bill.

1. The bill makes the correct choice, to make all types of discipline records eligible for release.

The Police Reform Commission described the growing trend of opening access to police complaint and discipline records, noting approaches vary and recommending full disclosure (all records regarding all complaints).[iii] The bill adopts their proposal, and we agree.

One goal of transparent records is to spot officers with histories of misconduct as they move among departments. For that purpose, records limited to sustained (and serious) complaints may be the priority for release. That was the choice of the California legislature when it ordered new access to discipline files in over 500 counties and municipalities employing 70,000 sworn officers.

But another goal is to allow evaluation of complaint investigations and outcomes. For that, access is needed to all complaints, especially since a large fraction are not adjudicated.[iv]

That was the approach of the New York legislature and is in the bill. But the potential workload should be noted, as its implications recur in many of the comments that follow. When access via state FOI law opened, in New York City alone there turned out to be 279,000 complaints of all kinds going back decades. Unions are traditionally skeptical of civilian evaluations of police work and sued to stop the New York release especially of unsustained complaints. Federal courts dismissed the claim that members would be harmed by public access to the full set of records.[v]

2. The definition of covered records needs amplification.

The bill aims to end past MPD practice of denying discipline records requests under FOIA.[vi] It does this (line 331) by simply decreeing that for requests for disciplinary records the exemptions in FOIA do not apply. But in fact, past denials have rested chiefly on only two -- protections for personal privacy and law enforcement records -- yet the bill ends the application of the entire exemption section of the law, D.C. Code § 2-534. The bill then addresses privacy interests (and only of the officer) by new redaction rules for these requests alone. This design raises several issues needing further attention.

The first step is to better define records eligible for this special treatment.

The "disciplinary records" to be analyzed for release without regard to FOIA exemptions are defined (line 334) as those "created in the furtherance of a disciplinary proceeding." Many OPC complaints result in referral to MPD for retraining. Would records of those be included, since the outcome is not clearly "discipline"? The bill should make clear the intent is to open all records of complaints of police misconduct, wherever filed, wherever investigated (OPC, MPD, etc.), and whether or not any discipline resulted.

Also, the bill should clarify whether all police records (as far back as are retained) are to be open. Logistics of handling requests under a new release mandate may be daunting. The commission reported on policies of purging discipline incident records from officers' files, but it's not clear if those are retained elsewhere. If large volumes of records have been retained under a lengthy retention schedule, there will be significant amount of redaction needed and that is always a serious bottleneck.[vii] The Council may want to consider setting a shorter limit (than the total years on file) for discipline records available to the public, especially for lesser offenses. If a large backlog develops, no request should be denied at the

retention expiration if it was eligible when received. Or this could be left for review as experience develops, with a mandated report at intervals.

Note the definition of discipline records is used again in defining contents of the database. Uncoupling these may be helpful, as suggested below, #7.

3. Some FOIA exemptions probably still need to be preserved in the bill.

Private details are now routinely redacted from requested police records released under FOIA, though often excessively.[viii] To replace the privacy exemptions (and associated detailed case law) that will no longer apply, the bill spells out (line 348ff) an alternative limited set of allowable redactions such as the officer's minor infractions and a few personal details.

But since "disciplinary records" include "any record created in furtherance of a disciplinary proceeding" (line 335), the investigation files will contain a great deal more beyond the officer's own personal details (line 352ff) that are protected by the bill's new redaction rules.

Records of other persons that should be considered for privacy protection include some body camera video, some victim autopsy details such as photos, and witness interview details.

Other exemptions to consider adding back include:

- delaying release during pending investigations (and to avoid misuse of investigation holds, the law should allow only short extensions (60 days) renewable only upon public written explanation by a police official or prosecutor, or when charges are filed);
- limiting release to facts alone in privileged communications of police officials with agency attorneys.

4. Consider providing for efficient handling of requests in cases where investigation records of an incident span several agencies.

An incident may be investigated by a police department, one or more investigative agencies and a prosecutor. Those pursuing the full story of any incident will request records from all. Parallel and duplicative workloads would follow, with different offices possibly redacting the same files. At worst, inconsistent releases could result from different redaction rules. This could be avoided by requiring designation of a lead agency to handle review and redaction once for the body of common records.

5. Limiting fees should be considered in view of likely volumes of records.

We recommend by statute waiving all or most fees for misconduct records requests. They are squarely within the essential government accountability public interest purpose of open records laws. Waiver could extend at least to costs of search, review and redaction. Without fee relief, access to what are likely to be extensive records and video will be out of reach for many. MPD in recent years has quoted extraordinary fees for expensive redaction of body worn camera video.

6. A special response deadline may be needed.

FOIA requests must be answered within 15 days, but many already take longer. In 2019, almost 3,000 requests, or over a quarter of the total, took 16 or more days, and the figure doubled in the disrupted pandemic year of 2020 according to the mayor's annual FOIA reports. Disregarded laws breed public cynicism, especially when there is no effective remedy (FOIA appeals opinions directing agencies to take action are not binding).

As suggested throughout these comments, the new workload of requests under the bill may tax the D.C. FOIA system already struggling to fulfill its legal obligations. Especially in high profile use-of-force cases the file will be enormous (as described in note vii from experience already in California). A special deadline for this class of requests (as enacted for BWC requests) may be useful. But such a decision could also wait until any special deadline can be set using data on the new requests.

7. The bill's proposed public database needs clarification of records contained.

The database will be more or less difficult to create depending on what is in it. The bill as introduced requires (line 383) that the database include an officer's "disciplinary history and records…consistent with" the definition of records used in the mandatory release section (line 334ff). Preparing redacted versions of all disciplinary records as defined there, for all officers going back as far as the record retention rules provide, will be a major undertaking.

However, a database may be useful for many with basic data elements rather than records. See the database developed by the NY ACLU to give brief details of the hundreds of thousands of NYPD complaints released.[ix] It is the digital equivalent of a library card catalogue—a guide to contents, glimpses of individual items, and a guide for those who will then check out full titles; all the records are available on request, so the database need not be burdened with the exact same contents.

*

We appreciate the chance to offer views on this important step forward in open government and look forward to working with the committee on further development of the bill.

*

The Open Government Coalition is a citizens' group established in 2009 to enhance public access to government information and ensure the transparency of government operations of the District of Columbia. Transparency promotes civic engagement and is critical to responsive and accountable government. We strive to improve the processes by which the public gains access to government records (including data) and proceedings, and to educate the public and government officials about the principles and benefits of open government in a democratic society.

ENDNOTES

[i] For example, see testimony of Coalition President Tom Susman before this committee last year. "The Council should by statute clarify that the public interest in accountability justifies access to complaint and discipline investigation files. This step was taken by California and New York legislatures and should be taken here. The head of the D.C. Office of Police Complaints agreed in a recent press interview, stating 'It would add a lot to community trust if the community was aware what kind of discipline was being handed out to MPD officers.'" Available at: https://dcogc.org/wp-content/uploads/2020/10/TMS-DOCGC-testimony-MPD-BWC-10-15-20-12.doc.

[ii] "Opaque." See *Discipline* (D.C. Police Complaints Board, Policy Report #21-2, Oct. 14, 2020), p. 1 (finding D.C. police discipline "an opaque system that can appear to the community as being too lenient"). Available at: https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Discipline.FINAL_.PDF.

"Withheld from Police Reform Commission." See *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission* (April 1, 2021), p. 157 ("The Commission was not able to review files for specific investigations conducted by the OPC and the MPD, nor did we have access to MPD disciplinary records….and we might have learned more had MPD's processes been more transparent.").

A recent review of the field agreed. "Law enforcement agencies and their internal investigations have typically been shrouded in secrecy and public suspicion. The fundamental goal of civilian oversight is to have an independent entity bring transparency to this historically opaque process." Michael Vitoroulis, Cameron McEllhiney, and Liana Perez. *Civilian Oversight of Law Enforcement: Report on the State of the Field and Effective Oversight Practice*s, p.14. (Washington, DC: U.S. Dep't of Justice, Office of Community Oriented Policing Services, 2021). Available at: https://cops.usdoj.gov/RIC/Publications/cops-w0952-pub.pdf.

[iii] *Decentering Police*, p. 175 (Recommendation 9).

[iv] The D.C. Office of Police Complaints receives roughly 800 complaints in a year. Around half are dismissed on the merits without adjudication (possibly because body worn camera video is available in three quarters of complaints). Only adjudication of the evidence can lead to sustaining a complaint, and only 18-24 have advanced to that stage in recent years. OPC annual reports are available at: https://policecomplaints.dc.gov/page/annual-reports-for-OPC.

[v] See the database of 279,000 complaints here: https://www.nyclu.org/en/campaigns/nypd-misconduct-database. The court action was *Uniformed Officers Ass'n. et al. v. Bill DeBlasio*, 20-CV-2789. It ended in the U.S. Court of Appeals for the Second Circuit with a Summary Order, February 16, 2021 (refusing to enjoin the law ending an exemption for police discipline records since the court found no likelihood of harm to future employment from release of unsubstantiated complaints, nor any likelihood of threats of physical harm from angry citizens). The court wrote: "Unions have not sufficiently demonstrated that those dangers and risks are likely to increase because of the City's planned disclosures. In arriving at that conclusion, we note again that many other States make similar misconduct records at least partially available to the public without any evidence of a resulting increase of danger to police officers." Available at: https://www.courthousenews.com/wp-content/uploads/2021/02/nypd-discipline-ca2.pdf.

[vi] The Office of Police Complaints formerly released citizen complaints under FOIA. For reasons never explained, the Office changed course some years ago and now says it can neither confirm nor deny even the existence of complaints, to preserve officers' privacy. Mitch Ryals, "D.C. Office of Police Complaints Records Leave Much to Be Desired." *Washington City Paper,* September 3, 2020. Available at:

https://washingtoncitypaper.com/article/308805/d-c-office-of-police-complaints-records-leave-much-to-be-desired/. Such an extraordinary response can be justified only when the confirmation or denial of the existence of responsive records would, in and of itself, reveal exempt information. This response, colloquially known as a "Glomar denial" was first judicially recognized in the national security context. *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (raising issue of whether the CIA could refuse to confirm or deny its ties to Howard Hughes' submarine retrieval ship, the *Glomar Explorer*). The D.C. Mayor's Office of Legal Counsel has upheld these denials in administrative appeals, for example No. 2015-58 (May 4, 2015), and that position has never been tested in court. The legislation proposed in B24-0356 is needed to end this use of the privacy exemption and make clear the policy of the District of Columbia that all complaints, investigations of misconduct, and disciplinary results if any shall be open.

[vii] For perspective on the potential workload, we interviewed an individual who worked in a California law enforcement agency that had to respond to requests under the state's disclosure requirement prescribed by legislation known as SB1421. He told the Coalition it was common that a complaint file for a serious incident could include thousands of pages. Included would be officer personnel records, police reports, interview transcripts from officers as well as witnesses and informants, radio dispatch transcripts, criminal histories of victims and others, autopsy reports with attached photographs and lab tests, forensic analyses (clothes, blood, hair, etc.), as well as records generated in internal processing of the case to determine discipline for any policy violations, and records of investigations by any external bodies. Body worn camera data could include video from as many as a dozen officers at the scene for minutes or hours. Reviewing and redacting the file of records not even counting video in one such case could take days of staff time according to this person.

[viii] For example, MPD hires a contractor to remove many details before releasing body worn camera video under FOIA. The redaction follows unpublished rules and the results lack a sound legal basis, according to an advisory opinion of the Office of Open Government issued in response to a Coalition complaint. MPD declines to follow the opinion. Opinion available here: https://www.open-dc.gov/BWC_FOIA_AdvisoryOpinion_2020.

[ix] See https://www.nyclu.org/en/campaigns/nypd-misconduct-database.

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Supplement to Testimony of the
D.C. Open Government Coalition

by

Fritz Mulhauser
Co-Chair, Coalition Legal Committee

Submitted for the record of the
Council of the District of Columbia, Committee on the Judiciary & Public Safety
on
Bill B24-0356, "Strengthening Oversight and Accountability of Police Amendment Act of 2021"

November 4, 2021

The following texts offer language in areas in Sections 5 and 7 on opening police discipline records where our hearing testimony suggested clarification. In addition, we offer two other points:

- We agree with the testimony of the D.C. Auditor opposing the mandatory search committee (line 47ff) if a new Deputy Auditor is proposed in the final bill. But if a committee is retained, it should include public members as well.
- Treatment of the D.C. Department of Corrections is inconsistent in the bill, and we encourage the committee to explore the issue to resolve its full or partial inclusion. The new Deputy Auditor is to review DOC policy and practice (line 75). Yet the new Office of Police Accountability will not handle complaints about correctional officers' use of force or other misconduct. Correctional officers' discipline records are included in the release section (line 336) but not the database section. Legislation in California and New York led to release of correctional officers' records along with those of other law enforcement employees. (For example, see a database for the first half of 2020 of NY City Department of Corrections officer discipline.)

1. **The bill makes the correct choice, to make all types of police discipline records eligible for release (not limited to certain incidents or certain outcomes of investigation).**
2. **The definition of covered records needs amplification.**

(a) Sec. 5 (4) should be expanded to make clear the breadth of records intended to be released. The Coalition recommends a new subsection (d-1)(2) beginning at line 334ff reading as follows:

(2) For purposes of this section, the term "disciplinary records" that shall be released pursuant to this subsection includes

(A) personnel records and any other records maintained by any agency comprising

all complaints, allegations and charges against an MPD or HAPD officer whatever the subject, however received and investigated, and however resolved (including records relating to an incident in which the officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident);

(B) name of officer complained of or charged;

(C) investigative reports;

(D) photographic, audio, and video evidence;

(E) transcripts or recordings of interviews;

(F) autopsy reports;

(G) all materials compiled and presented for review to a prosecutor or to any person or body charged with determining whether to file criminal charges against an officer in connection with an incident, or whether the officer's action was consistent with law and agency policy for purposes of discipline or administrative action, or what discipline to impose or corrective action to take;

(H) transcripts or recordings of, and exhibits introduced in, any trial or hearing on any complaint or charge;

(I) documents setting forth recommended findings, findings, or final disposition of any disciplinary proceeding including findings of fact and analysis of the officer's conduct and appropriate discipline; and

(J) copies of disciplinary records relating to the incident, including any letters of intent to impose discipline, any documents reflecting modifications of discipline due to an appeal or grievance process, and letters indicating final imposition of discipline or other documentation reflecting implementation of corrective action.

(b) A subsection on time limits is needed. Fairness to officers, public interest, and workload should be considered and the legislation should be clear about how far back to extend record access. We couldn't suggest such a date or dates as we lack facts on what is retained now in the police departments, and whether that is set by law, regulation or internal policy (which affects details of new law on keeping records as well as searching and releasing them). The Coalition recommends the committee get detailed facts before markup by asking the MPD, HAPD and OPC to describe the full extent of discipline and complaint records held in employee and complaint files, and also the same held in any additional records kept in agency files separate from employee and complaint files. The Police Reform Commission noted reports of "purging" of discipline from employee files, and recommended that end. But whether the information and records are retained is unclear.[1]

Better data will allow specifying files to be disclosed and time frames, especially the key question whether the bill should set a limit how far back agencies must search and disclose. The bill could even specify both an absolute historical cutoff (for example "retain records of local service as long as a D.C. officer is a police officer anywhere") plus different release treatment of records of incidents of greater and lesser gravity and depending on how far back they occurred.

Record retention is very important to clarify. Without clarity, the way is open for litigation over the Council's intent on extent of records covered. Police organizations elsewhere have

[1] "MPD should stop automatically purging 'adverse actions'—the most serious level of discipline—from officers' personnel records after three years. They should be permanently recorded, and when disciplining an officer MPD should be able to consider any previous adverse actions against that officer. Even lesser 'corrective actions' should not be automatically purged; officers should be required to demonstrate changed behavior." Commission Report, p. 26.

litigated aggressively over such details to slow implementation of laws they opposed in general.

3. Some FOIA exemptions (affecting other interests beyond the officer involved) probably still need to be preserved in the bill.

(c) We recommend an expanded redaction section (d-1)(3) beginning at line 346 as follows:

(3) When providing records pursuant to subsection (d-1)(1), the agency shall redact a record only for the following purposes:

(A) To remove technical infractions. "Technical infraction" means a minor rule violation, solely related to the enforcement of administrative departmental rules that (i) do not involve interactions with members of the public, and (ii) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

(B) To remove an officer's personal data or information such as a home address, telephone number, identities of family members, or use of any employee assistance program, mental health service, or substance abuse treatment unless such use is mandated by a disciplinary proceeding disclosable under his section, but not the name and work-related information of any officer.

(C) To preserve the anonymity of whistleblowers, complainants, victims, and witnesses.

(D) To protect confidential medical, financial, or other information of which disclosure is specifically prohibited by federal law or would cause a clearly unwarranted invasion of personal privacy that outweighs the strong public interest in records about possible misconduct and use of force by officers.

(E) Where there is a specific, articulable, and particularized reason to believe that disclosure of part or all of the record would pose a significant danger to the physical safety of the officer or another person.

(F) To protect privileged communication between agency officials and their attorneys.

(d) Law enforcement routinely invokes an exemption in existing D.C. FOIA, D.C. Code § 2-534(a)(3), to deny requests as "investigatory," often for long periods creating doubt whether actual investigation continues or that is simply an available pretext. Review on appeal has been ineffective as the mayor's appellate office often defers to agency officials' blanket conclusory statements. With § 2-534 deleted by the bill, as applied to discipline records, we encourage adding back improved text to allow only limited investigative holds. Equivalent limits should also be added to the main text of D.C. FOIA law when there is an opportunity.

We recommend a new section (d-1)(4) as follows to limit and require written justification of both criminal and administrative investigation holds as well as holds when charges are tried:

(4) An agency may withhold a record of an incident that is the subject of an active criminal or administrative investigation, in accordance with any of the following:

(A) (i) During an active criminal investigation, disclosure may be delayed for up to 60 days from the date the misconduct or use of force occurred or until the prosecutor determines whether to file criminal charges related to the misconduct or use of force, whichever occurs sooner. If an agency delays disclosure pursuant to this clause, the agency shall provide, in writing, the specific basis for the agency's determination that the interest in delaying disclosure clearly outweighs the public interest in disclosure. This writing shall include the estimated date for disclosure of the withheld information.

(ii) After 60 days from the misconduct or use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer who engaged in misconduct or used the force. If an agency delays disclosure pursuant to this clause, the agency shall, at 180-day intervals as necessary, provide, in writing, the specific basis for the agency's determination that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding. The writing shall include the estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner.

(iii) After 60 days from the misconduct or use of force, the agency may continue to delay the disclosure of records or information if the disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against someone other than the officer who engaged in the misconduct or used the force. If an agency delays disclosure under this clause, the agency shall, at 180-day intervals, provide, in writing, the specific basis why disclosure could reasonably be expected to interfere with a criminal enforcement proceeding, and shall provide an estimated date for the disclosure of the withheld information. Information withheld by the agency shall be disclosed when the specific basis for withholding is resolved, when the investigation or proceeding is no longer active, or by no later than 18 months after the date of the incident, whichever occurs sooner, unless extraordinary circumstances warrant continued delay due to the ongoing criminal investigation or proceeding. In that case, the agency must show by clear and convincing evidence that the interest in preventing prejudice to the active and ongoing criminal investigation or proceeding outweighs the public interest in prompt disclosure of records about misconduct or use of force by officers. The agency shall release all information subject to disclosure that does not cause substantial prejudice, including any documents that have otherwise become available.

(B) If criminal charges are filed related to the incident in which misconduct occurred or force was used, the agency may delay the disclosure of records or information, whose release could deprive a person of a right to a fair trial or an impartial adjudication, until a verdict on those charges is returned at trial or, if a plea of guilty or no contest is entered, the time has expired to withdraw the plea.

(C) During an administrative investigation into an incident covered by this section, the agency may delay the disclosure of records or information until the investigating agency determines whether the misconduct or use of force violated a law or agency policy, but no longer than 180 days after the date of the employing agency's discovery of the misconduct or use of force, or allegation of misconduct or use of force, by a person authorized to initiate an investigation.

4. Limiting fees should be considered in view of likely volumes of records.

(e) A full statutory fee waiver would rest on an uncertain assumption—that all discipline records requests will meet the public interest criterion in D.C. Code § 2-532(b). But the possibility of a broad fee waiver for discipline records (so that fees are not a barrier to public information) is a policy decision for the Council. Again, we lack data to suggest details (such as what will be the size and processing effort for requests under this new statute). We suggest a mandatory report back from the agencies. Limited redaction allowed in released discipline records, including body-worn camera video, intended to be less than

in the present situation where the usual MPD redaction is excessive and hence costly (see above #3) should limit that element of cost and delay. Electronic records (which should predominate in recent files) should not entail any "copying." Agency differences in fees charged is another longstanding problem with D.C. FOIA, and should be addressed in general by broader FOIA legislation needed as discussed several times above, mandating the Office of Open Government to develop a government-wide fee schedule. For now, we propose a new section should be added as (d-1)(5) as follows:

(5) Copies of records subject to disclosure pursuant to this section shall be made available upon the payment of fees according to D.C. Code § 2-532. The MPD and OPA shall submit to the Council ninety days after the end of the first year of experience after the effective date of the Act a report on requests for discipline records under the Act, identifying requesters by type, file sizes released, costs and fees, with recommendations on any changes needed.

5. A special response deadline may be needed.

(f) If the bill seems likely to generate a large workload, an extended deadline is needed to avoid the current problem of requesters greatly disappointed with FOIA response delays. Compare the special 25-day deadline provided for body-worn camera video in D.C. Code § 2-532(c)(2A). A new section could be added as (d-1)(6) as follows:

(6) Except to the extent temporary withholding for a longer period is permitted pursuant to (d-1)(4), records subject to disclosure under this section shall be provided at the earliest possible time and no later than 45 days, except Saturdays, Sundays, and legal public holidays, from the date of a request for their disclosure.

6. The bill's proposed public database needs clarification of records contained.

(g) The database required in Sec. 7 of the bill as introduced, line 376ff, will take a long time to create owing to redactions likely needed in many records. This is because line 383 suggests <u>all records</u> are to be included—the same records and to the same extent as required to be released (line 334ff). That definition (as clarified in #1 above) is unworkable for the contents of a database and should be rethought.

A selected set of data elements will serve the public better -- a clearer, faster-loading finding aid, with full files available on request, as in the New York City database here. We propose a hybrid plan with some elements specified in the statute and detailed plans to be worked out (with a response required by a time certain and with a requirement for user and expert involvement and review of examples elsewhere).[2] The bill as introduced set the December 2023 publication date. Other intermediate planning dates involve months in 2022 when executive and levgislative work may be disrupted by the election year and the start of new mayoral and Council terms. We left out specific dates.

We recommend a revised section 7, identified as amending the mandatory, proactive publication section of D.C. FOIA, D.C. Code § 536, as follows:

[2] In the bill as introduced, Sec. 5 applies to MPD and HAPD but the database in Sec. 7 of the draft does not mention HAPD. The revised text suggested here in 7(a) and 7(e) includes HAPD officers in the database and HAPD therefore involved in database plans. We don't know if HAPD records will now support such a database.

Sec. 7

(a) By December 23, 2023, the mayor shall publish a searchable database of sworn officers in MPD and HAPD accessible to the public on the Internet without registration or charge.
(b) The database shall at a minimum contain for each officer
(1) Rank and shield history;
(2) Department commendations, recognition or awards;
(3) Trainings, including in-service, promotional, and other modules;
(4) Disciplinary history, with dates, including each complaint or charge, the outcome for each including disciplinary actions taken, and the status of any open investigation.
(c) Considering users' views and other issues, the mayor shall submit a proposed plan for the database to the Council within 180 days of the effective date of the Act.
(d) The plan shall include timelines and agencies' responsibilities for creating the contents of the database (including how far back in time the data will extend and how it will be updated regularly), testing the database, and evaluating its usability by the public.
(e) The Mayor shall establish and consult with an advisory group to consider relevant examples of such databases elsewhere and provide recommendations for the proposed plan required by subsection (c) of this section. The advisory group shall consist of one representative from each of the following agencies and organizations, and any three additional organizations chosen by the mayor:
(1) Metropolitan Police Department
(2) Office of Police Complaints (or, to be renamed Office of Police Accountability)
(3) Housing Authority Police Department
(4) Fraternal Order of Police
(5) American Civil Liberties Union of DC
(6) DC Open Government Coalition
(7) Reporters Committee for Freedom of the Press
(8) Public Defender Service
(9) Office of the Attorney General
(10) Office of the United States Attorney for DC
(11) Electronic Privacy Information Center
(f) The Mayor shall submit the proposed plan required by this section to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution, within this 45-day period of review, the proposed plan shall be deemed disapproved.

Testimony of Eva Richardson, Staff Attorney,
Disability Rights DC (DRDC) at University Legal Services
Before the Council of the District of Columbia,
Committee on the Judiciary and Public Safety
Public Hearing to Consider Bill 24-0254, the "School Police Incident Oversight and Accountability Amendment Act of 2021"; Bill 24-0306, the "Youth Rights Amendment Act of 2021"; and Bill 24-0356, the "Strengthening Oversight and Accountability of Police Amendment Act of 2021"
Thursday, October 21, 2021, 9:30 a.m. - 3:00 p.m.

Good afternoon Councilmember Allen and members of the Committee on the Judiciary and Public Safety. My name is Eva Richardson. I am a staff attorney at Disability Rights DC at University Legal Services, the designated protection and advocacy program for people with disabilities in the District of Columbia. As per our federal mandate, DRDC represents hundreds of individual clients annually, with many more benefiting from the results of our investigations, litigation, outreach, education, and advocacy.

I am here to speak about two issues related to the proposed bills before the Committee. First, I would like to address the proposed Youth Rights Amendment Act, particularly as it relates to youth with disabilities. DRDC is pleased that the Committee seeks to bolster protections for kids under age 18 when encountering law enforcement. The proposed requirements that young people receive developmentally appropriate Miranda warnings and a reasonable opportunity to confer with an attorney before making a statement to law enforcement, and that evidence obtained through consent searches be excluded, will foster more equitable and appropriate dynamics between police and youth. As you've heard, these additional protections are eminently important, given kids' developmental differences from adults. Young people are less equipped to understand and speak up for their legal rights, and this reality exacerbates

already problematic power dynamics with police. These power dynamics and their resultant inequities are particularly concerning for young people with intellectual, developmental, and behavioral health disabilities.[1]

While young people are generally more vulnerable during police interactions, we know that kids with disabilities are particularly at risk of being targeted by law enforcement, often with negative, dangerous, or even deadly outcomes.[2] In many cases, a young person's disability will not be immediately apparent to law enforcement, and police may read disability manifestations as noncompliance or even threatening behavior. This is why the protections contained in the proposed bill are especially important for youth with disabilities in the District. By shifting the power balance more toward vulnerable youth, these protections for youth broadly will have the effect of protecting youth with disabilities.[3] For this reason, DRDC supports these proposed procedural safeguards for young people when encountering law enforcement.

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[1] 50-80% of a law enforcement officer's encounters are with a person with a disability. *See* David V. Whalen, *et al.*, *Disability Awareness Training: A Train the Trainer Program for First Responders* (2011), *available at* http://www.ndss.org/Global/Law%20Enforcement%20Disability%20Awareness%20Training.pdf. People under age 30 with disabilities are 44% more likely to be arrested. This statistic includes emotional, sensory, physical, and cognitive disabilities that are protected under the Americans with Disabilities Act (ADA). Erin J. McCauley, M.Ed., *The Cumulative Probability of Arrest by Age 28 Years in the United States by Disability Status, Race/Ethnicity, and Gender*, American Journal of Public Health (Dec. 2017).

[2] *See* Helping Educate to Advance the Rights of Deaf communities (HEARD), Police Violence & Discrimination Against Deaf People, (last modified June 2020), *available at* https://docs.google.com/spreadsheets/d/1HZ6YLtXzRNiEsu2RCfEUb1WmsCwM4Pn89ikpAwE4b-Q/edit#gid=1519942027 (last visited Nov. 4, 2021).

[3] *The Sentencing Project, Back-to-School Action Guide: Re-Engaging Students and Closing the School-to-Prison Pipeline*, (August 2021), *available at* https://www.sentencingproject.org/wp-content/uploads/2021/08/Back-to-School-Action-Guide-Re-Engaging-Students-and-Closing-the-School-to-Prison-Pipeline.pdf.

> This shift is particularly critical as children return to school after COVID-19 virtual learning. In addition to these academic challenges, the pandemic caused a serious spike in mental health problems among adolescents nationwide. Compared to pre-pandemic times, young people have become more likely to contemplate or attempt suicide12 and more likely to visit the emergency room due to mental health problems.13 Nearly half of parents in a nationwide survey in early 202114 said their adolescent children had developed a new or worsening mental health condition since the start of the pandemic. Likewise, a large majority of students in a national survey in early 2021 reported that they are "experiencing more problems now than they did in January 2020, before the pandemic began," and these problems were especially prevalent among youth of color . . . For instance, the National Association of School Psychologists wrote last year that; "Under normal circumstances, we would expect approximately 20% of

Next, I would like to address the proposed bill aimed at increasing oversight and accountability in the area of school policing. These changes are critical to supporting advocacy and justice for young people with disabilities. It is well-documented that students with disabilities tend to be treated more harshly at school than their peers without disabilities. Nationwide, students with disabilities comprise just 12% of students in public schools, but represent 75% of students physically restrained at school, 58% of students placed in seclusion, and at least 25% of students arrested and referred to law enforcement.[4] And we know that Black and brown students with disabilities face even greater discrimination when it comes to school discipline.[5] Schools often call police before attempting the behavioral interventions and disability-related services to which these students are entitled.[6] Students with disabilities are afforded protections under federal law to ensure that they do not face discrimination on the basis of their disabilities,[7] but these trends around policing in schools perpetrate exactly that

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> children to experience some social–emotional and behavioral concern throughout their school trajectory—we now expect these rates to double or triple after COVID."

[4] U.S. Dep't of Educ., Off. For Civil Rights, *Discipline, Restraint and Seclusion*, (last modified Jan. 16, 2020), https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/dis-issue02.html.

[5] U.S. Comm'n On Civil Rights, *Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison Pipeline for Students of Color with Disabilities*, July 2019, https://www.usccr.gov/files/pubs/2019/07-23-Beyond-Suspensions.pdf.

> "While students of color do not have higher rates of misbehavior, students of color with disabilities are subjected to exclusionary discipline practices at a disproportionally higher rate than their White peers with disabilities. For instance, last year in Grand Rapids, black students with disabilities lost more than 500 days of instruction, compared to their white peers. These early discipline inequalities, compounded by a lack of action and oversight by the federal government, put students in a place where they are more likely to have an aversion to school, drop out, or be involved with the juvenile justice system."

[6] *See* Nat'l Council on Disability, *Breaking the School-to-Prison Pipeline for Students with Disabilities*, July 18, 2015, https://ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf.

[7] Title II of the ADA prohibits discrimination against people with disabilities in State and local governments services, programs, and employment. Law enforcement agencies are covered because they are programs of State or local governments, regardless of whether they receive Federal grants or other Federal funds. U.S. Dep't of J., Civil Rights Division Disability Rights Section, *Commonly Asked Questions About the Americans With Disabilities Act and Law Enforcement*, (last modified Feb. 25, 2020), https://www.ada.gov/q&a_law.htm.

discrimination.[8] In order to combat the school-to-prison pipeline[9] for kids with disabilities, it is critical that we have comprehensive, disaggregated, and publicly available data regarding school-based disciplinary actions involving law enforcement.[10] The Committee's proposed requirement that local education agencies maintain this data, and that MPD report school-involved incidents disaggregated by race, gender, age, and disability, will help advocates define and understand the scope of the problem and plan their advocacy accordingly.

Finally, DRDC is pleased that the Committee has taken a broad approach to defining law enforcement in the proposed legislation. However, it would particularly benefit the public and our understanding of who is impacted and what change is needed if the collected demographic data about students involved in disciplinary incidents, stops, or arrests is disaggregated not only by their general disability status, but by their specific type of disability.

That concludes my testimony. Thank you for your time.

[8] Students of color are disproportionately referred to law enforcement or subject to school-related arrest. Students with disabilities are disproportionately referred to law enforcement or subject to school- related arrest and incarceration. *See generally* Jenni Owen, Jane Wettach & Katie Claire Hoffman, *Instead of Suspension: Alternative Strategies for Effective School Discipline* (2015), *available at* https://law.duke.edu/childedlaw/ schooldiscipline/downloads/instead_of_suspensio n.pdf.

[9] The "school-to-prison pipeline," is a national trend wherein children are pushed out of public schools and into the juvenile and criminal justice systems. A disproportionate number of these children have learning disabilities or histories of poverty, abuse, or neglect, and would benefit from additional educational and counseling services. "Zero-tolerance" policies criminalize minor infractions of school rules, while cops in schools lead to students being criminalized for behavior that should be handled inside the school. American Civil Liberties Union, *School-to-Prison Pipeline*, https://www.aclu.org/issues/racial-justice/race-and-inequality-education/school-prison-pipeline (last visited Nov. 4, 2021).

[10] There must be safe and sufficient ways for youth to address the harm they are experiencing from the police, while in and out of school. It is imperative that a youth-focused complaint mechanism is created so that these incidents do not fall through the cracks and police are held accountable. To further increase transparency and accountability, this complaint mechanism should be trauma-informed, accessible, and youth-centered so that students can make complaints about school-based incidents involving police.

STND4YOU, Inc. Forensic Speech-Language Pathology Clinical Opinion Letter

To: D.C. Council Committee on the Judiciary and Public Safety
Bill: Bill 24-306/B23-0882, THE "COMPREHENSIVE POLICING AND JUSTICE REFORM AMENDMENT ACT OF 2020"
Re: A More Mature Miranda Doctrine

October 15, 2020

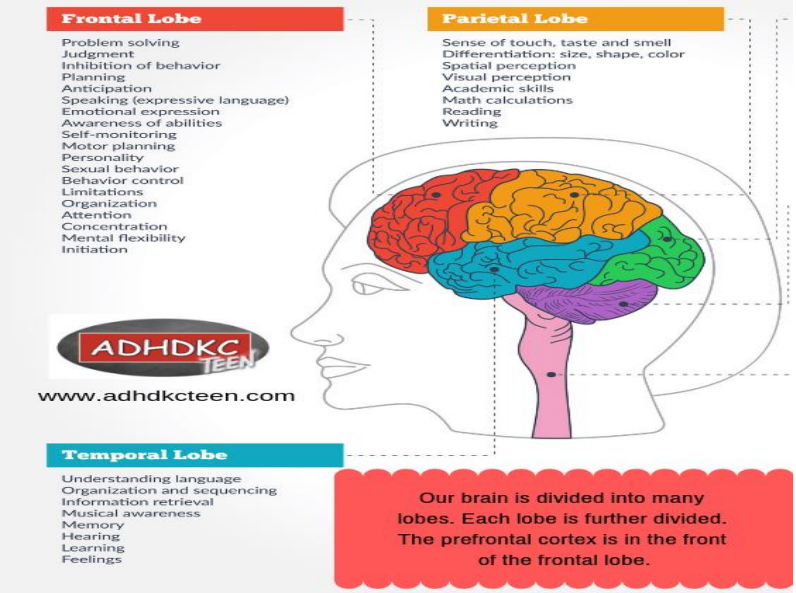
STND4YOU, Inc. is a Nonprofit organization developed to address diversion, advocacy and free wrap-around clinical services for Black and Latinx youth who are placed at-risk for delinquency and involvement with the justice system secondary to their overlooked cognitive and communication disorders. There is a portion of the need for more mature Miranda Rights that we believe should make mention of the number of Black youth who are also overrepresented in the special education system who do not understand their rights due to varying language and learning disorders. Clinicians like Speech-Language Pathologists should be consulted to discuss what and how the youth's understanding can be impacted during this process. We would like to be involved to add this piece to a very powerful movement you are creating. Our founder, Dr. Shameka Stanford is an associate professor in the department of Communication Sciences & Disorders at Howard University, and a juvenile Forensic Speech-Language Pathologist (the first and only in the United States) with a clinical specialty in in juvenile law and special education law.

This letter is written to support the More Mature Miranda Initiative. In support of the more mature Miranda initiative, it is important for me to highlight how the presence of cognitive and communication disorders can increase a youth's vulnerability to waive a right they do not inherently have the knowledge, intelligence, and cognitive ability to comprehend. My opinions are based on my education in the area of communication sciences and disorders and forensics, clinical training, and clinical forensic experience in relation to these matters. Research has demonstrated that children account for an increased amount of coerced confessions secondary to their developing cognitive abilities. However, the discussion about coerced confessions cannot be had without addressing the prevalence of children living with learning disabilities, cognitive and communication disorders who are coerced or falsely confess to crimes. Communication and Cognitive disorders (CCD) is defined as a deficit or significant impairment in the primary functions of attention, memory, problem solving, emotional functioning, comprehension and production, literacy, pragmatics, social skills, and expressive and receptive language (American Speech-Language-Hearing Association, 1997). Cognitive-communication disorders can impact an individual's communication and comprehension status in a way that affects their ability to fully participate in their (Stanford, 2019). More specifically, during the Miranda rights, cognitive and communication impairments affect the individual's comprehension, judgement, consequential thinking, and decision-making skills. This is most prevalent in children with cognitive and communication disorders during a time where their brain is also concurrently developing.

Maturity of language and cognitive skills occurs with the development of the frontal lobe, particularly the prefrontal cortex (PFC), which is a continuous process from childhood until late adolescence (Ciccia, Meulenbroek, & Turkstra, 2009). The frontal lobe in a typically developing brain controls the child's ability to emotionally regulate as well as, problem-solving, process information/think, and comprehend information. However, the brain and particularly the frontal lobe does not fully develop until approximately 25 years of age or older. Consequently, this means the prefrontal and temporal cortexes of the child with a cognitive and communication impairments that responds to and utilizes good judgement and comprehension is not consistently and automatically activated when engaging with law enforcement. In a child with cognitive and communication disorders, there are areas of the brain that are necessary for the ability to comprehend, functionally problem solve, and think rationally that will never be fully developed (Johnson, Blum, & Geidd, 2009; Stanford, 2018). Explicitly, secondary to cognitive and communication disorders, areas of the brain that regulates the child's verbal-reasoning skills, problem

solving skills, and comprehension during the reading of Miranda rights may take longer than the 25 years old to fully develop, if at all.

The visual below presents the **frontal and temporal lobe areas** of the typically developing brain where children with cognitive and communication disorders experiences significant impact in the areas where consequential thinking, problem-solving, judgment, self-monitoring, concentration, attention, and most importantly understanding language are control are activated.



In the area of **cognition**, memory, reasoning, judgment, attention and concentration impairments can impact the child's ability to understand the Miranda rights. In the area of **executive functioning,** impairment in problem-solving, decision-making, organization, and planning can impact the child's ability to understand the Miranda rights. As aforementioned, to inherently understand Miranda Rights to the extent you make a conscious decision to waiving your rights would require; (1) functional critical thinking, (2) executive function, (3) and comprehension skills. At a micro level the child with underlying language impairments would also need to possess strong vocabulary, verbal reasoning, inferencing, and recalling information skills. In the areas of **communication,** impairments in thinking and processing, difficulty understanding language, and vocabulary deficits can impair the child's ability to understand the Miranda rights. For instance, in a 2018 (not yet published) research study in which I analyzed the confluence of cognitive and communication disorders and increased risk of referral to the justice system for black youth, 85% of the participants demonstrated vocabulary impairments. Further, data from the research study demonstrated that 90% of the participants were unable to define 70% of the words presented in the Miranda Rights. For example, a 70% of the participants were unable to define the words attorney, appointed, and afford. The findings of this analysis identified six key domains of communication and cognition that when impaired can increase the risk of youth being coerced into confessions, and false or forced waivers of their rights. These areas included: 1) age-appropriate vocabulary development and skills; 2) abstract language comprehension; and 4) processing and organizational planning. This demonstrates that although the youth may verbalize understanding and demonstrate a surface level comprehension of the words of the Miranda rights in isolation; it is more likely than not, a significant portion are unable to comprehend the words contained within it well enough to understand the overall context.

Lastly, the inability to functionally track and participate in conversations with peers and adults can impair the child's ability to understand the Miranda rights. This information is most relevant to understanding how cognitive and communicative disorders in children can impact their understanding of the information presented in the Miranda rights. The Miranda rights are built on the expectation that the individual can demonstrate and process what is requested of them and what will occur during the law

enforcement interaction. To do this, the individual must be able to follow directions, comprehend the words used, recall information, and infer the consequences of what may occur if they choose to waive their rights. Consequently, children with cognitive and communication disorders are significantly unable to decipher what is expected of them resulting in misunderstandings which can increase their risk of waiving their rights. Especially when the child is engaged in a situation that causes frustration, anxiety, tension distress. During heightened situations of distress, like being arrested or unexpected law enforcement interaction, children with cognitive and communication disorders will primarily rationalize and respond with the emotional parts of their brain, not taking the time to determine if the communication lacks comprehension.

Therefore, it becomes necessary that as we determine a more mature Miranda, we keep in context that just because children may be able to periodically demonstrate the ability to determine what is happening, does not mean that their cognitive and communication limitations and impairments are not consistently present and likely to impact their ability to understand their rights and the consequences of waiving their rights.

Thank you,

Shameka Stanford, Ph.D., CCC-SLp

Shameka Stanford, Ph.D., CCC-SLP/L
COO, STND4YOU, Inc.
Juvenile Forensic Speech-Language Pathologist

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GOVERNMENT OF THE DISTRICT OF COLUMBIA

B24-0356, THE "STRENGTHENING OVERSIGHT AND ACCOUNTABILITY OF POLICE AMENDMENT ACT OF 2021"

Written Testimony of

Karen M. Dale
Market President/CEO of AmeriHealth Caritas District of Columbia
Chief, Diversity, Equity and Inclusion Officer of AmeriHealth Caritas Family of Companies

For the
Committee on the Judiciary & Public Safety
Council of the District of Columbia
Charles Allen, Chairperson

Submitted Friday, October 29, 2021

My name is Karen Dale, and I am the Chief Diversity Equity and Inclusion Officer of the AmeriHealth Caritas Family of Companies, and the Market President of AmeriHealth Caritas District of Columbia. AmeriHealth Caritas is committed to doing our part to help achieve racial equity across the country. Toward that aim, we have joined CEO Action for Racial Equity (**CEOARE**), a Fellowship of over 100 companies that mobilizes a community of business leaders with diverse expertise across multiple industries and geographies to advance public policy in four key areas — healthcare, education, economic empowerment and public safety. Its mission is to identify, develop and promote scalable and sustainable public policies and corporate engagement strategies that will address systemic racism, social injustice and improve societal well-being.

AmeriHealth Caritas DC serves more than 118,000 District residents, approximately 40% of whom live in wards 7 and 8 where 46% of this past summer's 1,674 violent crimes occurred. Notably, 92% of the ward 7 population and 88% of the ward 8 is Black. Aside from the direct impact of the crime itself, this high rate of crime increases the likelihood of a negative interaction with police, and the potential deleterious outcomes of such interactions. Chronic direct and indirect exposure to police violence against or killings of unarmed black Americans is health-harming – not only in the physical sense, but such exposure also carries with it a higher likelihood of adverse mental health impacts.

As a business leader in the District for more than two decades, I am writing the Council today to voice my support for meaningful police reform. I commend the City Council for establishing the DC Police Reform Commission (the Police Commission) to study and improve public safety in the District, including proposing solutions to address police accountability and transparency. It is encouraging that the findings of the Police Commission's April 1, 2021 report serve as the basis for the police reform measures proposed in Bill 24-0356, Strengthening Oversight and Accountability of Police Amendment Act of 2021 (Bill 24-0356). Specifically, I believe that meaningful reform must include the creation of publicly accessible police misconduct registries because they will help increase accountability and transparency in American policing.

I applaud the efforts of Chairman Mendelson for introducing Bill 24-0356. Notably, I support the creation of the **Officer Disciplinary Records Database**. I also applaud the Council for including an amendment to the Freedom of Information Act of 1976 to make the disciplinary records of Metropolitan Police Department ("MPD") and DC Housing Authority Police Department officers public records. Transparency is the path to accountability. ***"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."***[1]

Our nation has been deeply affected by the tragic killings of George Floyd, Breonna Taylor, Antwan Gilmore and many other Black Americans. These killings have exposed the significant gaps that exist in the application of equity and justice for all Americans. CEOARE is actively advocating across the country for the openness of law enforcement records through the creation of police databases that can be used to make sure that police departments are hiring qualified and capable individuals, to hold officers

[1] James L. BUCKLEY et al., Appellants, v. Francis R. VALEO, Secretary of the United States Senate, et al. (two cases). | Supreme Court | US Law | LII / Legal Information Institute (cornell.edu), 424 U.S. 1, [insert pinpoint cite] (1976)

accountable for their actions, and to give the public confidence in the integrity of the police officers they interact with in their communities.

Accountability and transparency help build trust between the police and the communities they serve; these principles should serve as the cornerstone to equitable reform efforts. For the first time in 27 years, public confidence in law enforcement dipped below 50%, falling five (5) percentage points to 48% between 2019 and 2020[2]. **Accessibility to police officers' disciplinary and legal history would be a critical step to restoring public confidence in the institution of policing.** With this information, leaders would be able to identify neighborhoods in the city where stronger police/community relationship-building initiatives are needed, and police departments would be better able to identify patterns in misconduct. Without trust and accountability, a police department cannot effectively do its job. Failure to keep communities safe is an unacceptably tragic outcome.

Public accountability and transparency have long been standard in health care. For example, DC Health maintains a list[3] on its website of all disciplinary actions taken against physicians licensed to practice medicine in the District. Additionally, DC Health maintains a database[4] of information about Health Professionals licensed to practice in DC including their names, license number, license status and discipline information from 1996 to the present. This information helps ensure that the highest quality of care is provided to the residents of DC. Law enforcement in DC should also embrace this level of disclosure to community members. While the information gleaned and reported from disciplinary proceedings may not be flattering – and indeed at times may be downright alarming – access to such records serves the critical function of arming the public, press, academics and policymakers with the data needed to develop evidence-based solutions.

AmeriHealth Caritas is guided by one philosophy: Help people get care, stay well, and to build healthy communities. Accordingly, we are choosing to use our voice to stand alongside the millions of Americans calling for meaningful police reform. We are stepping up together because mere acknowledgement of systemic societal racism is not enough. Action is needed.

Today, I call on the Council to make police disciplinary records public data including, as recommended by the Police Reform Commission, the status of the investigation, the outcome of the investigation and the discipline administered. I also encourage the Council to ensure that the final version of the law includes funding for the creation of the database, requirements for police departments to report discipline data on a prescribed schedule, and penalties for noncompliance.

Thank you for your leadership and commitment to transforming policing in the District. Passing this bill will set a meaningful example for the rest of the country and help preserve the safety of and create equity specifically for the over 300,000 Black Washingtonians and the thousands of other Black Americans who work in or travel through DC each day.

[2] Amid Pandemic, Confidence in Key U.S. Institutions Surges (gallup.com)
[3] Medicine Disciplinary Actions Taken | doh (dc.gov)
[4] Search for a Health Professional Profile (dc.gov)

October 21, 2021

DFER
DISTRICT OF COLUMBIA

Nikki D'Angelo
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Judiciary and Public Safety Committee Hearing:
B24-0254, the School Police Incident Oversight and Accountability Amendment Act of 2021; B24-0306, the Youth Rights Amendment Act of 2021; and B24-0356, the Strengthening Oversight and Accountability of Police Amendment Act of 2021

Good morning Councilmember Allen and members of the Judiciary and Public Safety Committee. My name is Nikki D'Angelo and I am a Ward 5 resident, DCPS parent, former DC charter school teacher, and former DCPS central office employee. I am testifying on behalf of Democrats for Education Reform DC (DFER DC) and I am pleased to offer testimony in support of B24-0254, the School Police Incident Oversight and Accountability Amendment Act of 2021 and, B24-0306, the Youth Rights Amendment Act of 2021.

As a former teacher and social worker in DC for almost 10 years, I handled countless incidents and altercations between students - and not once did I believe that any of those situations would have been better handled by a police officer. During this time, I heard many disturbing stories of how my students experience the police in the District. The trusted adults in schools are often teachers and social workers, not police. We must keep every student safe in school buildings with high-quality, uninterrupted learning so they can thrive in life, school, and career. The DC Council must continue to identify evidenced-based solutions to reduce the number of students that are placed in foster care, arrested, committed, detained, and incarcerated; enhance trauma-informed and unconscious bias teaching and training; and provide greater wrap-around supports to students and their families. All of these solutions must include feedback from our school communities.

B24-0254, the School Police Incident Oversight and Accountability Amendment Act of 2021

I can't fathom living in a city where students of color make up 100% of school-based arrests, especially knowing many of those students have disabilities. In terms of this bill, I fully support improving transparency and accountability for both schools and the Metropolitan Police Department regarding school-based disciplinary actions involving law enforcement. The public needs to see these sobering statistics so we can make school-level discipline fair and rare. I recommend expanding the language to include special education transportation so we know what is happening on our buses as well.

B24-0306, the Youth Rights Amendment Act of 2021

Considering my years of experience aforementioned, I am in full support of this bill. I would not expect a child to give consent to a police officer and then be assigned responsibilities and punishments that far exceed their developmental level. As adults, it is our responsibility to ensure we don't assign children responsibilities that could have a negative impact on them for the rest of their lives - this has to include interrogating children and implementing searches.

Considering this data and the context it creates, my question for the Council is how are we incentivising the DC government and all local education agencies to better educate and support our students with special needs, because those are the students that are more often involved with the criminal justice system?

To reiterate, I am in full support of B24-0254, the School Police Incident Oversight and Accountability Amendment Act of 2021 and B24-0306, the Youth Rights Amendment Act of 2021. It is my hope that as this process continues and new information unfolds, the DC Council will continue to focus its efforts on how to ensure our young people of color are safe in the District.

Thank you for allowing me to testify.

Submission of Rebecca Shaeffer
Legal Director, Fair Trials Americas
On behalf of Fair Trials Americas

Committee on the Judiciary and Public Safety Public Hearing on on Bill 23-0723, the "Rioting Modernization Amendment Act of 2020"; Bill 23-0771, the "Internationally Banned Chemical Weapon Prohibition Amendment Act of 2020"; and Bill 23-0882, the "Comprehensive Policing and Justice Reform Amendment Act of 2020"

October 23 2020

This submission follows oral testimony provided to the Council on October 15.

About Fair Trials: Fair Trials[1] is an international criminal justice reform organization with offices in London, Brussels, and Washington DC. Fair Trials works to improve rights protection in criminal legal systems around the world with reference to international standards and comparative best practice. For the past 20 years, Fair Trials has worked in Europe and globally to develop and implement improved procedural rights standards, including the right to counsel in police custody, improved notification of rights for people in custody (orally and in writing), improved access to disclosure of evidence prior to interrogation, and increased safeguards for children in conflict with the law. Through its cross-regional learning program, "the Translatlantic Bridge," Fair Trials is seeking to support US jurisdictions looking to improve protections for people in custody by providing them with information and expertise from international jurisdictions where access to counsel in custody is well established.

Introduction: As the District looks for meaningful ways to increase accountability and oversight over police, access to counsel in police custody can play an important role in identifying, documenting and preventing police misconduct during a period of time where police are currently able to act with no oversight – in the perilous first hours post-arrest.

In order to maximize the time and resources of the Committee, I would like to validate the contents of the submission of DC Justice Lab in its brief, "A More Mature Miranda,"[2] and the submission of the Georgetown Juvenile Justice Initiative in relation to the particular needs of youth in the District, and to the particular tendency of young people to falsely confess and to waive rights under police pressure. I will not repeat that information here. Instead this submission focuses on additional benefits of providing counsel to arrested people (in this case, children), particularly those which pertain to police oversight and accountability. I also providing, in annex, a general brief on this topic produced by Fair Trials in Annex, entitled, "Station House Counsel: Shifting the Balance of Power Between Citizen and State."[3]

Proposed scope of legislation: In coalition work with the DC Justice Lab, Georgetown Juvenile Justice Initiative, Black Swan Academy, Rights 4 Girls, the ACLU DC, the Center for Court Excellence, and the Public Defender Service, Fair Trials has identified momentum behind the provision of counsel for

[1] www.fairtrials.org
[2] Available at: https://static1.squarespace.com/static/5edff6436067991288014c4c/t/5f7cb311f1089b28400d4ad5/1602007825403/More+Mature+Miranda.pdf
[3] Annex I, also available at: https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf

youth in police custody, and we focus on that issue in this brief. However, in other jurisdictions we are working toward access to counsel in police custody for all arrested people, regardless of age, and we see this youth-specific provision as an opportunity to demonstrate the value of early access to counsel as a stepping stone toward full representation for children and adults alike. With that caveat in mind, Fair Trials recommends an amendment to the Comprehensive Policing and Justice Reform Bill (*hereinafter*, **the Policing Bill**) that would:

> Make any statement made to law enforcement officers by any person under eighteen years of age *inadmissible* in any court of the District of Columbia for *any purpose*, including impeachment, unless:
> • The child is advised of their rights by law enforcement in a manner consistent with their cognitive ability;
> • The child actually confers with an attorney in relation to their right to silence and to a laywer; and
> • The child knowingly, intelligently, and voluntarily waives their rights *in the presence of counsel*.

Background: Nationally, about 90% of youths waive their right to counsel.[4] In D.C. the procedure and language for informing children of their rights is the same as for adults, but juveniles' cognitive skills and reading comprehension are still developing and they may not truly understand the information they are given.[5] More importantly, they tend to undervalue the role of counsel. Children are more likely to waive the right to a lawyer despite being the group that is least able to resist police interrogation and to make wrongful confessions.[6][7] Youths face not only the power differentials inherent to all interrogation but also the effect of being raised to respect and obey adults. They are more likely to be influenced by deceptive methods and short-term incentives (i.e., being told they can go home if they say "what happened").[8]

Even if a child does invoke their rights during interrogation, D.C. does not have a formal system for providing a lawyer until the initial hearing stage. However, the legal process begins before the initial hearing. When counsel is not yet appointed, youth are interviewed by Court Social Services officers. D.C. attorneys have reported these interviews including questions about drug use, gang affiliation, and the charged offense itself. Although using these answers as evidence of a criminal offence in court is against the court rules, attorneys have reported them being prejudicial nonetheless, particularly in the context of guilty plea negotiations, diversion and pre-trial decisions.

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[4] "Police routinely read juveniles their rights but do kids understand?" American Bar Association (2016). Available at: https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/august-2016/police-routinely-read-juveniles-their-miranda-rights--but-do-kid/

[5] Id, n 3.

[6] "Arresting Development: Convictions of Innocent Youth," Tepfer, Joshua, et.al. Northwestern University College of Law Scholarly Commons (2010). Available at: https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1204&context=facultyworkingpapers

[7] *Haley v. Ohio*, 332 U.S. 596

[8] "Access Denied: A National Snapshot of States' Failures to Protect Juveniles' Access to Counsel https://njdc.info/wp-content/uploads/2017/10/Access-Denied.pdf

The negative effect of the lack of mandatory juvenile representation has a discriminatory impact on Black children in the District, where Black children make up 95% of youth who are subject to arrest.[9] Furthermore, people from lower socioeconomic backgrounds are also less likely to assert their right to counsel.[10]

While the juvenile system is intended to be primarily rehabilitative, it can and frequently does result in criminal conviction and loss of liberty, with long term impacts on life outcomes for youth. Furthermore, prosecutions of children may be transferred from juvenile to adult criminal court. D.C. tried 541 youths as adults between 2007 and 2012.[11] In D.C., transfer laws stipulate that: juvenile courts may waive jurisdiction at their discretion; in some types of cases jurisdictional waiver is presumptive (though not mandatory); and in other types prosecutors have total discretion to bring the case in criminal court.[12] The juvenile bears the burden of proof in cases of presumptive waiver. D.C. also has "once and adult, always an adult" laws, meaning a defendant who has previously been tried as an adult cannot have a subsequent case brought in juvenile court, no matter the offense.

National and global movement toward station house counsel, especially for youth: An amendment to the Policing Act that provides for counsel for youth in police custody would place the District firmly within a growing movement of jurisdictions both within the USA and around the world that increasingly recognizes the benefits of providing early access to counsel during police custody, prior to interrogation and as a necessary precursor to any effective waiver of the right to silence.

Several states and jurisdictions mandate counsel for younger children in custody (for example, up to age 15), but increasingly, states are beginning to expand access to older children, up to the age of 18. The most significant is the recent passage of SB 203[13] in California, which expands the juvenile access to counsel law first enacted as a city ordinance in San Francisco in 2018,[14] and will be enacted across the state beginning on January 1. A similar law is under consideration in New York State.[15] In Chicago, pursuant to Illinois state law[16] and the terms of a consent decree[17] (meant to address, in part, police torture of people held in Chicago police custody).

These states join dozens of other jurisdictions, including every member state of the European Union, the United Kingdom, Canada Australia and New Zealand in providing access to lawyers for arrested people of any age in police custody. Around the world, police station access to counsel is understood to be a key safeguard against police abuse, arbitrary detention, insufficient notification of rights, unlawful arrest, lack of access to medical care and sanitation, coercive interrogation, and excessive

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[9] "Racial Disparities in DC Policing: Descriptive Evidence from 2013-2017. ACLU DC (July 2019). Available at: https://www.acludc.org/en/racial-disparities-dc-policing-descriptive-evidence-2013-2017

[10] "Do Juveniles Understand what an Attorney is Supposed to Do?" NJDC (2015). Available at: https://njdc.info/wp-content/uploads/2015/09/Do-Juveniles-Understand-What-An-Attorney-Is-Supposed-To-Do.pdf

[11] "Capital City Correction: Reforming DC's Use of Adult Incarceration Against Youth." Campaign for Youth Justice (2014). Available at: http://www.campaignforyouthjustice.org/images/pdf/Capital_City_Correction.pdf

[12] "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting." NCJRS((Sep 2011). Available at: https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf

[13] Available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB203#:~:text=SB%20203%2C%20Bradford.,Juveniles%3A%20custodial%20interrogation.&text=Existing%20law%20requires%2C%20until%20January,of%20the%20above%2Dspecified%20rights.

[14] The Jeff Adachi Act, mandating both counsel and access to two phone calls for youth in custody, available here: https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-61366.

[15] Text of proposed bill available here: https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A06982&term=2019&Summary=Y&Actions=Y&Memo=Y&Chamber%26nbspVideo%2FTranscript=Y

[16] 725 ILCS 5/103-4. Available at: https://ilga.gov/legislation/ilcs/documents/072500050K103-4.htm

[17] For more information on the terms of the consent decree, see: http://chicagopoliceconsentdecree.org/

prosecutions.[18] In each of these jurisdictions police are able to conduct effective investigations alongside defense counsel in custody.

Other jurisdictions can also provide models for more effective notification of rights for youth in police custody. Alongside the presence of defense counsel, many jurisdictions with stronger procedural rights for arrested people have developed "easy read," simple and visual representations of custody rights, to help children better understand the consequences of waiver. This kind of effective, written notifications of rights go far beyond current Miranda warnings, which are poorly understood by children in particular. Examples of these simple "letters of rights" are included in annex.[19]

Impact beyond the detention context: In the context of the USA and the District, the potential benefits of opening police custody to the oversight and intervention of defense counsel can have a much broader impact than simply preventing ill treatment and protecting the right to silence. The zealous advocacy of counsel in the critical hours immediately post-arrest can have both upstream effects (on the behavior and arrest patterns of police officers) as well as downstream effects (on the course and outcome of charging, diversion, pre-trial detention, and ultimate case outcomes).

Cost Savings due to decarceration and prevention of police misconduct: The Public Defender for Cook County Ill, which has the nation's only dedicated police representation unit, reports that in 18% of cases in which public defenders assist people in custody, they are able to secure the person's immediate release with no criminal charges. A study of Cook County's early representation programs estimated that cost savings associated with early access to a lawyer could range between 12 and 43 million dollars.[20] Cost savings were realized through reduced jail time (both pre-trial and post-adjudication), reduced recidivism, and reduced liability payouts due to police misconduct effectively prevented by counsel.[21] Existing research on early access to counsel has demonstrated lower rates and duration of pre-trial detention, higher probability of a reduction in charges, higher probability of release from detention and reduced jail admissions when lawyers can quickly access arrested people.[22]

Data collection: Furthermore, in addition to the immediate oversight provided by the presence of counsel in police custody, defense lawyers can collect data on patterns of policing and police misconduct that are currently difficult to obtain. For example, defense counsel may be able to gather information on arrests that never lead to criminal charges, including those which are not charged due to unlawful, overzealous or abusive acts by police. This data can aid the work of the Office of Police Complaints and other relevant bodies, which can in turn help to improve community relations.

Conclusion: The state of justice in the District would be substantially improved by an amendment to the Policing Bill requiring counsel for youth in police custody, prior to and during interrogation and in

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[18] "Access and Contact with a Lawyer." Association for the Prevention of Torture. Available at: https://www.apt.ch/en/dfd_print/636/analysis/en

[19] Annex II, "Notice of Rights andEntitlements," Hertsfordshire, UK police, available at: https://www.herts.police.uk/assets/Information-and-services/About-us/rights-and-entitlements-booklet.pdf and "Rights and Entitlements, Leaflet for Young People." Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765546/Rights_and_entitlements_-_leaflet_for_young_people__web_.pdf

[20] "The Fiscal Savings of Accessing the Right to Counsel Within 24 Hours After Arrest," Sykes, Brian et. al. UC Irvine Law Review (2015). Available at: https://www.law.uci.edu/lawreview/vol5/no4/Sykes.pdf

[21] See, "One Hour Access to Counsel: A Cost-Saving Necessity," (2020), Available at: http://www.chicagoappleseed.org/our-blog/one-hour-access-to-counsel-cost-saving-necessity/

[22] "Early Intervention by Counsel," Worden et.al. Office of Justice Programs, NCJRS (April 2020). Available at: https://www.ncjrs.gov/pdffiles1/nij/grants/254620.pdf

order for waivers of the right to counsel and to silence to be valid. Youth are particularly susceptible to police coercion, and custody is a situation of extreme vulnerability. Furthermore, defense counsel can play a pivotal role in decarceration, decriminalization, and oversight of police when they are able to access arrested people in the early hours post arrest.

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OCTOBER 2020

STATION HOUSE COUNSEL: SHIFTING THE BALANCE OF POWER BETWEEN CITIZEN AND STATE

Fair Trials

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INTRODUCTION

For people who have been arrested, the immediate hours spent in police custody are a time of extreme vulnerability. As recent documentaries, including *Making a Murderer* and *When They See Us* have exposed, most people in police custody in the US have limited, if any, communication with the outside world, at a time when ill-treatment, coercive questioning, and other rights violations are most likely to occur, and when criminal proceedings are set into motion.

Arrested people in the US are almost never able to access counsel until, at the earliest, the first court hearing. Until then, they are subject to the unchecked power of the police. By the time an arrested person accesses counsel, key decisions about charge, detention, diversion and dismissal have already been made by authorities, and the machinery of the criminal legal system has already irrevocably begun to grind.

As this brief shows, involving defense lawyers earlier can not only provide oversight over arrest, custody and detention but can also have a transformative effect on the entire criminal legal system. Early access to counsel has the potential to disrupt the machinery of criminalization, mass incarceration, and police control.

In 2014, only 3 out of every 1,000 arrestees in Chicago had an attorney at any point while in police custody. When individuals in custody attempt to invoke their legal rights to counsel, they report facing hostility from police.[1]

03

THE PROBLEM: HOW THE US IS FAILING PEOPLE WHO ARE VULNERABLE TO POLICE POWER

US citizens' right to counsel is protected under the US Constitution, but the interpretation of the right to counsel has failed to reach the stage of early police custody. The 6th Amendment right to counsel does not apply until later in the process, usually the first court hearing. The 5th Amendment (derived from the *Miranda v Arizona* decision[2]) has been interpreted only to mean that police must inform an arrested person of their right to a lawyer and their right to silence – not to actually provide a lawyer. An arrested person must assert the right to silence with no legal assistance. In practice, few people are able to maintain the right to silence without counsel.

80%

At least 80% of arrested people waive their right to a lawyer and to silence in the face of police pressure.[8]

Although there are guidelines recommending that a person has access to counsel as soon as is practical after they are taken into custody,[3] in most parts of the United States this is far from the reality.[4] An American Bar Association report from 2004 describes many instances of individuals waiting in jail for several months without access to a lawyer.[5] In one particularly egregious case, a woman was in jail for over a year without once speaking to a lawyer or appearing in court.[6] Some states have adopted their own laws that guarantee access to counsel within a certain period of time.[7] In no jurisdiction in the US are defendants regularly able to access counsel prior to arraignment (sometimes days after arrest).

04

Legal counsel in police stations is needed to protect the right to silence and prevent serious rights abuses, including physical brutality, unlawful arrest, coercive interrogation and denial of medical attention and basic physical needs. Without a lawyer present, these violations are unlikely to ever be remedied.

90%

Around 90% of juveniles, waive their Miranda rights.[9]

But early access to counsel does more than protect defendants from potential abuses – with early access, lawyer can help to divert unworthy cases from ever entering the system.

By the time defendants see a lawyer in court, key decisions have already been made in relation to charging and bail – decisions which will be determinative for many defendants who may be coerced to plead guilty to avoid pre-trial detention, overcharging and long sentences.

Lawyers in police custody can identify unlawful or abusive arrests, cases worthy of diversion or cases that should never be prosecuted at all, acting as a powerful agent for liberation, who can challenge the otherwise inexorable march of mass incarceration.

The Registration of Exonerations has documented that 12% of exonerations arise from false confessions – including 37% of juvenile exonerations and 70% of exonerations of people with mental illness and/or developmental disabilities.[10] *A key role for lawyers in police custody is to identify these vulnerabilities and ensure that these individuals are able to withstand police coercion.*

05

WHAT DO LAWYERS DO IN POLICE STATIONS?

Lawyers in police station defend the rights of their clients at the time they are most vulnerable. Through confidential and private meetings, they can:

- make sure their client understands their rights – in particular, the right to remain silent. Although the police have the obligation to notify these rights, lawyers are best placed to explain their rights to suspects, and the consequences of waiving them;
- gather information from their client, which may help them secure a pre-trial release;
- find out about detention conditions and treatment by the police and detect and challenge abuses;
- assess their client's fitness for the interrogation; and
- explain what is likely to happen during the process and why.

If an interrogation goes ahead, a lawyer's principal role is to be a check on police coercion. Lawyers can ask to privately advise their client, they can facilitate communication between the police and their client, ask for questions be clarified or rephrased, and flag the need for an interpreter. They can read and check the written records of the interrogation and correct mistakes. If procedural rights are not respected by the police, a lawyer can ask for their observations to be recorded on the interrogation transcript for later legal challenge. For example, if the transcript does not reflect the person's actual responses, the person is inebriated during the interrogation, an interpreter should have been present or the police used coercive techniques.

Lawyers can also start to advocate for their clients' rights with police and prosecutors much earlier in the process. They can make arguments about the propriety of the arrest and any charges that are being considered. They can also, encourage law enforcement not to seek pre-trial detention, to argue for diversion or other non-criminal disposition, and demand sufficient disclosure to be able to make arguments about these early decisions. They also start to build a rapport with their client, which is crucial for effective defense but virtually impossible if you first meet on the doorsteps of the court.

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HOW STATION COUNSEL COULD BE TRANSFORMATIVE

The transformative effect of early access to counsel goes beyond protecting individuals at a time of vulnerability. Interventions that hold the police to account can have a significant impact both downstream (on the way cases are charged and plead) and upstream (on patterns of arrest), potentially leading to decarceration. Lawyers in police custody can create systematic change to a number of criminal justice outcomes, by:

- Challenging unlawful and abusive arrests, including those that do not lead to criminal charges, discouraging police from unnecessary street contact.
- Reducing prosecutions and jail admissions by encouraging police and prosecutors to drop clearly unworthy cases.
- Identifying the vulnerabilities of arrested people and promoting diversion and treatment opportunities.
- Identifying incidence and patterns of police misconduct and ill treatment of arrested people.
- Improving communication channels and trust between police, community (including victims and witnesses), defenders and prosecutors.
- Capacitating defense lawyers to prepare more comprehensively for arraignment, pre-trial detention and plea negotiations – reducing wait times and administrative hurdles.
- Improving access to medical care and other essential needs of detained people.

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POLICE STATION ACCESS TO COUNSEL IN EUROPE

In many countries in Europe, people have the right of access to a lawyer, free of charge, prior to and during interrogation, 24 hours a day.

United Kingdom

Following a number of scandals involving police torture of IRA suspects in British custody during the Irish sectarian conflict of the 1980s, UK law was changed to give suspects in police custody a right to consult a solicitor privately and free of charge at any time. Detailed Codes of Practice require the police to: repeatedly inform detainees of this right; prohibit anything which could deter exercise of the right; and facilitate access to a lawyer. This right applies throughout police detention and a suspect has a right to have a lawyer present during interrogation. Where these rights are violated, evidence that is obtained by the police during interview will be inadmissible in criminal proceedings in most circumstances.

European Union

Access to a lawyer in a police station became a right across Europe as a result of a seminal case in 2009, involving a 17 year-old boy in Turkey who was suspected of participating in an unlawful demonstration. It was decided that his conviction, based on a confession given without access to a lawyer, was unfair. This case and subsequent European legislation, led to a revolution in police station access to counsel, which became mandatory across Europe in 2016.

In Belgium, for example, suspects now have the right to confidential communication with a lawyer in police custody before the police interview and to a lawyer being present throughout the police interview. There is a new duty scheme in place for the prompt notification, appointment and payment of lawyers who attend clients in police custody. Many different models have been created across Europe, creating a wealth of learning for the US. Fair Trials is working to ensure that the legal right to access a lawyer in police custody is being implemented across Europe.

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HOW DOES ACCESS TO COUNSEL WORK IN PRACTICE?

Police station lawyer systems are in place in many parts of the world and can help US jurisdictions understand how police station lawyer access might be designed. While the principles behind access to a lawyer are the same, there is no perfect system. US jurisdictions have an opportunity to learn from other jurisdictions to develop a system that works for them.

How are lawyers contacted?

In some systems, a third-party contractor runs a dedicated line that connects arrested people with on-call lawyers (often through police intermediaries). In others, a bar association plays this role through an online platform. In Belgium the appointment of lawyers is made via an online platform that connects police stations with lawyers.

How long before they get to police station?

Most jurisdictions require that a lawyer who is contacted and on-call must arrive at the police station within a short period of time, usually two hours. Interrogation may not take place until then. Where there may be a delay in a lawyer arriving at the police station in person, a telephone consultation may be held as an initial step. Since COVID-19, some jurisdictions have adopted this practice so that lawyers advise their clients and participate in interrogations via videolink.

Which lawyers do this?

Public defender offices as such do not exist in most of Europe, but private lawyers take on legal aid cases in a coordinated system. Suspects can normally either choose their own nominated lawyer or the on-call lawyer from a scheduled list. Either way, the lawyer's services are provided free of charge and paid for by the state. On-call lawyers are often required to meet certain quality requirements as well as meeting ongoing key performance indicators and quality measures.

How are they paid?

Police station legal advisers are often paid a fixed fee by the State. In England and Wales, the remuneration is around $45 for telephone advice and $250 for in-person attendance.

Do they have an ongoing role in the case?

Sometimes they can help a law firm get a case and the fees for any subsequent trial, which is why there is competition for duty solicitor slots even though the fees are low.

WHAT WOULD ACCESS TO COUNSEL LOOK LIKE IN THE US?

There are few examples of true police station access to counsel programs in the USA, but some attempts have been made. The most prominent example is Cook County/Chicago, where lack of access to counsel in police custody has been persistently problematic, despite being prioritized in the 2019 consent decree developed in response to the US Department of Justice's finding that Chicago police engaged in a pattern or practice of excessive force and racial bias.[11] Even with a special police station representation unit (unique in the country) and a legal obligation to facilitate lawyer access, only 2% of arrested people in Chicago get access to a lawyer, because police have failed to provide arrested people with legally-mandated phone calls to counsel.

Beyond Chicago, efforts are being made in some jurisdictions to expand police station access to counsel for children. In San Francisco, the Jeff Adachi Ordinance, enacted in 2018, provides children with access to counsel before interrogation.[12] Similar legislation is being considered in New York State.[13] However, these limited experiments have not resulted in increased practical access to lawyers for people in custody.

The experience of Chicago suggests that at least in some jurisdictions, the "on call" system used in the UK and most of Europe may not work in the US, given the recalcitrance of many police cultures. We need to experiment to assess which models will be most effective at disrupting abusive and carceral police and legal cultures.

The existence of organized public defender offices (absent in most of Europe and the UK) creates the possibility of innovative models of police station access, for example the 24/7 presence of public defenders in police precincts. As jurisdictions experiment with different access models, some key elements should be included:

- accountability for police who fail or refuse to facilitate access to counsel;
- presumption of inadmissibility of statements obtained outside the presence of counsel;
- codification and implementation of broader custody rights and record keeping on procedural safeguards, including concrete timeframes for provision of rights including phone calls, access to medical care, sanitation, food and water, etc.
- data collection on take up, effectiveness and impact of station house lawyers on upstream and downstream outcomes;
- fee structures and attendance regimes for police station lawyers that protect their independence from police; and
- training of defense lawyers, police and prosecutors on the role of lawyers in police custody.

A study by First Defense Legal Aid in Chicago, which works to improve access to counsel during the first 24 hours following arrest, found that providing earlier access to counsel for arrested people in police custody in Cook County could create fiscal savings of between $12 and $43 million, largely in reduced jail time.[14]

POSSIBLE CHALLENGES

Global experience offers important lessons for US jurisdictions on the potential challenges to implementing police station access to counsel:

- **Independence of police station lawyers:** Lawyers who spend a lot of time in proximity to police, may find it challenging to retain sufficient independence from police interests and to be seen as independent by communities. Care should be taken to ensure that the system for appointing counsel, rotating lawyers in and out of police custody and community engagement enables robust defense.
- **Conflicts:** Some indigent defense systems may find it challenging to identify potential conflicts of interest between co-defendants at the early stage of police custody. A system for identifying and managing conflicts should be developed.
- **Police facilitation of counsel:** Most European systems rely on police initiating the request for counsel and informing arrested people of this right. The experience in Chicago suggests this may not be effective in some US contexts. Despite the fact that it is a Class 3 felony for police to fail to observe the right to counsel in Illinois, police regularly obstruct this right in practice in Cook County. These violations, among others, are the subject of an ongoing consent decree based on DOJ findings.[15] Therefore, it may be necessary, to ensure defense counsel are present and have access to people in police custody continuously, or else to appoint independent third parties to facilitate access.
- **Waivers of the right to counsel by arrested people:** Even where the right to counsel in police custody is well-established, many arrested people continue to waive their right to a lawyer.[16] Procedural safeguards are needed to ensure that waivers are knowing and voluntary.
- **Compensation for counsel:** Because police station-based legal work may be more arduous, and may occur during nights and weekends, compensation for lawyers should be sufficient to ensure they are not disincentivized from providing high quality representation. In ongoing efforts to divert funding from abusive police forces to community investment, provision for defense rights in police custody should be a priority for municipalities.

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CONCLUSION

It is time for US jurisdictions to learn from the experience of countless global jurisdictions that have rebalanced the relationship between police and citizens. We must ensure that in the vulnerable moments after arrest, people's rights are safeguarded and that there is oversight of police behaviour, by the advocacy of a defense lawyer. The police can no longer be permitted to operate in the shadows. There must be accountability at all stages of criminal legal proceedings, and Americans' Constitutional right to counsel must be fully implemented.

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. For the past 20 years, Fair Trials has worked to develop and implement improved procedural rights standards for criminal defendants across Europe and around the world. Fair Trials is uniquely placed to lead this work, given its experience working with jurisdictions in the EU to implement programs providing access to a lawyer upon arrest, in the police station. For more information, please contact Rebecca Shaeffer, Legal Director of Fair Trials (Americas), at rebecca.shaeffer@fairtrials.net.

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Submission of Chanel Cornett
Legal and Policy Officer, Fair Trials Americas*
***Titles and organizational affiliation for identification purposes only.**

Committee On The Judiciary And Public Safety Joint Public Hearing On The Recommendations Of The D.C. Police Reform Commission, B24-0094, The "Bias In Threat Assessments Evaluation Amendment Act Of 2021," B24-0107, The "Metropolitan Police Department Requirement Of Superior Officer Present At Unoccupied Vehicle Search – No Jumpout Searches Act Of 2021," B24-0112, The "White Supremacy In Policing Prevention Act Of 2021," and B24-0213, The "Law Enforcement Vehicular Pursuit Reform Act Of 2021"

Tuesday, June 1, 2021

This submission follows oral testimony provided to the Council on May 20.

About Fair Trials: Fair Trials is an international criminal justice reform organization with offices in London, Brussels, and Washington DC. Fair Trials works to improve rights protection in criminal legal systems around the world with reference to international standards and comparative best practice. For the past 20 years, Fair Trials has worked in Europe and globally to develop and implement improved procedural rights standards, including the right to counsel in police custody, improved notification of rights for people in custody (orally and in writing), improved access to disclosure of evidence prior to interrogation, and increased safeguards for children in conflict with the law. Through its cross-regional learning program, "the Translatlantic Bridge," Fair Trials is seeking to support US jurisdictions looking to improve protections for people in custody by providing them with information and expertise from international jurisdictions where right to counsel in custody is well established.

Introduction: On April 1, 2021, the DC Police Reform Commission released a 259 page report detailing recommendations to improve or find alternatives to policing in Washington D.C. One of the recommendations in Section 6 of their report includes guaranteeing juveniles and adults right to counsel in police custody prior to questioning by police:

> "2(c) Recommendation: The Council should work with the Public Defender Service for the District of Columbia and the MPD to institute legal counsel in police stations. Both youth and adults should be guaranteed legal counsel upon their arrest, prior to any questioning by the police. Public defenders or private counsel should be allowed access to police stations 24 hours a day to communicate with and otherwise represent their clients and to sit in on interviews between police and individuals suspected of a crime."

Pursuant to this recommendation, Fair Trials has drafted model legislation that would afford adults and juveniles the right to counsel within 2 hours after arrival at a police precinct and guarantee attorneys 24 hour entry into the precincts to carry out consultation in a confidential setting and provide legal assistance during interrogations and officer led questioning. Our drafted legislation also includes two other measures to ensure comprehensive implementation and enforcement of the right to counsel, such as: prohibiting police officers from beginning interrogation or questioning until counsel has been consulted, if such person wishes to invoke their right to consult counsel; and ensuring incriminating statements elicited in violation of

such person's right to counsel may not be used against them in criminal proceedings. We believe the Commissions' recommendations, along with our proposed codification of their recommendations, will ensure that the current privilege to be guided by an attorney upon arrest (for those who can afford and demand private counsel) becomes a right for everyone, and will provide oversight and protection against harmful policing practices in the District, which is the ultimate purpose of the Commission that the Council established.

Fair Trials is in the early stages of a project, together with the Urban Institute and the University of Chicago, to conduct implementation studies of existing right to counsel in police custody laws, provide technical support for implementation and legislative drafting, create data collection programs to determine their quantitative impact, and coordinate a national coalition of right to counsel practitioners and stakeholders. Moreover, we are engaged in ongoing conversations with multiple service providers, including DC law school clinics. the Superior Court Trial Attorneys Association, and the Public Defender Service for the District of Columbia, regarding their offices' capacity to implement and to effectively provide counsel in police stations. Our work will enable the District to learn from the experiences of other jurisdictions and provide the District with tools to successfully implement community oversight, via the right to counsel, over police in our city.

The District also possesses the infrastructure and is especially poised to become a leader on this issue nationally. There exists a wealth of indigent defense practitioners via The Public Defender Service for the District of Columbia, which is nationally renowned as a model for indigent defense, numerous highly ranked law schools with indigent defense clinics, and a robust Criminal Justice Act, or panel attorney program. The District is recognized as one of the most policed cities in the nation and must rise to the occasion of also being recognized as a city that provides its citizens with the most protection against abuse.

The following submission includes: proposed statute language and ideal elements; comparative legislation from Illinois, Maryland, California, and Europe regarding right to counsel in police stations; and issues resulting from implementation, and comments on how the legislation could be improved.

I. Proposed DC Statute and Ideal Elements

Below is a proposed statute for a DC right to counsel in police stations program. The statute affords persons suspected of a criminal offense the right to consult with counsel prior to interrogation or interview. The onus is placed on police officers to provide this right, rather than on the arrested person, due to the imbalance of power and information between police and people in custody. The proposed statute also affords attorneys 24-hour entry to provide consultation services and represent their clients during interrogations or questioning. Finally, an enforcement mechanism is included should violations of this right occur.

Proposed Statute:

A. Upon arrest, and prior to any interrogation or questioning, an officer must provide persons suspected of a criminal offense the right to consult with an attorney within 2 hours after arrival at the police precinct in person, alone and in private, for as many times and for such period as desired.

B. Attorneys must be allowed 24-hour entry into District of Columbia operated police precincts in order to carry out consultation and assistance described in Section A, and must be provided with the means by which to consult with arrested people in a confidential setting.

C. When arrested people invoke the right defined in Section A, interrogation or questioning may not start until they have consulted with counsel.

D. Incriminating statements elicited in violation of Section A may not be used against persons suspected of a criminal offense in criminal proceedings relating to the purpose of such interrogation, interview, or questioning.

Ideal Elements:

Ideally, we would propose a statute with detailed guidance for police and defense counsel that seeks to prevent many of the challenges with implementation we have seen in other jurisdictions. Therefore, we lay out our ideal elements of the law and its implementation, but propose only short and broad legislative language that we hope will provide ample space to implement robustly and with full consultation from all stakeholders. An ideal statute would:

- Define how the police should inform defendants of their rights, using plain and accessible language the defendant understands, orally and in writing, if need be with the help of an interpreter.
- Define the content of the information provided by the police regarding the right to consult counsel.
- Define how counsels are contacted, by the police and/or by defendants and via what technology. .
- Outline the conditions of consultations, including the respect for confidentiality of communications between arrested people and lawyers.
- Anticipate any budgetary needs the program may require.
- Specify the time afforded to defendants to consult with their lawyers and the time period in which counsel must be contacted and attend the station.
- Specify that it applies to all criminal offenses, including misdemeanors.
- Specify that a suspect may always revoke their waiver before or during questioning and that questioning must immediately stop and may only resume after the person have consulted with counsel.
- Specify which attorneys would provide counsel in police stations, such as the Public Defender Service for the District of Columbia, law school clinics, CJA/Panel attorneys, or pro bono attorneys.

II. Comparative Statutes, Implementation Issues, and Comments

The District has the opportunity to join and take part in leading the growing movement toward greater involvement of counsel in police custody around the country. It would also be part of a larger international movement, joining every country in the European Union which, because of Fair Trials' advocacy, have increased safeguards for individuals and recognized the central role that legal counsel plays in protecting citizens from state violence in custody.

Across the country other jurisdictions are increasingly adopting legislation guaranteeing access to counsel in police custody. In the context of juveniles, California began

implementation of a similar bill in January, SB 203[1] and Maryland's Juvenile Interrogation Protection Act[2] is progressing through both chambers of the Maryland Legislature. Moreover, the state of Illinois passed right to counsel legislation for all arrested people, adults and children, 2017 and recently strengthened it through amendment in order to confront the persistent problem of Chicago police failing or refusing to provide arrested people with legally-mandated phone calls to counsel.[3] Further advocacy for the right to counsel in police stations has begun in the states of Washington and New York and other states are becoming interested in granting these safeguards to their residents.

Below are right to counsel statutes in other domestic and international jurisdictions. Also included are comments regarding how the statutes could be improved and implementation issues that were highlighted in litigation. Fair Trials drew upon the drafting and experiences of these jurisdictions in drafting the proposed DC right to counsel in police stations statute.

1. Illinois

Section 725 ILCS 5/103-4 - Right to consult with attorney
Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. When any such person is about to be moved beyond the limits of this State under any pretense whatever the person to be moved shall be entitled to a reasonable delay for the purpose of obtaining counsel and of availing himself of the laws of this State for the security of personal liberty.

https://ilga.gov/legislation/ilcs/documents/072500050K103-4.htm

Comments:

- "Any person.... shall.. be allowed to consult..." usage of the word "shall" instead of "must" could be interpreted to mean that this privilege is optional and police have discretion to grant this privilege. Additionally, the usage of "shall be allowed" places the burden on the client to mention this right, rather than placing a duty on the officer to provide the client this right. Better language would include the word "must" and place the onus on the officer to provide the client the right to consult with an attorney. i.e. "any person... must be provided the right to consult with any licensed attorney..."
- "For such period each time as is reasonable.." is not good language because "reasonable" is vague and it enables officers to determine what is "reasonable."
- The statute is vague about at what time consultation with an attorney is allowed. For example, is consultation allowed prior to interrogation, interview, or questioning (which would be the purpose of early access to counsel) or is this a general allowance of consultation with an attorney at any time?

[1] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB203, explained at page 7

[2] https://mgaleg.maryland.gov/2021RS/bills/hb/hb0315t.pdf, explained at page 7

[3] https://www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=1966&ChapterID=54&SeqStart=3100000&SeqEnd=4200000, explained at page 6

Section 725 ILCS 5/103-3 - Right to communicate with attorney and family; transfers
(a) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner. Such communication shall be permitted within a reasonable time after arrival at the first place of custody.

https://ilga.gov/legislation/ilcs/documents/072500050K103-3.htm

Comments:

- "shall have the right" places the onus on the client to exercise this right, rather than placing a duty on the police to provide the client this right. Better language would be "persons... arrested must be provided the right to communicate with an attorney..."
- "reasonable number of telephone calls" the usage of "reasonable" is vague and enables the officer to decide what is reasonable. The statute should identify how many calls are allowed.
- "shall be permitted within a reasonable time after arrival" the usage of "reasonable is vague and enables officers to determine what a reasonable time after arrival is. The statute should identify exactly how long after arrival a call must be provided.
- "Persons who are arrested" statute is limited to those who are arrested, this means that those who are subject to interview, interrogation, or questioning and have not been arrested are not covered under this statute.

Implementation Issues with Both Illinois Statutes:
In litigation against the City of Chicago, claimants alleged that the Chicago Police Department instituted policies to deny arrestees their right to counsel, in violation of the aforementioned statutes (Section 725 ILCS 5/103-3 and Section 725 ILCS 5/103-4):

> "These policies include: refusing to allow people in CPD custody access to a phone for extended periods of time or at all; refusing to inform attorneys where their clients are being held in custody when directly asked for location information; refusing to allow attorneys physical access to police stations where their clients are being held; conditioning telephone access on a client's waiver of state law and their constitutional rights; and refusing to display the COOK COUNTY PUBLIC DEFENDER's Police Station Representation Unit (PSRU) hotline number in CPD stations so that detainees do not know how to get in touch with an attorney."

The DC statute can mitigate these issues by: placing the onus on the officer to provide access to counsel rather than on the defendant to request access to counsel; including a provision that grants attorneys entry to police stations 24 hours a day; including a provision that prevents the right to counsel from being conditioned on a waiver of other rights; and including a provision that requires the precinct to display the contact information of a Public Defender Service hotline.

Updated Section 725 ILCS 5/103-3 (Effective July 1, 2021)
(a-5) Persons who are in police custody have the right to communicate free of charge with an attorney of their choice and members of their family as soon as possible upon being taken into police custody, but no later than three hours after arrival at the first place of custody. Persons in police custody must be given:

(1) access to use a telephone via a land line or cellular phone to make three phone calls; and
(2) the ability to retrieve phone numbers contained in his or her contact list on his or her cellular phone prior to the phone being placed into inventory.

(a-10) In accordance with Section 103-7, at every facility where a person is in police custody a sign containing, at minimum, the following information in bold block type must be posted in a conspicuous place:
(1) a short statement notifying persons who are in police custody of their right to have access to a phone within three hours after being taken into police custody; and
(2) persons who are in police custody have the right to make three phone calls within three hours after being taken into custody, at no charge.

(a-15) In addition to the information listed in subsection (a-10), if the place of custody is located in a jurisdiction where the court has appointed the public defender or other attorney to represent persons who are in police custody, the telephone number to the public defender or appointed attorney's office must also be displayed. The telephone call to the public defender or other attorney must not be monitored, eavesdropped upon, or recorded.

(c) In the event a person who is in police custody is transferred to a new place of custody, his or her right to make telephone calls under this Section within three hours after arrival is renewed.

(d) In this Section "custody" means the restriction of a person's freedom of movement by a law enforcement officer's exercise of his or her lawful authority.

(e) The three hours requirement shall not apply while the person in police custody is asleep, unconscious, or otherwise incapacitated.

(f) Nothing in this Section shall interfere with a person's rights or override procedures required in the Bill of Rights of the Illinois and US Constitutions, including but not limited to Fourth Amendment search and seizure rights, Fifth Amendment due process rights and rights to be free from self-incrimination and Sixth Amendment right to counsel.

https://www.ilga.gov/legislation/ilcs/ilcs4.asp?ActID=1966&ChapterID=54&SeqStart=3100000&SeqEnd=4200000

2. Maryland

HB 315/SB 136
(B) A law enforcement officer may not conduct a custodial interrogation of a child until:
(1) The child has consulted with an attorney who is:
(I) retained by the parent, guardian, or custodian of the child; or
(II) provided by the office of the public defender; and
(2) The law enforcement officer has notified, or caused to be notified, made an effort reasonably calculated to give actual notice to the parent, guardian, or custodian of the child in a manner reasonably calculated to provide actual notice that the child will be interrogated.

(C) A consultation with an attorney under this section:

(1) Shall be confidential:
(I) conducted in a manner consistent with the Maryland rules of professional conduct; and
(II) confidential; and
(2) May be:
(I) in person; or
(II) by telephone or video conference.

(E) The requirement of consultation with an attorney under this section:
(1) may not be waived; and
(2) applies regardless of whether the child is proceeded against as a child under this subtitle or is charged as an adult.

https://mgaleg.maryland.gov/2021RS/bills/hb/hb0315t.pdf

Comments:

- The statute is limited to custodial interrogations, but there are scenarios where an officer could have contact with a juvenile and even elicit an incriminating statement that are not formally custodial interrogations. To make this statute better, ideally the language would state: "a law enforcement officer may not conduct any interview, questioning, or interrogation of a child until..."
- The term "child" should be defined, as some statutes relating to "children" only apply to juveniles under the age of 16.
- There is concern that the consultation will only occur via telephone since it requires less resources as opposed to in person, which is preferred. The statute could be improved by limiting the consultation to in person.

3. California

SB 203 California

625.6. (a) Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB203

Comments:

- The statute is limited to custodial interrogations, but there are scenarios in which an officer could have contact with a juvenile and even elicit an incriminating statement that are not technically custodial interrogations. To improve this statute, ideally the language would state: "prior to any interview, questioning, or interrogation..."
- Use of he term "shall" is less definitive than it our suggested phrasing, "must."
- There is concern that, if consultations are explicitly permitted to be conducted by telephone, that in-person consultations will infrequently occur in favor of phone consultations. Research from the UK and Europe has demonstrated that telephone legal advice for arrested people in custody is not sufficient to protect their rights

and should be used only in emergency situations or at the request of the arrested person.[4]

4. Europe

England and Wales Statute (Police and Criminal Evidence Act "PACE")
6 Right to legal advice

6.1 … all detainees must be informed that they may at any time consult and communicate privately with a solicitor, whether in person, in writing or by telephone, and that free independent legal advice is available.

6.3 A poster advertising the right to legal advice must be prominently displayed in the charging area of every police station.

6.4 No police officer should, at any time, do or say anything with the intention of dissuading any person who is entitled to legal advice in accordance with this Code, whether or not they have been arrested and are detained, from obtaining legal advice.

6.5 … Whenever legal advice is requested, … the custody officer must act without delay to secure the provision of such advice. If the detainee has the right to speak to a solicitor in person but declines to exercise the right the officer should point out that the right includes the right to speak with a solicitor on the telephone. If the detainee continues to waive this right, or a detainee whose right to free legal advice is limited to telephone advice rom the Criminal Defense Service (CDS) Direct (see Note 6B) fdeclines to exercise that right, the officer should ask them why and any reasons should be recorded on the custody record or the interview record as appropriate...

6.6 A detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice unless:
(b) an officer of superintendent rank or above has reasonable grounds for believing that:
(i)the consequent delay might:
- lead to interference with, or harm to, evidence connected with an offense;
- lead to interference with, or physical harm to, other people;
- lead to serious loss of, or damage to, property;
- lead to alerting other people suspected of having committed an offense but not yet arrested for it;
- hinder the recovery of property obtained in consequence of the commission of an offense.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710129/2018_CodeC-Revised_Final-APS__18-05-23_WebCovers.pdf

European Union Directives
The right of access to a lawyer in criminal proceedings

[4]https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defense practically and effectively.

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

4. Member States shall endeavor to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with Article 9.

5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of point (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

(a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings. Article 4 Confidentiality Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0048&from=EN

III. Conclusion

The intended impact of lawyers in police custody is to influence systematic change to a number of criminal justice outcomes, beyond the simple protection of the right to silence, and accrue broad benefits to the justice system by:

- Challenging unlawful and abusive arrests, including those that do not lead to criminal charges, discouraging police from unnecessary street contact.
- Reducing prosecutions and jail admissions by encouraging police and prosecutors to drop and divert more cases.
- Identifying the vulnerabilities of arrested people and promoting diversion and treatment opportunities.
- Identifying incidence and patterns of police misconduct and ill treatment of arrested people.
- Improving communication channels and trust between police, the community (including victims and witnesses), defenders and prosecutors.
- Capacitating defense lawyers to prepare more comprehensively for arraignment, pre-trial detention and plea negotiations – reducing wait times and administrative hurdles.
- And Improving access to medical care and other essential needs of detained people

The right to counsel in police stations has the potential to disrupt the machinery of criminalization, mass incarceration, and police control. The police in the District must no longer be permitted to operate in the shadows, and implementing the right to counsel for all adults and children in police custody is a key element of their reform.

Fair Trials Americas stands ready to work with the Council and all relevant service providers and stakeholders to assist in the development and implementation in law and practice of this important recommendation of the Police Reform Commission.

Testimony of

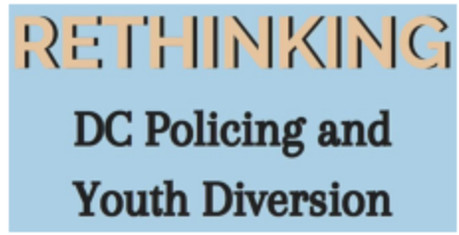
Georgetown University Law Center ACLU,

Georgetown University Law Center Youth Advocates, and

George Washington University Rethinking DC

On B24-0306, the Youth Rights Amendment Act of 2021

Submitted November 5, 2021



As students of Georgetown University Law Center, George Washington University, and residents of the District of Columbia, we stand in strong support of B24-0306, "The Youth Rights Amendment Act of 2021." We are nineteen members of the Georgetown Law ACLU and Georgetown Youth Advocates and George Washington University Student group Rethinking DC. We represent four residents of Ward 2, one resident of Ward 3, two residents of Ward 5, 11 residents of Ward 6, and 1 individual residing outside the District.[1]

As students of the law, we understand that *Miranda* warnings and privacy rights are often misunderstood by many adults, but by even more children. Further, we know that Supreme Court jurisprudence stemming from *Miranda*, such as *Duckworth v. Eagan* and *Moran v. Burbine*, grants an excess of power to police in determining how a *Miranda* warning and its waiver might occur.[2] And, even when children waive their *Miranda* or privacy rights by consenting to searches, they likely feel uniquely vulnerable to police coercion. In fact, this problem is so severe that, while children account for just 8.5% arrests in the U.S., they account for 33% of all false confessions.[3] These false confessions can lead to wrongful convictions, which have the potential to vastly alter a young person's life.

This is a particularly potent danger for Black and Brown children. Black children, especially, are subject to significantly more policing than White children. White children are largely protected from consent searches by virtue of their skin—whereas police searched 738 Black youth over a six month period of 2019, they searched just four White youth in the same period.[4] Similarly, White children are largely protected from the implications of coercive

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[1] The Georgetown Law ACLU, Georgetown Youth Advocates, Georgetown Black Law Students Association, and George Washington University Student Group Rethink DC invited their membership to a conversation about the Youth Rights Amendment Act with representatives of the DC Justice Lab and Georgetown Law Juvenile Justice Clinic and Initiative. After the conversation, students worked together to draft this testimony. While members of the Black Law Students Association helped prepare this testimony, the organization takes no official position on this matter.

[2] *See Duckworth v. Eagan*, 492 U.S. 195, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) (holding police need not recite *Miranda* warnings word-for-word as the Supreme Court set forth in *Miranda v. Arizona*, so long as police communicate the basic contents of the warning); *see Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (holding the requirement that an individual waive his *Miranda* rights knowingly, voluntarily, and intelligently is met even when police withhold important information from the suspect, such as calls from an attorney to the police station seeking to speak with the suspect).

[3] *See* Katrina Jackson & Alexis Meyer, "Demanding a More Mature *Miranda* for Kids," at 1 (Oct 2020), *available at*: https://www.defendracialjustice.org/wp-content/uploads/toolkit-files/Policy-Advocacy/Sample-Policy-Reports/More-Mature-Miranda.pdf

[4] *Id.*, at 2.

interrogations—Black youth make up 70% of the District's population but account for 95% of its youth arrests.[5]

False confessions occur because coercion is inherent in police interaction, particularly for Black and Brown children. That is, after all, the very proposition upon which the then-remarkable holding—a requirement for a prophylactic warning—in *Miranda* rests. But, not only are children in a coercive situation when they are asked to consent to potentially life-changing decisions, they do so without the benefit of fully developed cognitive abilities. Those abilities continue to develop until an individual reaches 25 years of age.[6] Children's abilities to calculate risks and act against their impulses are not fully formed.[7] When faced with a coercive situation, youth are more prone to risky and impulsive behaviors.[8] It is essential, then, that the adults protect children, not exploit them. But, given that police intend to gather information precisely by exploiting youth's vulnerability to their coercive influence, we assert that an attorney must be present.

The only way to protect children in interrogations is to provide them with a criminal defense lawyer. A criminal defense lawyer is the only person who can protect the actual interests of the child, as their purpose is to serve as an advocate for the youth's expressed interests. A defense lawyer is able to ensure that a child is fully informed of their rights and their options, as well as the true consequences of any choices they make. They can thus advise the child on how to reach their stated goals, and ensure the child has the agency to make decisions for themselves that are fully informed and free from coercion. Criminal defense attorneys may not, importantly, substitute their own judgement or will for that of the child, which protects the child's agency and interests. Further, a defense lawyer is the only person the child can speak to with whom conversations are privileged, providing yet another layer of protection for children. Having children discuss their rights with lawyers before waiving them ensures children understand their rights, are acting in their own interests, and can discuss their needs without fear of consequences.

Consent searches are also more likely to hurt than help, as constant attention on Black and Brown youth from the police leads to more crime. Rather than creating a self-fulfilling prophecy about their intent to commit crimes, we must treat children with respect. This is how

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[5] *Id.*
[6] *Brain Maturity Extends Well Beyond Teen Years*, Tell me More, National Public Radio, Oct. 10, 2011. https://www.npr.org/templates/story/story.php?storyId=141164708
[7] *Id.*
[8] *Id.*

we will keep our communities safer. We understand the Metropolitan Police Department has concerns about how this bill would affect their ability to maintain public safety, however this bill will not reduce their ability to keep our community safe. We have many legal standards for youth that differ from the standards for adults. In *J.D.B. v. North Carolina*, the court found that a child's age must be part of the analysis which determines whether a child is in custody, and thus whether *Miranda* warnings must be given, because a child is more likely than an adult to feel bound to submit to a show of police authority.[9] Differing standards also pervade youths' daily lives—they cannot vote, drive, rent a car, own a gun, drink alcohol, or even work without parental consent. These alternative standards exist for good reason. For example, children are three times more likely to give a false confession than adults, but will be less likely to do so under an attorney's advice.[10] Ensuring that youth are questioned with an attorney present will make the information they provide more accurate by limiting false confessions.

But it is also important to recognize that youth are entitled to the fullest protection of their rights regardless of their innocence. What this bill asks of the Metropolitan Police Department is nothing more than to do their jobs appropriately, which means respecting the rights of all youth in DC. The Constitution already protects against coercion. This bill merely holds police officers accountable by providing a more tangible framework for reducing coercion when officers interact with youth and considers adolescent development to construct requirements that align with our common sense understanding that youth should be treated differently than adults, especially in high pressure situations.

Police Chief Contee has stated that this bill will shield youth from any consequences of criminal actions and limit the ability of the juvenile system to deal with serious crimes.[11] Chief Contee's loaded language indicates that good police work is contingent on coercive tactics. Chief Contee wants accountability for the youth of DC; this bill merely reciprocally requires that the

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[9] *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).
[10] Bluhm Legal Clinic, Wrongful Convictions of Youth (Northwestern University Pritzker School of Law), https://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem/ (last visited Nov. 4, 2021).
[11] *See., Public Hearing on B24-306, the "Youth Rights Amendment Act of 2021," B24-356, the "Strengthening Oversight & Accountability of Police Amendment Act of 2021," and B24-254, the "School Police Incident Oversight & Accountability Amendment Act of 2021,"* (Oct. 21, 2021) (testimony of Robert J. Contee III, Metropolitan Police Department, Chief of Police), at 1, *available at*: https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/release_content/attachments/MPD%20TESTIMONY_10%2021%2021%20hearingb.pdf

police be held accountable for their tactics. Youth in DC may still be held accountable, but their Constitutional rights must be protected along the way. Coercive police tactics like custodial interrogation and pressuring youth to consent to searches are harmful, and disproportionately harmful to Black and Brown youth. To borrow some phrasing from Chief Contee's own testimony, it is risky for the community to have a system that teaches police officers there are no consequences for actions that harm people, and it is especially risky when the harm is against youth.[12]

[12] *Public Hearing on B24-306, the "Youth Rights Amendment Act of 2021," B24-356, the "Strengthening Oversight & Accountability of Police Amendment Act of 2021," and B24-254, the "School Police Incident Oversight & Accountability Amendment Act of 2021,"* (Oct. 21, 2021) (testimony of Robert J. Contee III, Metropolitan Police Department, Chief of Police), at 2, *available at*: https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/release_content/attachments/MPD%20TESTIMONY_10%2021%2021%20hearingb.pdf

Written Testimony of Colin Miller in Support of B24-0306

Adolescents are among the most vulnerable populations with respect to false confessions.[1] Research has shown that 49% of false confession cases involving defendants exonerated by DNA evidence were from people under 21 years of age.[2] According to the National Registry of Exonerations, 36% of individuals exonerated for wrongful convictions involving false confessions were 18 years or younger at the time of their alleged crime.[3] Conversely, the percentage is 9.88% for those above the age of 19.[4]

Teenagers are also more likely than adults to waive their *Miranda* rights.[5] This may result from the likelihood that adolescents will misunderstand the *Miranda* warning.[6] In one study, of the 66 DNA exonerations involving false confessions, 23 involved juveniles and at least 22 of those juveniles were mentally impaired or mentally ill.[7] All 66 of these juvenile exonerees had waived their *Miranda* rights.[8] Courts have also questioned the ability of teenagers ability to invoke their constitutional rights, particularly regarding their ability to waive their rights voluntarily, knowingly, and intelligently.[9]

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[1] The National Registry of Exonerations, *available at* https://www.law.umich.edu/special/exoneration/Pages/about.aspx.
[2] *See* David Coffey, *Why do people confess to crimes they didn't commit?*, Livescience (2020), *available at* https://www.livescience.com/why-people-fasely-confess-to-crimes.html.
[3] The National Registry of Exonerations, *supra note* 1.
[4] *Id.*
[5] Jason Mandelbaum and Angela Crossman, *No illusions: Developmental considerations in adolescent false confessions*, CYF News (2014) (Citing Redlich, Silverman, Chen, & Steiner (2004), *available at* https://www.apa.org/pi/families/resources/newsletter/2014/12/adolescent-false-confessions.).
[6] Viljoen, J. L., Klaver, J., & Roesch, R., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, *Law and Human Behavior, 29*(3), 253, 254 (2005).
[7] Brandon Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 400 n.16 (2014).
[8] *Id.* at 402.
[9] Oberlander, L. B., & Goldstein, N. E., *A review and update on the practice of evaluating Miranda comprehension*, *BEHAVIORAL SCIENCES & THE LAW, 19*(4), 453-461 (2001).

Unsurprisingly, adolescents are more likely to base their decisions on immediate, rather than long-term, consequences.[10] This suggests that teenagers will likely make different decisions than the ones they would make as adults.[11] Experts attribute juvenile false confessions to the use of police interrogation tactics intended for adults.[12] Specifically, Locke Bowman, the Executive Director of the Roderick and Solange MacArthur Justice Center at the Northwestern University School of Law, has found that "[t]he interrogation process is inherently coercive. It is psychologically difficult [] even for strong, intelligent people to withstand."[13] According to Bowman, this potential for coercion is even higher when such strategies are "impose[d upon] an individual who is young, who is intellectually vulnerable, the capacity of the person to withstand the process is easily overcome."[14]

It is for these reasons that I submit this written testimony in support of B24-0306, which would "make any interrogation of a person under 18 years of age by law enforcement, during a custodial interrogation, inadmissible in court unless given a reasonable opportunity to confer with an attorney." There is simply too high of a risk that juveniles will falsely confess to allow law enforcement officers to interrogate juveniles without giving them a reasonable opportunity to confer with counsel.

Sincerely,

Colin Miller
Professor of Law
University of South Carolina School of Law

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[10] *See generally*, Grisso, T., Steinberg, L., Woolard, J. et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, LAW HUMAN BEHAVIOR 27, 333-363 (2003).

[11] *Id.*

[12] *Why are Youth Susceptible to False Confessions*?, Innocence Project (2015) (Listing the tactics as coercion, false promises of leniency, and deception about evidence.), *available at* https://innocenceproject.org/why-are-youth-susceptible-to-false-confessions/.

[13] *Id.*

[14] *Id.*

Greetings,

My name is Sunny Kuti, the Youth Organizer with the National Reentry Network for Returning Citizens. I am writing to express my support for the Strengthening Oversight and Accountability of Police Amendment Act. I think the bill is a step towards tackling the most urgent issues as far as police reform is involved. I believe that the same, and if not more, oversight and accountability are achievable for correctional officers in the D.C. Department of Corrections(DOC). While I was incarcerated in D.C., I had some bad experiences with correctional officers.

D.C. DOC's correctional officers have entirely too much power and control over people who are housed in the correctional facilities. With no mechanism to hold correctional officers accountable, they are allowed to **disrespect and assault** a person housed in a correctional facility. The way that correctional officers treat people in DOC's facilities is **unconstitutional**. On too many occurrences, correctional officers disrespect and assault people and have no one to hold them accountable. For instance I remember a particular situation when a correctional officer blatantly disrespected an inmate by calling him out by his name then daring him to stand up for himself. Once the man did stand up for himself he was falsely accused of assaulting an officer, then he was brutally assaulted by a gang of officers.

If a person finds themselves in this situation where a correctional officer has assaulted or disrespected them, the only way to have something done about this is by filing a grievance form. **The DOC policy states that one should handle a problem with a correctional officer by going through the grievance process,** but the keyword is ***should***. **Way too often when a person files a grievance form, the form is either thrown away and mishandled** by the officers or never receives a response. This is corroborated by the District of Columbia Office of the Inspector's(OIG) Report on the DOC. The OIG reported that of 453 use-of-force complaints filed against staff at the DOC, all 453 of those complaints were mishandled by the DOC.[1] This is a lose-lose situation for a person faced with these types of situations. When a grievance **is filed,** a person is either told there is nothing that can be done or that the person filled it the wrong way. People filling out forms wrong is often a problem for people in the DOC because the proper way to file a form is often not in the inmate hand book**. In my own personal experience I went through the first few steps of filing a grievance just for nothing to be done about the situation and ironically the situation got worse.**

So now, imagine *you are being assaulted or disrespected without a real opportunity to handle the situation and prevent more assaults.* If all this is constitutional and fair for a human, then

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[1] District of Columbia Office of the Inspector General, *" Department of Corrections: DOC's Current Procedures for Receiving, Investigating, and Resolving Use of Force Incidents Are Not Operating Effectively,"* OIG Project No. 20-1-26FL, p.3(July 2021) Can be accessed: http://app.oig.dc.gov/news/view2.asp?url=release10%2FOIG+Final+Report+No%2E+20%2D1%2D26FL+%2D%2D+Department+of+Corrections+Use+of+Force%2Epdf%0A%0A&mode=release&archived=0&month=00000&agency=0

please give a better definition of constitutional for me to understand. Correctional officers need to have the same independent oversight as police officers. The Strengthening Oversight and Accountability of Police Amendment Act is a small but much needed change towards better treatment of our people.

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

B24-0356, THE "STRENGTHENING OVERSIGHT AND ACCOUNTABILITY OF POLICE AMENDMENT ACT OF 2021"

Written Testimony of
CEO Action for Racial Equity

For the
Council of the District of Columbia
Committee on the
Judiciary & Public Safety's
Hearing on Thursday, October 21, 2021
Ward 6 Councilmember Charles Allen, Chairperson

Submitted: Friday, November 5, 2021

Executive Summary

CEO Action for Racial Equity (**CEOARE**) is a Fellowship of over 100 companies that mobilizes a community of business leaders with diverse expertise across multiple industries and geographies to advance public policy in four key areas — healthcare, education, economic empowerment and public safety. Its mission is to identify, develop and promote scalable and sustainable public policies and corporate engagement strategies that will address systemic racism, social injustice and improve societal well-being.

We write the Council today to voice our support for meaningful police reform. CEOARE is actively advocating across the country for the creation of police misconduct registries that can provide law enforcement agencies with complete access to candidates' misconduct records. This access will support the hiring of certified, qualified and capable individuals as officers, and assist in preventing officers who have been terminated for misconduct or resigned in lieu of termination due to misconduct from being rehired by other law enforcement agencies. CEOARE supports the establishment of the Officer Disciplinary Records Database (**the Disciplinary Database**) as included in District of Columbia (**DC or the District**) Bill 24-0356 (**the Bill**), for the following key reasons:

- The Bill builds on and proposes enacting into law many of the recommendations from the Decentering Police to Improve Public Safety, A Report of the DC Police Reform Commission (**Police Reform Commission)**, April 1, 2021, delivered to the Council of the District of Columbia[1], (**Police Reform Commission Report**), specifically, the Disciplinary Database.
- The proposed Disciplinary Database will promote police accountability and professionalism, in addition to improving transparency of officer misconduct and helping to rebuild the public's confidence and trust in the police officers that they interact with in their communities.

While CEOARE supports the Disciplinary Database as proposed, we ask the Council to consider the six recommendations outlined below to strengthen the proposed reform measures:

- Establish requirements for reporting to the Disciplinary Database on a prescribed schedule with penalties for noncompliance;
- Include records in the Disciplinary Database related to officers who resign in lieu of termination while a misconduct claim is pending;
- Include officer and complainant demographic data as part of the disciplinary record, consistent with collection of such demographic information under Section 1-301.191 of the DC Code, as established by the DC Neighborhood Engagement Achieves Results (NEAR) Act[2] ;
- Revise and/or clarify the DC Metropolitan Police Department (**MPD**)'s policy of automatically purging disciplinary actions from officers' personnel files, as recommended in the Police Reform Commission Report[3], and further, set forth

[1] A Report of the DC Police Reform Commission, April 1, 2021, "Decentering Police to Improve Public Safety"; See also, DC Police Reform Commission - Condensed List of Recommendations, April 1, 2021
[2] Code of the District of Columbia, § 1–301.191(c)(6)
[3] Police Reform Commission Report recommended that MPD "revise its policies and stop purging disciplinary actions automatically from officers' personnel files after a set number of years." April 1, 2021 at 174.

how long such records should be publicly accessible through the Disciplinary Database;
- Establish an audit schedule; and
- Mandate screening of candidates for hire by the MPD and other DC police agencies against the Disciplinary Database and other misconduct databases, as available.

CEOARE appreciates the Council's consideration of our full written testimony on the following pages, which include a more detailed explanation of our six recommendations.

Support for the Disciplinary Database in Bill 24-0356, Strengthening Oversight and Accountability of Police Amendment Act of 2021

Accountability and transparency help build trust between the police and the communities they serve, and we believe these principles should serve as the cornerstone to equitable reform efforts. For the first time in 27 years, Americans' public confidence in law enforcement dipped below 50%, falling five (5) percentage points to 48% between 2019 and 2020[4]. **Accessibility to police officers' disciplinary history, including legal history related to misconduct, would be a critical step to restoring public confidence in the institution of policing.** Without trust and accountability, a police department cannot effectively do its job. Failure to keep communities safe is an unacceptably tragic outcome.

We commend the Council for establishing the Police Reform Commission to study and improve public safety in the District, including proposing solutions to address police accountability and transparency. It is encouraging that the findings of the Police Reform Commission Report serve as the basis for the police reform measures proposed in Bill 24-0356. **Specifically, we appreciate the Bill's inclusion of a publicly accessible police misconduct registry because it will help increase accountability and transparency in policing.**

We also applaud the MPD for recently submitting its report on disciplinary actions, grievances, and Equal Employment Opportunity investigations for calendar years 2016 through 2020, RC24-0075 (**the MPD Disciplinary Report**). The MPD Disciplinary Report is a positive step towards increasing transparency as it demonstrates that MPD does take action against officers that violate department policy. But we believe the disclosure of additional information, such as, complete data on the officers involved, the circumstances around the misconduct and the results of any investigation, would collectively enable the development of evidence-based solutions for improving public safety. For example, the MPD Disciplinary Report highlights that between 2016 and 2020, 45 MPD officers were terminated for misconduct including for personal criminal activity and unnecessary or wanton force. However, the MPD Disciplinary Report does not identify the name of the officers, resulting in the potential for the individual to be hired by another law enforcement agency that would have no knowledge of the applicant's history of misconduct.

Our nation remains impacted by the tragic killings of George Floyd, Breonna Taylor, Antwan Gilmore and many other Black Americans. These killings have exposed the significant gaps that exist in the application of equality, equity, and justice for all Americans. Today, we recognize the efforts of Chairman Mendelson and other Councilmembers for their work and intentionality in including the Disciplinary Database provisions in Bill 24-0356.

The Disciplinary Database is also commendable because it promotes "front-end" accountability, a principle advanced by the New York University School of Law Policing Project[5] and endorsed in the Police Reform Commission Report.[6] For some, accountability often means holding individuals accountable for their actions, which typically occurs after something has gone wrong. In the case of public safety, this often involves the loss of lives or serious bodily injury. We agree that it is critical to hold individual officers and law

[4] Brenan, Megan, Gallup, August 12, 2020, ""Amid Pandemic, Confidence in Key U.S. Institutions Surges"
[5] Policing Project New York University School of Law, June 1, 2020 "Our Statement Regarding Policing in the United States".
[6] Police Reform Commission Report, April 1, 2021 at 157-58.

enforcement agencies responsible for their actions and wrongdoings. But equally paramount to meaningful police reform is:

> *establishing rules, regulations, and policies on the front end (before things go wrong), in a way that is transparent, evidence-based, and provides an opportunity for public input and debate. [This allows the] public to have a real voice in how it is governed. These, after all, are the very most basic elements of democracy.*[7]

The Council's proposed publicly accessible Disciplinary Database will, if enacted, help increase transparency around the system of police hiring, data collection and the officer discipline process. A registry will help shed sunlight on such structural issues as hiring practices, complaint handling and discretionary authority over officer terminations, suspensions and sanctions. Transparency of process and outcomes is key to informing the public safety solutions. **"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants."**[8]

Recommendations

While the Disciplinary Database as proposed in Bill 24-0356 improves upon the current state of transparency and accountability in policing, we believe there are opportunities to strengthen the reform measures. Based on our review of leading practices in state-level police reform efforts, we recommend the following:

Data Collection

- **Records should be submitted regularly with penalties for noncompliance** – The Bill should include language that will require MPD and other DC police agencies to submit data to the Disciplinary Database on a set schedule. There is currently a DC law requiring MPD to submit an annual misconduct and grievances report (DC Code § 5–1032)[9] and the law has no penalties for noncompliance. However, eight years passed between MPD's submission of its most recent report (RC24-0075) and its prior report (RC20-0010)[10], despite the annual reporting required under existing DC law. Accordingly, the pending DC Bill should include penalties for any agency that does not comply with the proposed registry reporting requirements. Other jurisdictions have introduced legislation setting both a schedule for data submissions and penalties for noncompliance.[11] Incentives to comply will be critical to ensuring the effectiveness of the proposed Disciplinary Database. A database with no data, incomplete or stale data, or inaccurate data would be misleading, undermine the intended transparency objectives of the law, and may result in harm to the public.

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[7] Policing Project New York University School of Law, June 1, 2020
[8] Brandeis, Louis, D., Harper's Weekly, December 20, 1913, Other People's Money-Chapter V: "What Publicity Can Do"
[9] Code of the District of Columbia § 5–1032
[10] RC20-0010 - Correspondence from Metropolitan Police Department- "Metropolitan Police Department's Report on Disciplinary Actions and Grievances for Calendar Year 2012", March 7, 2013
[11] George Floyd Justice in Policing Act of 2021, H.R. 120, 117th Congress (GFJPA) which passed the US House of Representatives in March 2021, but has stalled in the U.S. Senate, requires applicable federal, state and local law enforcement agencies to submit information to a registry every 6 months. See Section 201(c) and (d). GFJIPA conditions a law enforcement agency's receipt of federal funds on the agency's compliance with the reporting requirements under the law. South Carolina Senate Bill S124 also proposes authorizing the Law Enforcement Training Council to take punitive action against a law enforcement agency that refuses to implement and enforce compliance with the new training standards including issuing civil fines and excluding agencies from grant funding.

- **Disciplinary Records should include any records associated with or related to an officer's resignation from the department** – Where officers resign prior to completion of a misconduct investigation, there may be no record of the incident. Law enforcement executives recommend closing this loophole to prevent "bad cops from resigning their way out of accountability"[12]. California SB 16[13] was recently enacted, requiring, among other reforms, release of records if an officer resigns before a misconduct investigation is complete. For these reasons, we believe the Disciplinary Database should require the entry of records involving officers who resign for misconduct in lieu of termination.
- **Demographic information should be reported as part of the discipline record –** The Bill should also require as part of a disciplinary record, the **demographics** of officers[14] and any complainants[15], as advanced by advocacy organizations and some states. The required data elements can be similar to those currently collected for felony crime suspects and victims in DC.[16]

Record Retention

- The Police Reform Commission recommended that MPD "revise its policies and stop purging disciplinary actions automatically from officers' personnel files after a set number of years[17]." We agree. The Bill should require that MPD revise or clarify its policies to match their stated practice of retaining "records of all disciplinary actions resulting from sustained misconduct […] 'regardless of passage of time'" as told by Mr. Marvin Haiman to the DC Police Reform Commission.[18] The Bill should also set forth the amount of time that disciplinary records should be publicly accessible through the Disciplinary Database.

Data Quality

- The Bill should require an **audit** of the accuracy, completeness and timeliness of inputs to the Disciplinary Database on a regular basis. The Alabama legislature passed a bill in 2021 creating a Law Enforcement Officer Employment Database and required the state Peace Officers' Standards and Training Commission to "randomly audit law enforcement agencies' compliance with the reporting requirements" of the law. [19]

Utilizing Other Police Misconduct Databases

- **Screen prospective law enforcement applicants in applicable misconduct databases –** The Bill should mandate that MPD and other DC police agencies verify all applicants' certification status with the National Decertification Index[20] (NDI), the national database that tracks, on a voluntarily basis, decertification of law enforcement officers by the applicable state standards and training agency. This mandate would be similar to

[12] Safe Communities Institute, (May 17, 2021). The LEWIS Registry – A Q&A with Dr. Erroll Southers. USC Price Safe Communities Institute; *See also,* Troy Riggs, Former Public Safety Director Denver, CO and Former Public Safety Director and Chief of Police, Indianapolis, IN, interview with CEOARE, August 2021, stating "*Complete and publicly available data are key to creating meaningful police misconduct registries. Communities have a right to know whether officers, entrusted with protecting the public, have been terminated, resigned for any reason, or have a pending investigation against them. Transparency is the path to building trust and accountability in policing*."
[13] CA SB 16, 2021-2022, (California, 2021); and Press Release - State Senator Nancy Skinner (D-CA), September 30, 2021, Governor Signs SB 16 to Expand Access to Police Records.
[14] TX H.B. 3723, 87th Reg. Sess. (Texas 2021).
[15] NYU School of Law Policing Project Draft Transparency Statute, VII. 2., February 8, 2021
[16] Code of the District of Columbia § 1-301.191(c)(6)
[17] Police Reform Commission Report at 174
[18] Police Reform Commission Report at 175, citing footnote 698
[19] AL H.B. 411, 2021 Reg. Session, https://legiscan.com/AL/bill/HB411/2021
[20] About NDI, International Association of Directors of Law Enforcement Standards and Training, https://www.iadlest.org/our-services/ndi/about-ndi

Subtitle K of DC Act A23-0336, enacted in July 2020, which makes an applicant ineligible for appointment as a sworn member of the MPD if misconduct or disciplinary reasons were the cause of a previous termination or resignation from another law enforcement agency.[21] Many states have proposed or enacted the requirement to screen applicants in applicable state registries[22] and the NDI[23]. MPD and other police agencies should be required to check with outside jurisdictions/states, as appropriate, to see whether a police misconduct database is maintained and, if so, to check such database before hiring a candidate who has prior law enforcement experience.

Closing

As business leaders, our businesses prosper where there are thriving communities, but most importantly, as business leaders we have a responsibility to our employees and customers to help make sure that they live and work in safe, strong and healthy communities. We are choosing to use our voice to stand alongside the millions of Americans calling for meaningful police reform. We are also joined in our support of the Officer Disciplinary Records Database by the ACLU of DC. We are stepping up together because mere acknowledgement of systemic societal racism is not enough. Action is needed.

Today, we call on the Council to work quickly to make these important improvements and move to establish the Disciplinary Database. Thank you for considering our testimony and for your leadership and commitment to transforming policing in the District. Passing this Bill will set a meaningful example to the rest of the country and help preserve the safety of and create equity specifically for the over 300,000 Black Washingtonians and the thousands of other Black Americans who work in or travel through DC each day.

Thank you.

[21] § 5-107.01(f) < D.C. Code < D.C. Law Library < Reader (dccouncil.us)
[22] FL H 1529, IL HB 3653 and CA SB 16
[23] MA Session Law - Acts of 2020 Chapter 253 No. Section 3 and NC S300, Section 15

Dear Councilmember Charles Allen and the Committee on Judiciary and Public Safety,
My name is Lori Pitts, and I am writing to you today to urge you to pass the “Strengthening Oversight and Accountability of Police Amendment Act of 2021.” Although briefly mentioned in the bill, the Council must pass the bill with amendments to include correctional officers in the D.C. Department of Corrections(D.C. DOC) under supervision of the Deputy Auditor for Public Safety in the Office of the Auditor for the District of Columbia, and under the jurisdiction of both the Office of Police Accountability and the Police Accountability Board that are created under this bill.
On October 13th, the conditions of the D.C. Department of Corrections became national headlines as the D.C. Director Quincy Booth and Warden Wanda Patten were held in civil contempt of court. Mr. Worrell, the incarcerated individual at the center of the case has had a broken wrist for six months, and has been awaiting the D.C. DOC to approve his surgery, as recommended by a physician in June. Judge Lambreth found the behavior of the D.C. DOC to be “suspicious” and not just “inept or a bureaucratic shuffling of papers.” It should be emphasized that Mr. Worrell is a white man, and a participant of the January 6th insurrection, therefore his platform is much larger, and his media presence provides him much more national visibility than the other residents in the jail, most of whom are Black. Although survivors, attorneys representing clients in the D.C. jail, and local advocates have testified on similar neglect over the D.C. DOC’s operation, the D.C. DOC will be brought to light in a new investigation by the United States Attorney General, for its possible violation of people’s civil rights.
The time to act is now. The D.C. DOC has operated largely unobserved for 45 years. The D.C. DOC relies on an internal administrative process to report and audit its behaviors and base it's success on its own internal metrics. However, when an independent investigation does occur, these processes in the jail seemingly fail to protect the individuals who are confined there. For example, in the 2021 Office of Inspector General(OIG) Report of the D.C. DOC in 2021, the OIG found that the D.C. primarily relied on their internal administrative oversight process to review and close the 453 use-of-force incidents. Of the 453 use-of-force incidents that they reviewed, the OIG found that the D.C. DOC mishandled **all** of them. Although, the Correctional Information Council(CIC) does conduct investigations of the D.C. DOC, however, it has been reported by people inside the jail, that the D.C. DOC changes its behavior for these investigations, and the reports of the CIC do not have any enforcement behind them to result in actual change. This is why independent oversight is so necessary.
Therefore, I call upon you and the Committee to pass the “Strengthening Oversight and Accountability of Police Amendment Act of 2021” to provide meaningful oversight of the D.C. DOC and keep the correctional officers accountable for the treatment of individuals in the jail. The time is now, as the nation watches us, to be a model of criminal justice reform and center public safety in the District, than to continue to harm people in our jail, particularly as we are in the spotlight.
Sincerely,
Lori Pitts
Ward 5

Statement Submitted To
The Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chair

On Youth Rights Amendment Act B24-0306

Submitted
Friday, April 16, 2021
By
Josephine Ross
Professor of Law
Howard University School of Law
Jross@law.howard.edu
&
Kaylah Alexander, law student
Howard University School of Law

We write in support of the Youth Rights Amendment Act of 2021 and propose an amendment to the bill that will immensely improve the importance and reach of the legislation. Admirably, the current bill would prohibit "consent" searches of those under the age of 18. As the bill recognizes, "consent" is never truly consensual given the power differential that exists between a police officer and civilian. As this testimony will show, the power differential does not disappear on someone's eighteenth birthday.

Legally, police officers do not need consent to search. Without consent, police still have the authority to search our bodies, bags, automobiles, and homes. However, police may only do so when they have facts that would reasonably justify the intrusion. To go into our pockets or handbags or the trunk of our car, police need probable cause to believe there is evidence of contraband or wrongdoing in the place to be searched. To search our homes, police need a warrant that sets forth probable cause. To frisk of our bodies, or request people to lift their shirts, police need something less than probable cause, namely, reasonable suspicion that the civilian is armed and dangerous. But consent creates an end-run around these rules. Police may claim that a search was consensual when they lack proper justification. Most civilians cooperate fully with police, saying yes to whatever officers' request, and then this cooperation excuses unreasonable searches and racial profiling, immunizing police conduct that we want to eliminate from the District.

We propose abolishing consent as an excuse for otherwise improper searches regardless of age, except when the person has had an opportunity to confer with their lawyer. Adults and youth alike should not need to refuse a police officer who wants to look in our pockets in order to preserve fundamental constitutional rights. In fact, the proposed amendment would instill a spirit of cooperation with police since people would no longer be penalized for cooperating fully with officers.

The DC Police Reform Commission recommended this change to DC law in their thorough and well-reasoned 2021 Report. The Commission explained that the data shows that consent searches yield little in the way of public safety and that benefit is far outweighed by the negative impact on the thousands of searches of innocent civilians:

> MPD has only recently begun to make data available on the scope and efficacy of its consent searches during stops. The data show that, between July 22, 2019 and December 31, 2020, MPD officers conducted 4,427 consent searches of persons. Only 2.3% resulted in the seizure of a gun and only 9.5% resulted in the seizure of any evidence of a crime. And those figures assume that officers reported all of their consent searches of individuals (including, e.g., all the times they asked someone on the street to lift their shirt and show their waistband), which is doubtful.[1]

Data also confirms that police exercise consent searches in a racially problematic manner.

> MPD officers are also conducting a disproportionate number of consent searches of Black people. From July 22, 2019 through December 31, 2020, 92% (4,779 out of 5,188) of all consent searches were of Black people. These figures confirm the concerns expressed by the District's Office of Police Complaints in 2017: "This disproportionate use of consent searches causes concern for the Police Complaints Board that the practice is undermining community trust in the police, especially in areas with substantial minority populations."
>
> . . . There is no justifiable reason to permit a practice that is not only inherently coercive and intrusive, but also ineffectual and prone to extreme racially disparate effects. By enacting legislation to prohibit consent searches altogether, the Council will properly require officers who wish to conduct searches to properly focus on safety, rather than on targeting individuals who are likely to consent.[2]

Elsewhere in the Report, the Commission put it more bluntly: "The Council should correspondingly pass legislation curtailing several invasive, ineffectual enforcement tactics. . . It should prohibit consent searches, given that voluntary consent is an oxymoron in the policing context and that residents, especially in over-policed communities, rarely feel sufficiently free and safe to voluntarily consent."[3]

Multiple racial implications flow from the consent loophole. First, there's the unequal application of so-called "consent" searches that the Report documented. Second, the consent loophole allows illegal racial profiling to flourish by pretending that those targeted wanted to

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[1] Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission (April 1, 2021), available at https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf.

[2] *Id*. at p. 104-05 [of Decentering Police]. This follows Recommendation 8 that reads: "The Council should modify Section 110 of Act 23-336 ("Limitations on Consent Searches") by prohibiting all consent searches—warrantless searches permitted based solely on the consent of the individual whose person or property is searched—and, in criminal cases, should require the exclusion of any evidence obtained from a consent search."

[3] *Id* at p. 21 [of Decentering Police] (The report goes on to state: "And it should allow 'pretext' stops—stops for minor offenses when the actual purpose is to conduct a fishing expedition on a more serious offense—only with supervisory approval and only to investigate violent crimes.")

waive their rights. Third, black and brown civilians are more likely to be afraid of police violence, increasing the power imbalance between officer and civilian. As screenwriter Lena Waithe told Jelani Cobb, she pays attention to police violence against black bodies. "I am like every other black person – I am traumatized every time these stories come out. Every time these stories hit our phones, our Instagram feed, our Twitter, our TV, a piece of us dies because we know that we could be next."[4] This is not a child or teenager afraid of police, but a grown woman.

Thanks to social media, images of police brutality are shared widely. When Eric Garner refused to consent to a search, he was tackled and placed in a deadly chokehold by members of the New York Police Department. Thousands of people saw him plead with officers to "please, don't touch me." [5] No-one who watched that video or other similar videos will ever feel safe saying no to a consent search, especially black men. In one study of black men from California who had seen media accounts of the 2018 shooting of Stephon Clark, all the participants reported what researchers termed "psychological anguish" that included the loss of "feeling safe in their existence."[6]

This fear of police crosses class status as well as age boundaries. The "consent" search captured on the officer's body camera in October 2020 was both chilling and typical. Beverly Hills police stopped a Black Versace consultant named Salehe Bembury after he jaywalked.[7] One officer asked the executive if he minded putting his hands behind his back so police could pat him down. Mr. Bembury allowed them to do whatever they asked. Following the "consent" frisk, officers received his permission to search the executive's wallet, thumbing through it for identification.

To obtain the Versace executive's legal "consent," officers followed the script set out by the Supreme Court interpreting the Fourth Amendment. The Beverly Hills officers did not raise their voice nor brandish their guns, and they used practiced phrases like "you don't mind if I take a look."[8] Although the man's cooperation might pass as voluntary consent in a courtroom, nothing

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[4] Cobb, Jelani, "Lena Waithe on Police Violence and Queen & Slim." The New Yorker Radio Hour. Podcast audio, December 16, 2019, www.newyorker.com/podcast/politicalscene/lena-waithe-on-police-violence-and-queen-and-slim

[5] Although the police later said they planned to arrest Eric Garner, they lacked probable cause for the arrest or the search. To legally find out if Eric Garner carried untaxed cigarettes, he needed to consent to the search. JOSEPHINE ROSS, A FEMINIST CRITIQUE OF POLICE STOPS (Cambridge University Press, 2021) at 127-128.

[6] Allen E. Lipscomb et al., "Black Male Hunting! A Phenomenological Study Exploring the Secondary Impact of Police Induced Trauma on the Black Man's Psyche in the United States," Journal of Sociology and Social Work, 7 (2019): 11–18.

[7] Sarah Moon, *Versace executive accuses Beverly Hills police of racial profiling after jaywalking stop*, CNN (Oct. 7, 2020, 8:03 PM), https://www.cnn.com/2020/10/07/us/versace-exec-accuses-beverly-hills-police-racial-profiling/index.html (the stop of Salehe Bembury occurred on October 1, 2020); *see also* Priya Elan, Versace executive accuses Los Angeles police of racial profiling, THE GUARDIAN (Oct. 10, 2020), https://www.theguardian.com/fashion/2020/oct/10/versace-executive-salehe-bembury-accuses-los-angeles-police-of-racial-profiling; Video: *Versace VP gets stopped, pat down asked about weapons for Jaywalking Beverly Hills police*, YOUTUBE (Oct. 3, 2020), https://www.youtube.com/watch?v=SyFU5ne7LYo.

[8] I write "arguably" because certainly there are judges who would allow Mr. Bembury to proceed with a civil rights lawsuit to proceed based on the violation of his Fourth Amendment rights and the equal protection clause. *Id*. at Video: *Versace VP gets stopped, pat down asked about weapons for Jaywalking Beverly Hills police*, YOUTUBE (Oct. 3, 2020), https://www.youtube.com/watch?v=SyFU5ne7LYo. (An officer can be heard asking "you

here was truly "consensual." Mr. Bembury did not truly wish to have his body touched nor his wallet inspected. There is too much power differential between officer and civilian for consent to ever be truly voluntary. The viewer knows there is no true choice here given everything we know about how police punish people who do not fully cooperate. These punishments can take various forms, including the application of gratuitous physical force, or a "contempt of cop" arrest, where police might claim the person failed to follow an order or disturbed the peace or resisted arrest.

Cooperating fully, Mr. Bembury was soon permitted to leave. But this should not diminish the harm of this so-called "consensual encounter." There's the stigma of being selected as a potential criminal, the fear of knowing that American police kill one thousand people a year, and the sense of powerlessness as a stranger puts his hands over one's body. Race and racial profiling are on full display here, from the officer's selection of the executive for investigation and search, to the way Mr. Bembury responds, and the particular stigma implied. Victim blaming compounds these harms, an inescapable offshoot of the consent doctrine. For example, if the police had found some contraband item during the search, a judge would allow the evidence found to be submitted against him at trial based on the consent loophole. In essence the law would instruct Mr. Bembury that the ruling against him was his own fault, based on his own decision to give up his constitutional rights during the encounter.[9] This is true in the District of Columbia where I practiced in DC Superior Court with my clinical Howard law students.

As I wrote in my book, A Feminist Critique of Police Stops (Cambridge University Press 2021), feminists showed how the power imbalance in the workplace between a boss and an employee makes it difficult if not impossible for employees to say no, and the law should acknowledge that there is no such thing as true consent in these situations. Police possess more power over civilians than a boss in one's workplace. As Mr. Bembury's ordeal illustrates, consent is a fiction that the Supreme Court designed to give the police easy, gratuitous access to bodies and property. The book also draws the parallel to consent within sexual assault laws.

> In 2018, New York State recognized that any sex with an on-duty officer is inherently coercive. Under the new law, police officers can't argue consent when they're accused of on-duty rape. The law was inspired by a rape allegation against uniformed police officers. Before the alleged rape occurred, one of the officers asked the woman to lift her shirt to see if she was hiding drugs: Was this a consensual exercise? Eliminating the consent defense for sex recognizes that police hold all the cards. That's an excellent step, but then why should the law allow that officer to claim that the civilian consented to a search of her body or purse? The situations involve the same unfair power differential. In both situations, police have the power to let you go or charge you, what to charge, and whether to be rough or gentle. Ultimately, civilians submit to police because it's the safest thing to

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said I could search you, right?" while halfway through a pat down). *See United States v. Drayton*, 536 U.S. 194, 210 (2002) (6-3 decision) (Souter, J.., dissenting) ("The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of immediate power is unmistakable.") *See also* Janice Nadler, *No Need to Shout*, 2002 SUP. CT. REV. 153.

[9] For more on how the consent loophole constitutes victim-blaming, see generally *See* ROSS, A FEMINIST CRITIQUE OF POLICE STOPS, Chapter 3; Josephine Ross, Blaming the Victim, 26 Harvard Journal of Racial and Ethnic Justice 1 (2010).

> do. Consent within the Fourth Amendment suffers from the same legal myopia as consent within rape law. In both instances, courts often blame the victim for their fate.

There is no difference between the reasoning in the current bill that prevents the consent loophole when police search youth and the amendment proposed here. Children should be applauded – not punished – for submitting to police requests. Same for adults. Children will view police as authority figures, but so do adults. Children may not know the harm that will flow from displeasing a police officer, so they may be more insulated than adults, who understand how a retaliatory arrest might cost them time and money and collateral consequences.

The legislative language needed here is relatively straightforward. In testimony to the City Counsel in 2020, we appended a draft of the language that the Council could use to amend the current DC law and make policing fairer in the District. Please see More Than A Plaza: Eliminate Consent Searches for more information (appendix): https://static1.squarespace.com/static/5edff6436067991288014c4c/t/5f81728032d45901b878f85f/1602318977141/Eliminate+Consent+Searches.pdf

Shanni Alon

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Bill 24-0254: School Police Incident Oversight and Accountability Amendment Act of 2021
October 21, 2021

My name is Shanni Alon, a GW alumna and current GW Law student living in Ward 6. I have previously assisted at an after-school program with Little Friends for Peace at the Perry School in Ward 6 working with elementary school students tutoring them and working on peace building skills. I submit this written testimony in support of Bill 24-0254, the School Police Incident and Oversight Accountability Amendment Act of 2021. I further offer two amendments that I believe will help achieve the bill's goals.

Introduction

Over the past twenty years, police have played an ever increasing role in school discipline and safety across the country. The District is no exception having implemented police in schools in 2005.[1] Each year there are hundreds of interactions between police and students on school campuses, some of which result in arrest and all of which result in trauma. Despite current collection and reporting requirements on the Metropolitan Police Department and schools, there remains a lack of transparency around what is happening to and with students on campus. Through the 2021 budget process, the DC Council significantly limited when and why students could be arrested at school and required the gradual sunsetting of the School Safety Division. The School Police Incident Oversight and Accountability Amendment Act of 2021 would increase transparency surrounding law enforcement involvement in schools.

The School Police Incident Oversight and Accountability Amendment Act of 2021 currently before the Council is part of a greater vision of creating police free schools in the District of Columbia.[2] This furthers the work the Council has already started—limiting arrests on campus and sunsetting MPD's School Safety Division. To achieve this vision, accurate and thorough

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[1] *Decentering Police to Improve Public Safety: A Report of the DC Reform Commission*, DC Police Reform Commission, 67 (2021) ("DC Police Reform Commission Report") https://dccouncil.us/police-reform-commission-full-report/.

[2] New York City's school system, the biggest school district in the US, is beginning to remove police from schools. About 5,000 school safety agents will be transferred to the supervision of New York City's Department of Education from the NYPD. Sahalie Donaldson, *NYC is Moving Almost 5000 School Safety Agents Out of the NYPD*, City & State New York (Aug. 30, 2020) https://www.cityandstateny.com/policy/2021/08/nyc-moving-almost-5000-school-safety-agents-out-nypd-will-help-calm-fears-about-policing-schools/184973/. Additionally, 33 school districts have eliminated police officers in schools and others have altered their relationship with security. There has been a refocusing on restorative justice and other services which would mitigate and de-escalate issues, such as mental health services, social workers, guidance counselors, and the like. Sarah Schwartz, et al., *These Districts Defunded Their School Police. What Happened Next?*, Education Week (June 4, 2021) https://www.edweek.org/leadership/these-districts-defunded-their-school-police-what-happened-next/2021/06.

data is necessary to understand the dynamics of MPD and the schools, and the various situations that arise resulting in police interference in schools.

Historical trends show that police presence in school disproportionately targets students of color and students with disabilities.[3] Students of color are more likely to attend schools with fewer resources, such as adequately trained school staff and guidance counselors, and are more likely to attend a school with a police officer.[4] In these types of schools, a minor school violation is more likely to quickly escalate because law enforcement is used to address discipline rather than trained staff.

It was reported that across the US during the 2017-2018 school year, 36% of elementary schools, 67.6% of middle schools, and 72% of high schools reported having a sworn officer on campus who routinely carried a firearm.[5] In 1975, only 1% of US schools had a police officer.[6] There is no evidence indicating that police presence in schools improves safety. The presence of law enforcement in schools can be traced to racist intentions during desegregation though many try to correlate the incident of school shootings to the increased presence of law enforcement in schools.[7]

In DC public schools, there is on average one security guard for every 165 students in contrast to one social worker for every 254 students, one counselor for every 352 students, and one psychologist for every 529 students.[8] Further, schools where a majority of students are people of color have more police officers, metal detectors, K-9 units, and military-grade weapons; this leads to more arrests in schools.[9]

DC Police Reform Commission's Report advocated a return to normal pushing for the reestablishment of police free schools. In support of this policy recommendation, the Commission advised a more "holistic public health approach to school safety" which would replace the current policing infrastructure [10] and limit the opportunity for school-based arrests[11]. This approach would create a safe and welcoming environment for all students and provide students and teachers with the necessary support.

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[3] West Resendes, *Police in Schools Continue to Target Black, Brown, and Indigenous Students with Disabilities. THe Trump Administration Has Data That's Likely to Prove It*, ACLU (July 9, 2020) https://www.aclu.org/news/criminal-law-reform/police-in-schools-continue-to-target-black-brown-and-indigenous-students-with-disabilities-the-trump-administration-has-data-thats-likely-to-prove-it/.

[4] West Resendes, *Police in Schools Continue to Target Black, Brown, and Indigenous Students with Disabilities. THe Trump Administration Has Data That's Likely to Prove It*, ACLU (July 9, 2020) https://www.aclu.org/news/criminal-law-reform/police-in-schools-continue-to-target-black-brown-and-indigenous-students-with-disabilities-the-trump-administration-has-data-thats-likely-to-prove-it/.

[5] Kristin Henning, *Cops at the Schoolyard Gate*, Vox (July 28, 2021) https://www.vox.com/the-highlight/22580659/police-in-school-resource-officers-sro.

[6] Kristin Henning, *Cops at the Schoolyard Gate*, Vox (July 28, 2021) https://www.vox.com/the-highlight/22580659/police-in-school-resource-officers-sro.

[7] Kristin Henning, *Cops at the Schoolyard Gate*, Vox (July 28, 2021) https://www.vox.com/the-highlight/22580659/police-in-school-resource-officers-sro; DC Police Reform Commission Report at 67-69, https://dccouncil.us/police-reform-commission-full-report/.

[8] DC Police Reform Commission Report at 68, https://dccouncil.us/police-reform-commission-full-report/.

[9] DC Police Reform Commission Report at 68, https://dccouncil.us/police-reform-commission-full-report/.

[10] DC Police Reform Commission Report at 70, https://dccouncil.us/police-reform-commission-full-report/.

[11] DC Police Reform Commission Report at 73, https://dccouncil.us/police-reform-commission-full-report/.

Data Collection and Reporting is Necessary
The School Police Incident Oversight and Accountability Amendment Act of 2021 places a greater responsibility on schools to collect disaggregated data and defines the various types of law enforcement that may be involved in a school incident and mandates that greater descriptions regarding the type of conduct resulting in disciplinary action as well as the reason for involving law enforcement and greater details regarding their type of involvement. The School Police Incident Oversight and Accountability Amendment Act also requires the Metropolitan Police Department to publish the data collected, which must be disaggregated and include the number of incidents, arrests, type of weapons, contraband, or controlled substance, reason for involvement, and demographic information, on their website biannually.

Ensuring the collection and publication of data that answers the who, what, when, where, why questions in detail surrounding police activity in schools will allow the public to understand any patterns and allow the Council and schools to put forth effective policy to ensure safe schools for all students. Without published disaggregated information regarding disciplinary actions in schools and the presence of law enforcement we cannot know what types of situations our children face in school and cannot provide effective resources for them. Lawmakers, parents, family members, and the greater community should know what the children in our community experience on a day-to-day basis in school.

Current Collection and Reporting Requirements
D.C. Code § 38-236 includes annual reporting requirements for local education agencies—"District of Columbia Public Schools system and any individual or group of public charter schools operating under a single charter"—and entities operating a publicly funded community-based organization—"Head Start or early childhood education program operated by a nonprofit entity, faith based organization, or other entity that participated in federally funded early childhood programs".[12] By August 15 they must submit a report to OSSE, the Office of the State Superintendent, containing the data specified in D.C. Code §38-236.09(a) relating to demographic information[13], type of discipline[14], and special education services[15], which is

[12] D.C. Code §38-271.01(1C).
[13] "Demographic data including: **(A)** The campus attended by the student; **(B)** The student's grade level; **(C)** The student's gender identification; **(D)** The student's race; **(E)** The student's ethnicity; **(F)** Whether the student receives special education services; **(G)** Whether the student is classified as an English language learner; and **(H)** Whether the student is considered at-risk as defined in § 38-2901(2A)." §38-236.09(a)(1).
[14] "Discipline data including: **(A)** Total number of in-school suspensions, out-of-school suspensions, involuntary dismissals, and emergency removals experienced by the student during each school year; **(B)** Total number of days excluded from school; **(C)** Whether the student was referred to an alternative education setting for the duration of a suspension, and whether the student attended; **(D)** Whether the student was subject to a disciplinary unenrollment during the school year; **(E)** Whether the student voluntarily withdrew or voluntarily transferred from the school during the school year; **(F)** Whether the student was subject to referral to law enforcement; **(G)** Whether the student was subject to school-related arrest; and **(H)** A description of the misconduct that led to or reasoning behind each suspension, involuntary dismissal, emergency removal, disciplinary unenrollment, voluntary withdrawal or transfer, referral to law enforcement, school-based arrest and, for students with disabilities, change in placement." §38-236.09(a)(2).
[15] "Special education services data, including whether a student received during the school year: **(A)** "A functional behavioral assessment; **(B)** An updated behavior improvement plan; or **(C)** A manifestation determination review, including the number of suspension days that triggered the review, whether the suspension days were cumulative, and the outcome of the review." §38-236.09(a)(3).

largely amended by the 2021 School Police Incident Oversight and Accountability Amendment. This bill modifies subparagraphs G and H to require more descriptive information surrounding law enforcement engagement in schools, reason for involvement whether that be disciplinary or school activities, and requiring a description of student misconduct which led to disciplinary actions. OSSE has until December 15 to publicly report disciplinary data received from the LEAs (the specifics of which are outlined in D.C. Code §38-236.09(b))and include a trend analysis. This bill requires a more individualized and detailed approach in documenting disciplinary incidents in schools which will be helpful in guiding future policy.

OSSE's Pushback

OSSE presented testimony at the October 21, 2021 hearing against this bill because the data requested was already being collected (though not published), and the level of detail this bill proposes is burdensome and out of OSSE's (and the schools') expertise. OSSE testified they would prefer a codification of their current reporting practices—OSSE and the schools currently follow the above laid out policies and use the DC School Report Card[16], Discipline Report[17], and Student Discipline Data Collection Guidance[18].

OSSE first says that this bill encompasses much of the data OSSE and the schools currently collect. OSSE would prefer to use their current disciplinary index which they state encompasses a wide range of disciplinary incidents rather than narrative descriptions because the index results in standardized data. However, OSSE's index omits the various nuances of situations which are of great importance in understanding the context of law enforcement involvement. Even if OSSE were to create a wider index in an attempt to encompass the various distinctions between incidents, OSSE would need to develop this index which would still leave gaps. A narrative format would not preclude OSSE's use of their index system currently in place, but would provide greater detail surrounding each disciplinary situation, which would shed light on the schools' reliance on law enforcement.

Additionally, OSSE expresses concerns regarding their lack of expertise in describing weapons, contraband, or other controlled substances and holds firm on their use of an index. However, OSSE's concerns on expertise would be nullified with the double reporting of both OSSE and MPD which could rectify any potential issues.

Finally, OSSE contends this Bill is too broad in that it includes all law enforcement involvement in schools and not just related to disciplinary actions. However, the public should know about the law enforcement's level of involvement in schools generally and not just with regard to disciplinary incidents. An armed police officer reading to a class can be just as traumatizing to students as the armed security officer in school patrolling the halls.

Proposed Changes to the Bill

The School Police Incident Oversight and Accountability Amendment places a greater responsibility on schools to collect disaggregated data and defines the various types of law

[16] DC School Report Card, https://dcschoolreportcard.org/.
[17] Discipline Report, OSSE, https://osse.dc.gov/page/discipline-report.
[18] Student Discipline Data Collection Guidance, OSSE, https://osse.dc.gov/publication/student-discipline-data-collection-guidance.

enforcement that may be involved in a school incident and mandates that greater descriptions regarding the type of conduct resulting in disciplinary action as well as the reason for involving law enforcement and greater details regarding their type of involvement. However, the bill as currently written has no requirement for publication of the data collected. The bill should be amended to include a publication requirement. The raw data collected by OSSE as well as OSSE's trend analysis should be published. The public needs to have access to the data to propose new policy initiatives to make schools safer for children.While the collection of data is necessary, it is not enough. Both MPD and OSSE should collect and publish disaggregated data regarding law enforcement involvement in DC schools. This allows for a more holistic data set as it is likely an incident reported in the school may not be reported by MPD and vice versa for various reasons such as no arrest being made or minimal law enforcement involvement like a police officer reading to a class.

Accurate data collection and publication would allow the public and lawmakers to see which disciplinary situations resulted in law enforcement intervention and would allow assessment of whether another type of resource would have been more effective and less traumatizing to students. For example, in Shreveport, Louisiana, a group of fathers started patrolling a high school in response to incidents of violence at the school.[19] Since the group of fathers have started patrolling the school there have been no incidents of violence.[20] Shreveport Mayor stated that the presence of father's "is one of the most effective mentoring programs [he has] seen."[21] This is just one example of how a non-police presence can achieve the goals people believe only a law enforcement presence can address. The data collected and published can shed light on how a non-law enforcement presence can help address the disciplinary incidents in DC schools.

1. Publication Timeline

Moreover, the bill only requires MPD to publish reports biannually but does not specify a timeline at which to publish making it probable that MPD procrastinate publication or data. OSSE publishes data annually at the end of the academic year. However, this does not allow for mid-year assessments or changes to school policy.[22] The late publication from OSSE also does not provide for policy changes and implementation to occur before the start of the next academic year. The Council should consider amending OSSE's publication requirement to biannually—after the first semester of school and at the end of the academic year[23]—which would allow for policy changes. The suggested publication time would also allow for Council to use the data in their legislative agenda.

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[19] The Associated Press, *'Dads on Duty' Patrol Louisiana School to Prevent Violence*, ABC News (Oct. 28, 2021) https://abcnews.go.com/US/wireStory/dads-duty-patrol-louisiana-school-prevent-violence-80836457.

[20] The Associated Press, *'Dads on Duty' Patrol Louisiana School to Prevent Violence*, ABC News (Oct. 28, 2021) https://abcnews.go.com/US/wireStory/dads-duty-patrol-louisiana-school-prevent-violence-80836457.

[21] The Associated Press, *'Dads on Duty' Patrol Louisiana School to Prevent Violence*, ABC News (Oct. 28, 2021) https://abcnews.go.com/US/wireStory/dads-duty-patrol-louisiana-school-prevent-violence-80836457.

[22] The New York City Council passed the Student Safety Act, and amendments thereto, which mandates public disclosure of school disciplinary data—including arrests on school property and student removal from classrooms. The Student Safety Act requires the New York City Department of Education and the New York Police Department to report, quarterly, to the City Council on school safety and disciplinary issues. New York Student Safety Act (2010) https://lims.dccouncil.us/downloads/LIMS/47800/Introduction/RC24-0075-Introduction.pdf.

[23] Potential publication deadlines: beginning of February and by August 1.

2. Enforcement Mechanism Should be Added

While this is a great first step in making schools safer for students, enhancing the reporting requirements of OSSE and MPD is only helpful if the data is published and timely. History shows that police and schools fail to report data to the federal government.[24] Without an enforcement mechanism it is unlikely that the data will be published by either MPD or OSSE. OSSE's Representative testified to Council that though data is currently collected, but because they are not required to report all the data collected, only the required information is published. The ACLU sued MPD for failure to publish stop and frisk data for over a year, which prompted MPD to then publish six months worth of the missing data.[25] Additionally, in September 2021, MPD published misconduct data for the years 2016 through 2020, despite the mandatory yearly publication.[26] To ensure publication, Council should consider adding an enforcement mechanism to this bill such as requiring the Chief of Police and the Superintendent to come testify before the Council regarding the findings of the report should it not be published. Requiring testimony from the Chief of Police and Superintendent would incentivize accurate and timely reporting because it is an inconvenience and somewhat burdensome for them to come testify in front of Council on a given day. Their testimony would also be beneficial for Council because it would, hopefully, provide Council with the necessary information to implement their legislative agendas. Additionally, such testimony would be a public rebuke and allow everyone to see that the publication of data is delayed, but would not greatly inhibit the daily functioning of MPD and OSSE.

Conclusion

The Council should amend The School Police Oversight and Accountability Amendment Act of 2021 to require both MPD and OSSE to collect and publish disaggregated data and should include a strong enforcement mechanism with regards to the publication. As the bill currently stands, the disaggregated data mandated to be collected will be enlightening, but without accurate collection and regular reporting, the data is useless as to inform policy changes.

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[24] Most police departments do not share information on their use of force. Only 27% of local and federal agencies contributed to the FBI database on police use of force despite a presidential order and proposed new legislation requiring individual police departments to provide information to the FBI. Tom Jackman, *For a Second Year, Most US. Police Departments Decline to Share Information on Their Use of Force*, The Washington Post (June 9, 2021) https://www.washingtonpost.com/nation/2021/06/09/police-use-of-force-data/.

[25] Colleen Grablick, *Update: D.C. Police Publish Six Months of Stop and First Data Following ACLU Suit*, DCist (Feb. 24, 2021) https://dcist.com/story/21/02/17/aclu-sues-dc-police-missing-stop-and-frisk-data/.

[26] MPD Report on Disciplinary Actions, Grievances, and Equal Employment Opportunity Investigations for 2016-2020, https://lims.dccouncil.us/downloads/LIMS/47800/Introduction/RC24-0075-Introduction.pdf.

GEORGETOWN LAW

Christy E. Lopez
Professor from Practice
Faculty Co-Director,
Center for Innovations in Community Safety

November 5, 2021

Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, DC 2004
VIA EMAIL

Re: B24-356: Strengthening Oversight & Accountability of Police Amendment Act of 2021

To the Council:

Thank you for the opportunity to submit written testimony regarding the Strengthening Oversight & Accountability of Police Amendment Act of 2021 ("Oversight and Accountability Act"). I offer this testimony in my professional capacity. I teach police accountability as a professor at Georgetown Law, where I also am faculty director of the Center for Innovations in Community Safety. I have worked to strengthen police accountability nationwide, including in Washington, D.C., for over 25 years, primarily as an attorney in the Civil Rights Division of the United States Department of Justice. I am currently drafting the principle on external oversight for the American Law Institute's Principles of Policing project. I am not writing on behalf of Georgetown University. Nor am I writing on behalf of the D.C. Police Reform Commission, which I was honored to co-chair, and which separately has submitted a letter regarding the Council's considerable work in this area.

I write mainly regarding two aspects of the Oversight and Accountability Act: first, the establishment and duties of a Deputy Auditor for Public Safety, and second, the importance of continuing administrative investigations of misconduct while the decision whether to prosecute criminally remains pending. While other aspects of the Act are equally important to furthering effective police accountability in the District, these two issues are among the most important, and, based upon testimony during the Council's October 21, 2021, hearing on this legislation, there appears to be confusion regarding both.

Deputy Auditor for Public Safety

The establishment of a Deputy Auditor for Public Safety would be an important, perhaps transformative, advancement in accountability and oversight of law enforcement in Washington, D.C. Establishing a Deputy Auditor would address two shortcomings that are common to oversight entities: the tendency to ask one entity to serve too many functions, and the tendency to

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under-resource external oversight entities, resulting in their inability to commit the time or develop the expertise necessary to do their work effectively. *See, e.g.,* Michael Vitoroulis, Cameron McEllhiney, and Liana Perez, *The Evolution and Growth of Civilian Oversight: Key Principles and Practices for Effectiveness and Sustainability,* NACOLE/COPS (2021). Washington, D.C.'s current oversight mechanism is focused on investigating allegations of misconduct by individual officers. *See* Michael G. Tobin, Executive Director of the Office of Police Complaints, October 21, 2021 Testimony, at 3 ("Today we have an oversight agency that is primarily investigative in its function and limited in its jurisdiction, and a civilian board that has little authority to provide meaningful community input into police policy, procedure, discipline, and training."); Michael Vitoroulis, *NACOLE Case Studies on Civilian Oversight: Office of Police Complaints, Washington, D.C. Investigation-Focused Model.* This "back-end" "incident-based" form of oversight can be useful at serving the important goal of accountability *after* an officer has committed misconduct. *See,* D.C. Police Reform Commission, *Decentering Police to Improve Public Safety,* at 157-160 (April 1, 2021).

The Deputy Auditor for Public Safety would serve a different, complementary function: it would provide focused "front-end," oversight directly aimed at *preventing* police misconduct from occurring in the first instance. It would do so by focusing systemically on police activity in the aggregate, identifying the practices that create the culture in which misconduct is more likely to occur; tracking the source of patterns of misconduct back to the policy or training deficiency that caused them; and providing insight into the particular changes to policy, supervision, or training, that should be made to make the recurrence of misconduct less likely. Maria Ponomarenko, *Rethinking Police Rulemaking,* 114 Nw. U.L. Rev. 1 (2019). Traditionally, including here in the District (as Executive Director Tobin alluded to in his testimony) police commissions have served this front-end accountability function, to the extent it has been served at all. However, one of the problems with such commissions is that they tend not to be full-time positions and are not robustly staffed, meaning commissions sometimes are not able to commit the necessary time, and may not be able to develop the necessary expertise, to perform oversight work as effectively as necessary.

The auditor-model for police oversight was developed to address this gap and, in recent years, has increasingly been acknowledged as uniquely effective--perhaps the most effective form of police oversight. *See, e.g.,* Samuel Walker, The New World of Police Accountability (2005). Although I agree with Executive Director that it would *seem* most sensible to augment the funding and authority of the current OPC to serve this "front-end" "systemic" function, rather than create a whole new entity, my consistent experience and observation in agencies across the country is that it is difficult for an oversight entity focused on the review or investigation of individual instances of police misconduct to also serve a front-end, systemic function. *See, e.g.,* USDOJ Investigation of the Chicago Police Department at 84-86 (January 13, 2017) (discussing Chicago's Police Board).

Creating a Deputy Auditor thus has tremendous potential to strengthen accountability and oversight in the District. However, unless it is structured in a way that *complements* rather than *duplicates* existing oversight efforts, it risks becoming just another layer of bureaucracy. I thus agree with D.C. Auditor Kathy Patterson's suggestion that the Council clarify language in the legislation to ensure that there are bright lines regarding what is within the Deputy Auditor's purview and what is in the purview of D.C.'s other oversight entities and that, as noted above,

the legislation make clear that the Deputy Auditor's functions are forward-looking and systems-based.

Thus it may be preferable, for example, for the Deputy Auditor, rather than the Commission, to be responsible for providing comments about certain new policies and training updates, after soliciting input from the Commission. This would also alleviate a problem with the legislation noted by both MPD's Chief Robert Contee and OPC Executive Director Tobin, that the new duties this legislation places on the Commission will overwhelm it, especially since these are part-time positions. Relatedly, it might be preferable that, rather than requiring the Commission to provide input in advance for *all* non-administrative policies, as it does currently, the legislation require that MPD policies and training curriculum be made available to the public online, alongside the opportunity for ongoing public input and a periodic updating of policies and training that reflects consideration of public input. There would still be some policies and training that would require oversight-input prior to issuance, but this would be a smaller number of agreed-upon policies, making the work more feasible and allowing the oversight entities to focus their attention where it is most needed.

One area in particular need of clarification in the legislation is which oversight entity will investigate or review which types of incidents or complaints. Duplication of effort can be particularly harmful when investigating complaints of misconduct and reviews of particular use of force incidents, because of the risks created when there are multiple interviews of the same person, or different findings by different entities regarding the same incident. The better practice is to ensure multiple perspectives working on the investigation together, e.g. police and non-police co-investigation and review of incidents.

Continuing Investigations of Administrative Investigations while Criminal Investigation Pending

In my experience, one of the single practices that most undermines police accountability systems is the practice of not completing administrative investigations because the criminal investigation is technically still pending (that is, the prosecutor has not issued a "declination letter" indicating the matter will not be prosecuted). *See, e.g., Additional Written Testimony of Hon. Kathleen Patterson* at 2 (October 21, 2021) (describing the recommendation in the Auditor's earlier report to "speed up the administrative reviews of use of force" as among the most significant recommendations made to MPD). Incidents referred to prosecutors for potential criminal prosecution generally include the most serious allegations of misconduct. Yet, the vast majority of these referred cases (by some estimates over 99%) are not prosecuted *See, e.g.,* OCDA Report, *The Durability of Police Reform*, at 58 n.114 (January 28, 2016) ("According to information we obtained from both MPD and the USAO, prosecutions of MPD officers for the excessive use of force are extraordinary rare, and there has never been a prosecution of an MPD officer relating to an officer-involved fatal shooting"). This means that where, as in D.C., this practice of not completing administrative investigations until receiving the criminal declination persists, there is *systematic delay* in the full-investigation and resolution of the *most serious allegations of misconduct*. Further, because the United States Attorney's Office in Washington, D.C. has a particularly egregious record regarding timely review of cases referred for consideration of criminal prosecution, this delay can be substantial. As of a few years ago, incidents in which a MPD officer fatally shot someone had been under review for as long as 1,497 days, and the average review time for these fatal shootings was 599 days. *Id.* at 60. While

USAO delays have reportedly decreased, representatives of the MPD police union, and the Office of Police Complaints both complained to the D.C. Police Reform Commission about how long it takes the USAO to issue declination letters. *See,* DC Police Reform Commission Report at 171.

No one wins when the administrative investigation of police misconduct is not completed for months or years because of a criminal prosecution that never happens. Administrative accountability has the potential to have a far more consistent impact on officer conduct than does criminal accountability, and is more likely to vindicate the rights of individuals harmed by police misconduct. Administrative discipline may include a short suspension that warns the subject officer and others not to repeat the conduct, or it may result in terminating an officer who is ill-suited for police work and may otherwise go on to harm more individuals. An administrative investigation may also absolve an officer of wrongdoing, allowing the officer to move on without the specter of an unresolved misconduct case hanging over his or her head for years. This specter can take a toll in officer health and morale, and may even negatively influence officer conduct. In the aggregate, the systemic delay in resolving the most serious allegations of misconduct delegitimizes the police accountability system in the eyes of both officers and the public.

To remedy this corrosive delay in misconduct investigations, the legislation should require that MPD and OPC change their longstanding practice, currently required by D.C. law and MPD policy, of never completing administrative investigations until the criminal review of the incident is complete. The legislation also should require strengthening the current language in law and policy regarding continuing administrative investigations while the criminal review is pending. Finally, the legislation should require that the rationale behind the decision to hold in abeyance or complete an administrative investigation pending resolution of the criminal review be documented in writing.

While there appeared to be some concern expressed during the hearing on the Oversight and Accountability Act that this approach might violate the rights of officers, this concern is ill-founded. If D.C. law and MPD policy is revised in accordance with the recommendation made by the D.C. Police Reform Commission, it would be consistent with Supreme Court guidance on this topic and would *promote* protection of the constitutional rights of *both* officers and members of the public. *See,* DC Police Reform Commission Report at 170-71.[1] Further, it is in keeping

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[1] D.C. Police Reform Commission Section VIII, Recommendation 5(c) provides:

In cases involving potential criminal charges against an officer but where the prosecutor has not yet issued a written declination decision, MPD should in certain circumstances permit its investigators, with approval from the Chief and after consultation with the prosecutor, to complete its administrative investigation. The Council and the Mayor should revise DC Code § 5-1109 and permit OPC, in certain circumstances, with approval from the PCB and after consultation with the prosecutor, to complete the administrative investigation before the prosecutor issues a written declination. The relevant factors include the passage of time since the incident occurred, the seriousness of the allegations, and the public interest in prompt completion of the administrative investigation. In some cases, the administrative investigation may be completed without interviewing the subject officer(s) if evidence from other sources, including but not limited to body-worn camera footage, is sufficient for the investigator to make complete and accurate findings without such interviews. Where subject officer interviews are necessary, MPD and OPC should seek a voluntary interview with the officer. If the officer does not voluntarily agree to be interviewed,

with current best practices and USDOJ recommendations regarding the completion of administrative investigations of police misconduct. *See, e.g.,* City of Baltimore Consent Decree at 131-133; *Additional Written Testimony of Hon. Kathleen Patterson* at 2 (quoting Michael Bromwich for proposition that the issue of unnecessarily delaying administrative force and misconduct investigations "has been noted in most DOJ pattern-or-practice investigations and is frequently addressed in consent decrees."). Further, it in no way undermines the Chief's authority to ensure proper handling of administrative investigations, as it *permits* but does not *require* the Chief to complete the administrative investigation, and encourages that the Chief (and head of OPC regarding investigations being conduct by OPC) do so only where the balance of equities favors completion (and after consultation with the prosecutor).

Mandatory Immediate Investigation of Certain Misconduct

There is one additional small but critically important change to the legislation that is necessary. Currently the legislation states that if the investigator finds evidence of abuse or misconduct not included in the original complaint the oversight entity "may" include these allegations in the original complaint. Some types of misconduct, for example the failure intervene to prevent an unreasonable use of force by another officer, or the failure to report serious misconduct, often are discovered as part of the investigation of the underlying incident. The investigation of such misconduct should be completed without delay. Thus, for at least some types of misconduct, the "may" in this provision should be changed to "must."

I hope that this information is helpful. Thank you again for the opportunity to provide it.

Sincerely,

Christy E. Lopez

Christy E. Lopez
Professor from Practice/Faculty Co-Director, Center for Innovations in Community Safety

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MPD and OPC (under revised DC Code § 5-1109)—pursuant to Chief of Police or PCB approval, and after consultation with the relevant prosecutor—should allow their administrative investigators to compel the subject officer(s) to submit to an interview.

The discussion accompanying this recommendation in the report provides further context explaining the propriety of this approach under both law and policy.

Testimony

of

Robert Pittman

Chairman

First District Police Citizens' Advisory Council, Inc.

Before

The Committee on the Judiciary and Public Safety

Charles Allen, Esq.

Chairman

B24-306, the "Youth Rights Amendment Act of 2021,"

B24-356, the "Strengthening Oversight & Accountability of Police Amendment Act of 2021,"

and

B24-254, the "School Police Incident Oversight & Accountability Amendment Act of 2021"

Virtual Hearing

October 21, 2021

101 M Street, S.W.
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Greetings Members of the City Council,

I am Bobby Pittman and I submit this testimony on **B24-306, the "Youth Rights Amendment Act of 2021," B24-356, the "Strengthening Oversight & Accountability of Police Amendment Act of 2021," and B24-254, the "School Police Incident Oversight & Accountability Amendment Act of 2021"** on behalf of myself.

The proposed legislation introduced is not simple and come with many unintended consequences. If they were to become law in their present form, it would be disastrous. I just learned of these bills and did not have time to formulate a group discussion let alone reactions. I applaud the efforts to change and protect those who you see as most vulnerable.

There are some things I think important to add to the record:

1. I agree with the testimony of the Chief of Police. He has illuminated critical issues.
2. The issue of Miranda rights is a topic where I think the following should be considered. It is my belief, especially in a tense and traumatizing situation where a fully functioning adult may not understand their rights fully. The example I will give is something that happened many years ago between a senior police officer and a law professor. The lawyer had an academic understanding of the law; however, he did not possess the knowledge of police regulations of the day. It ended in his arrest. Mirandizing children is something that I have had many conversations about with my previous commanders as well as others in MPD. I recognize that a child 5-6-8 or 12 who is functioning at, or above grade level would find this process traumatizing. I'm sympathetic to that type of event. Like most people I wish that arrest was rare. No one who is balanced wants to see another person regardless of age be arrested. Unfortunately, there are those times when it must happen. I know that most people share the view that we will never arrest out of the social and economic impact of poverty, and that mental disorders must be addressed by a multitude of agencies. The problem becomes one where neighbors call the police on neighbors and other disputes that police often attempt to mediate because there is no one else available.
3. I, like you believe there is a discussion to be had on mirandizing language, however, let's consider the other factors. If a crime has been committed, if there are victims etc. is it the right thing to do and impede the process of a lawful police investigation? While on one-hand you may be protecting the perpetrator of a crime, but on the other hand you are harming the victim and possibly the perpetrator also? It seems the prudent measure is to strike this language and allow police (including MPD) and prosecutors to offer what they have already done regarding children and arrests and look at additional measures that can be easily implemented, measured, evaluated, and adjusted for the situation and/or environment. Making static laws handicap society and the Community. It limits creativity and the ability to improve the quality of the police enforcement action. In 21st century policing this is where MPD seeks to go and compared to many agencies around the country MPD is further along than most. To impose this bill on law

enforcement without proper vetting of the impacts positive versus negative outcomes would be catastrophic for the community.

4. I also think you should consider juveniles who commit carjackings and other serious crimes in the following way: The Chief has pointed out that police have arrested some juveniles for multiple carjackings and other crimes. Could it be that they know that you the Council are constructing laws that impugn them from serious punishment? Could it be that the Council of the District of Columbia is encouraging crime? You have already stated for the record that there are too many arrests. But to a person who you have said in functionally diminished could they possible see your actions in reverse? It's like Bizarro in Superman world. Doesn't it harm the community more than help the community?
5. Theory and practice of law and police regulations are not the same. To establish that each juvenile has a right to have an attorney present before questioning does not seem practical. Where would these lawyers come from? How long would it be before a lawyer was available? How many people can simply call a lawyer and have them onsite immediately? Who calls the lawyer, the police? Do the police call the parent first or is it the OAG, Child Protective Services? Who?
6. What about parent rights over their children? As the Chief states, parents surrender their children to police. Shouldn't this be a factor in determining a law of this magnitude? What about the embarrassment to the parent and the victim? So, the juvenile perpetrators return to the same environment the next day and commits the same act against another adult or child. What happens then? Same effect? What if it happens a third or fourth time? Like a tootsie roll pop how many times before enough is enough, or you finally take legal action? Do second chances run out? Its this enabling behavior by the Council?
7. There is no language regarding the qualifications of the attorney. You assume that each attorney will best serve the interest of the juvenile client. I have seen with adult cases that attorneys are so overloaded with cases that they don't have time to best serve a criminal defendant. So, what will change here? Who pays for this? Will it really serve the interest of the juvenile or is it a theoretical exercise?
8. Preventing the police for executing a search will further hinder the rights of the victim. I thought we all supported victim's rights. These measures run counter to my understanding of protecting victims and their families.

You cite the following: *In the District of Columbia, we have some high-level data illuminating these disparities. According to the 2017 Civil Rights Data Collection Report by the U.S. Department of Education, Black students in the District of Columbia make up 71% of students but account for nearly 91% of school-based arrests. Latinx students make up the other 9%. The survey also found that 27% of students receiving referrals to law enforcement were students with disabilities. Furthermore, the Black Swan Academy found that 60% of girls arrested in DC are under the age of 15, with Black girls in DC 30 times more likely to be arrested than White youth of any gender identity.*

You blame Police for this? Isn't this an example of a failed public school system with the wrong administrators and staff? The real question, is why are the police called in the first place? If we accept that the teachers and the administrators know that 27% of the students has or have disabilities, why don't school officials know how to handle disciplinary problems that are going to result from contact with these children? What are the teachers and administrators doing to exacerbate these situations? How can they better handle what happens inside their buildings and why are they not being held accountable for their actions? Maybe these are the people whose records should be exposed?

Police are not Nazi Stormtroopers entering the buildings at will and making decisions as many of you want to project. Police come to the buildings because someone called. In EMS the Phrase "you call we haul" was used in policing "it's you call we are coming". Maybe a teacher fought another teacher. Maybe a teacher was assaulted by a student. Maybe students fighting or usually attacking another student. Parents come to school to fight students and bring weapons. What role does school administration have in these contacts and how to they seek to resolve these issues? These are the real problems beyond what the Chief has already explained.

You state that your Budget Director indicates that there is no cost for these proposed laws. So, here's how the cost begin to add up.

1. It cost the taxpayer tens of thousands of dollars to research data points from the police which should really come from who controls data in the school system.
2. The effects of these proposed laws will create additional litigation because parents will sue or maybe the OAG will sue the school system for failing to keep children safe. I pointed this out with the DC Housing Authority.
3. You will lose teachers and administrators who will get tired of being in unsafe buildings knowing that students have impunity to attack them, and the police can't arrest the perpetrator(s).
4. You will have to budget monies to hire new staff who will stay long enough to find a new job.
5. You won't solve the problems of these children who will have to be re-educated by corrections and/or diversion programs which there are already waiting lists.

6. You will have to budget for the lawyers to assist the many juveniles who your laws are designed to protect. If the lawyer represents the child who has authority to fire the lawyer? Is it all pro bono services from these lawyers or is it Public Defender Services?

I believe your legislation is well intended; however, you will continue to make situations that were never really addressed by many Councils even worse with your fixes. Most people in this city do not support these legislative changes. In my own interactions, I do not hear this from Community.

It is best to step back and reevaluate with people in the room that may possess many layers and dimensions of thought rather than being myopic. As I have said before, Do the right thing. This is not it. Walgreens is closing stores in San Francisco because the laws passed there make it nearly impossible to prosecute shoplifters. A couple of stores were losing nearly $1000.00 per day. Consider the economic impact of the legislation you proposed. Every legislative action has a cost.

ATTACHMENT S

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B24-0515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021"

and

B24-0561, the "Homeland Security Fusion Center and Law Enforcement Authority Amendment Act of 2021"

Monday, March 14, 2022, 9:30 a.m. – 12:30 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://www.facebook.com/CMcharlesallen/

On Monday, March 14, 2022, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to consider Bill 24-0515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021", and Bill 24-0561, the "Homeland Security Fusion Center and Law Enforcement Authority Amendment Act of 2021." The hearing will be conducted virtually via Zoom from 9:30 a.m. to no later than 12:30 p.m.

The stated purpose of B24-0515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021", is to amend the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982 to remove the requirement that cadets graduate from District of Columbia high schools in order to qualify for the Metropolitan Police Department's cadet program.

The stated purpose of B24-0561, the "Homeland Security Fusion Center and Law Enforcement Authority Amendment Act of 2021", is to amend An Act to authorize the District of Columbia government to establish an Office of Civil Defense, and for other purposes, to formalize the establishment of the District's intelligence fusion center within the Homeland Security and

Emergency Management Agency, to set forth the primary mission of the fusion center, and to designate the fusion center as a law enforcement unit for the purpose of carrying out its mission.

The Committee invites the public to provide oral and/or written testimony. Public witnesses seeking to provide oral testimony at the Committee's hearing must thoroughly review the following instructions:

- Anyone wishing to provide oral testimony must email the Committee at judiciary@dccouncil.us with their name, telephone number, organizational affiliation, and title (if any), by the **close of business on Monday, March 7, 2022**.
- The Committee will approve witnesses' registrations based on the total time allotted for public testimony. The Committee will also determine the order of witnesses' testimony.
- Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals (and any subsequent representatives of the same organizations) will be allowed a maximum of three minutes.
- Witnesses are not permitted to yield their time to, or substitute their testimony for, the testimony of another individual or organization.
- If possible, witnesses should submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.
- Witnesses who anticipate needing language interpretation are requested to inform the Committee as soon as possible, but no later than five business days before the hearing. The Committee will make every effort to fulfill timely requests; however, requests received fewer than five business days before the hearing may not be fulfilled.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be emailed to the Committee at judiciary@dccouncil.us **no later than the close of business on Friday, March 25, 2022.**

ATTACHMENT T

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B24-0515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021"

and

B24-0561, the "Homeland Security Fusion Center and Law Enforcement Authority Amendment Act of 2021"

Monday, March 14, 2022, 9:30 a.m. – 12:30 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://www.facebook.com/CMcharlesallen/

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

i. Public Witnesses

ii. Government Witnesses

1. Morgan Kane, Assistant Chief, Technical and Analytical Services Bureau, Metropolitan Police Department
2. Christopher Rodriguez, Director, Homeland Security and Emergency Management Agency

IV. ADJOURNMENT

ATTACHMENT U

GOVERNMENT OF THE DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT

Public Hearing on

B24-515, the "Law Enforcement Career Opportunities for District Residents Expansion Amendment Act of 2021"

Testimony of
Morgan C. Kane, MPA
Assistant Chief of Police

Before the
Committee on the Judiciary & Public Safety
Council of the District of Columbia
The Honorable Charles Allen, Chairperson

Virtual Hearing
March 14, 2022

Good morning, Chairman Allen, members of the Committee, and everyone watching the hearing virtually. My name is Morgan Kane, and I am the Assistant Chief for the Metropolitan Police Department's (MPD) Technical and Analytical Services Bureau. I appreciate the opportunity to speak with you about MPD's Cadet Program and highlight the value of *"The Law Enforcement Career Opportunities for District Residents Expansion Amendment Act,"* – the value for the young District residents who participate in the program, for the community that can benefit from their commitment and knowledge of city, and for the Department.

I would like to begin by noting that the District is my home. I am a proud Ward 8 resident. I am raising my seven-year-old son here, and he attends DC Public Schools. So our work is personal for me. Being successful as an agency and forging relationships with the community we serve is not just my job – it is a passion that directly impacts my family. And I am deeply committed to this agency, which has provided me with amazing opportunities and an even more amazing career. That is why I am so pleased to talk about this program that provides opportunities to our young adults in the District.

The MPD Cadet Program is one of Mayor Bowser's important long-term investments in developing pathways to the middle class and strengthening police-community relations. Young Washingtonians, ages 17- to 24-years-old, can join MPD's Cadet Program and serve part-time as uniformed, civilian employees. Members of the Cadet Corps earn a salary and learn about policing and the MPD, while taking college courses, and earning up to 60 tuition-free credits at the University of the District of Columbia Community College. Cadets spend part of their time working specific job assignments for MPD while also working toward their degree. Cadets convert to career police status upon successful completion of those college credits and acceptance into the Recruit Officer Training Program.

The program provides young adults with access to employment opportunities, secondary education, and a career in public service. Chief Contee often points to his becoming a police cadet as the moment that changed his life. We want to open that door to more young adults. It also ensures that our communities see people that they know, and that know them, safeguarding District streets. The Cadet Program has also become a key strategy for building and maintaining a strong pipeline of officers. The Cadet Program increases the pool of talented recruit officers from DC who will develop into MPD's future leaders. In FY21, MPD was able to hire the first full recruit class composed entirely of graduates of the Cadet Program. We believe this is truly a win-win opportunity, and an important investment for the city and the Department.

The Cadet Program has the added benefit of promoting jobs and educational opportunities for historically underserved populations. All of our current cadets are Black or Hispanic. It also represents an important opportunity to recruit more women to law enforcement. While 23 percent of MPD's sworn officers are women, females currently represent about 47 percent of the Cadet Corps. To underscore our commitment, MPD has joined a national coalition of law enforcement agencies across the United States and Canada committed to having women equal 30 percent of police recruits by 2030.

We appreciate your support, Councilmember Allen, and that of your colleagues, for the Cadet Program. We are working to increase the size and scope of the program this year to continue its success. With Mayor Bowser's commitment and the Council's support, the program has grown from fewer than 20 cadets in 2015 to 150 funded positions in the Fiscal Year 2022 budget. We are growing the program by launching the high school track of the Cadet Corps. The program enables high school seniors to work part-time as cadets while completing their senior year and prepares them for entrance into the full-time Cadet Program. The high school programming promotes positive life skills and self-confidence and enables students to really invest in their future rather than just having a part-time job.

This legislation would create opportunities for other young District residents. Currently, the Cadet Program is open to senior year high school students and young adults under 25 years of age residing in the District of Columbia who are graduates of high school in the District. This bill would remove the requirement that participants graduated from a District high school. The Cadet Program prepares candidates for entrance into the MPD Officer Recruit program and provides that a steady stream of youth connected to the District of Columbia are actively recruited as future police officers. This legislation helps expand the number of District residents who might benefit from the program. Many individuals may not have graduated from a District of Columbia high school, as currently required, but may have attended elementary, middle school, and some high school in the District. These are young adults who have spent most of their lives in our communities, but may have moved to and graduated in another state or have been homeschooled. They may have graduated from a neighboring jurisdiction but have a parent or grandparent living in the District with whom they spend time regularly. These residents may in fact have spent more time in the District than someone who graduated from a District high school.

Many of these young adults have spent significant time attending school, working, attending a place of worship, engaging in community service programs, and developing relationships throughout the District of Columbia. Those individuals can benefit from the program and give back to District communities. While the bill expands opportunities for more young adults, MPD will still give preference to District high school graduates who apply for the Cadet Corps. However, qualified candidates who are young adults living in and connected to the District, will not be automatically disqualified because they did not graduate from a District high school.

The Department is actively working to recruit more cadets and grow the program to 150 this year. As of March 3rd, there were 95 cadets in the recruiting pipeline. About 10 percent of MPD's interest in the Cadet Program is from those who graduated from a high school outside of the District of Columbia. Currently, there are six individuals who would be ready to join soon if this becomes law. As more people become aware of this opportunity, it is likely that more young District residents would apply.

Expanding the cadet program helps ensure that those individuals who might otherwise look for opportunities in neighboring jurisdictions instead return to the District, supporting a police department of officers who are invested in and understand the community they serve. Our cadets participate in community outreach events across the city every week and build on social and communication skills while building trust in the community.

Chief Contee often says that the Cadet Program represents the future of policing. We want police officers who come from our neighborhoods and who understand our communities. This bill recognizes that we can meet that goal, while strengthening our applicant pool by not just relying on District high school graduates, but graduates from neighboring jurisdictions who maintain strong connections with our city. Further, the bill represents a long-term investment in our city while strengthening police-community relations. I urge the Council to move this bill forward so that more of our young adults have the opportunity to shine right here in the District of Columbia.

ATTACHMENT V

Government of the District of Columbia
Office of the Chief Financial Officer

Glen Lee
Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Phil Mendelson** **Chairman, Council of the District of Columbia**
FROM:	**Glen Lee** **Chief Financial Officer**
DATE:	**November 30, 2022**
SUBJECT:	**Fiscal Impact Statement – Comprehensive Policing and Justice Reform Amendment Act of 2022**
REFERENCE:	**Bill 24-320, Draft Committee Print as provided to the Office of Revenue Analysis on November 15, 2022**

Conclusion

Funds are not sufficient in the fiscal year 2023 through fiscal year 2026 budget and financial plan to implement the bill. The bill will cost $1.23 million in fiscal year 2023 and $4.99 million over the four-year financial plan.

Background

The bill contains 26 subtitles, as described below:

Subtitle A – The subtitle prohibits the use of neck restraints and asphyxiating restraints by law enforcement officers operating in the District, including federal officers. Officers found violating the prohibition are subject to fine and imprisonment, as are officers observing use of the technique and failing to provide or request first aid and emergency medical assistance.

Subtitle B – The subtitle places new requirements on the Metropolitan Police Department (MPD) regarding video captured on body-worn camera (BWC). MPD is already required to report on certain BWC statistics, including how many times internal investigations were opened for a failure to turn on BWC during interactions. The subtitle adds an additional reporting requirement for the results of such internal investigations, including the number of times officers were disciplined. The subtitle also adds new reporting requirements around Freedom of Information Act (FOIA) requests on BWC footage, to include the charges for FOIA requests, the actual costs incurred, and the length of time

between initial request and MPD's final response. The subtitle allows the Chairperson of the Council committee with jurisdiction over MPD to request copies of BWC for an incident, provided that the BWC is not publicly disclosed. The Councilmember representing the Ward where the incident occurred may also jointly view the BWC footage. The Mayor must publicly post to a website BWC footage for any incident involving a serious use of force or officer-involved death, including the name of the involved officer, within five business days of the incident. For any officer-involved deaths, the website must include incidents going back to the launch of the BWC program on October 1, 2014. The subtitle provides requirements for MPD to allow persons recorded in BWC video (or their next of kin or, for minors, parents) to view the footage and to consent to its posting. For officer-involved deaths, MPD must consult with an expert in trauma and grief prior to providing next of kin opportunity to view the BWC recording.

The subtitle prohibits MPD officers from reviewing their BWC footage or any BWC footage shared with them prior to writing their initial incident reports. For subsequent reports, officers must indicate if they have viewed BWC video.

Subtitle C – The subtitle expands the membership of the Police Complaints Board (PCB) from five to nine members, and it changes the membership of the current PCB after the expiration of existing members' terms. The nine members will include one representative from each Ward and one at-large representative, and no member may be affiliated with any law enforcement agency. The chair of the PCB will be selected by its members and may only remove a member for cause. The bill also expands the remit of the PCB and Office of Police Complaints (OPC) to include complaints against the Office of Inspector General (OIG) law enforcement personnel and the District of Columbia Housing Authority Police Department (DCHAPD).

The subtitle specifies that the PCB shall collaborate with the Deputy Auditor for Public Safety (created and described under Subtitle Z, below) in its reviews of the complaint review process. The subtitle requires the Police Chief to submit any proposed written directives to the PCB for its review. PCB must review the proposed directive and report on various factors including whether the directive would increase transparency, racial equity and public confidence in law enforcement. PCB must approve or disapprove the directive within 14 days. PCB will have the new authority to review a complaint that alleges making false statements in applications for search warrants, arrest warrants, or in sworn testimony. The Executive Director of the Office of Police Complaints may initiate his own complaint against a police officer if a complaint investigation finds certain evidence of abuse or misuse of police powers. The bill allows the Deputy Auditor for Public Safety to have the authority to audit complaints referred to the MPD, the DCHAPD, or the OIG for further action.

The subtitle allows complaints to be made to OPC anonymously. The subtitle allows the Director of OPC to make discipline recommendations to a law enforcement officer's agency when OPC finds a complaint is sustained. The officer's employing agency must transmit the officer's personnel records to OPC to inform OPC's discipline recommendation.

Subtitle D – The subtitle makes permanent the Use of Force Review Board created under emergency and temporary legislation to review uses of force as set forth by MPD in its written directives. The subtitle also expands the membership of the Use of Force Review Board to include five civilian members – three appointed by the Mayor and two appointed by the Council – and clarifies that the civilian members have no current or prior affiliation with law enforcement.

Subtitle E – The subtitle repeals DC Code 22- 3312.03, which prohibits wearing hoods or masks with intent to discriminate, intimidate, or break the law.

Subtitle F – The subtitle places new requirements on "consent searches," which are generally searches that occur when a police officer requests to search an individual's person or property and does not have a warrant. In order to perform a consent search, officers will be required to explain to subjects using plain language and in a calm demeanor that they have a legal right to decline the search and the search will not be performed without their consent. If the officer is unable to obtain consent, the search may not be conducted.

Subtitle G – The subtitle adds requirements to the continuing education program of MPD officers. The training must include recognizing and preventing racism and white supremacy; limiting the use of force and using de-escalation tactics; the prohibition on techniques that restrict breathing; consent search requirements; and the duty and method to report suspected misconduct or excessive use of force by a law enforcement officer. The subtitle also adds four members to the Police Officers Standards and Training Board: the Executive Director of the Office of Police Complaints, and three additional community members. Each community member appointed to the board must have expertise in one of five outlined areas.

The subtitle also removes a U.S. citizenship requirement and allows permanent residents to be employed by MPD, and it requires MPD to review information on alleged or sustained misconduct and discipline if job applicants were previously employed by another law enforcement or public safety agency.

Subtitle H - The subtitle enhances requirements that helmets and uniforms MPD used during a First Amendment assembly prominently identify their affiliation as District police officers.

Subtitle I - The subtitle adds three criminal offenses for which a defendant may demand a jury trial when the victim-complainant is a law enforcement officer – assault, resisting arrest, and threats to do bodily harm.

Subtitle J – The subtitle repeals D.C. Code § 5-115.03, which, which specifies an officer commits a misdemeanor offense, punishable by fine or up to two-year imprisonment, for failure to make an arrest for an offense (including a federal offense) committed in their presence.

Subtitle K – The subtitle prohibits MPD from appointing sworn members who had any of the following experiences during prior employment by a law enforcement agency:

(1) Committed serious misconduct, as determined by the Chief by General Order;
(2) Terminated or was forced to resign for disciplinary reasons;
(3) Resigned to avoid potential, proposed, or pending adverse disciplinary action or termination.

Subtitle L - The subtitle makes the discipline of sworn law enforcement personnel a sole management right by precluding both substantive and impacts-and-effects bargaining over any matter pertaining to the discipline of sworn law enforcement personnel. The subtitle applies to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020.

Subtitle M – Current law requires MPD to initiate disciplinary actions against officers within 90 days of the incident. The subtitle repeals the 90-day limitation. The subtitle also allows the Chief of Police to increase penalties recommended by the trial board in officer discipline cases.

Subtitle N – The subtitle defines "deadly force" and codifies requirements for law enforcement officers to use deadly force, making permanent provisions existing under current temporary legislation. The subtitle further adds facts that must be considered in any judicial proceeding against an officer who has used deadly force, including whether the officer engaged in de-escalation techniques prior to using deadly force (including requesting support from a social worker or mental health professional) and whether the officer's conduct prior to the use of deadly force had increased the risk of confrontation.

Subtitle O – The subtitle makes permanent restrictions that have been in place since fiscal year 2021, under temporary legislation, to prohibit District law enforcement agencies from acquiring certain property from the federal government, including armed or armored vehicles, bayonets, explosives, and firearms and ammunition of 0.5 caliber or above.

Subtitle P – The subtitle makes permanent prohibitions on MPD's ability to use riot gear, chemical irritants and less-than-lethal projectiles during First Amendment assemblies. The subtitle also creates new procedures around MPD's issuance of an order to disburse during a First Amendment assembly, including that the order must be clearly audible and understandable and issued with an amplification system. The order must be repeated three times with at least two minutes between repetitions, unless there is imminent danger to people or property. Participants must be provided with a clear and safe route to disperse. The subtitle creates a private right of action in civil court for parties injured during First Amendment assemblies. Finally, the subtitle places new requirements on MPD before it can purchase less-lethal weapons, including to publish on its website a description of the weapons sought, their physical and psychological effects, an explanation of need, technical documentation, and a description of the training personnel will receive on the weapon.

Subtitle Q – The subtitle requires the Office of Police Complaints (OPC) to conduct a study to determine whether MPD engaged in biased policing when it conducted threat assessments before or during assemblies within the District from January 2017 through January 2021 and to include recommendations in its study. Data that must be analyzed for each assembly include the number of arrests; number and types of civilian and officer injuries; crowd control techniques, and number of officers deployed. OPC must provide a report on its study to Council no later than six months after the bill's effective date.

Subtitle R - The subtitle requires the Deputy Auditor for Public Safety (created and described under Subtitle Z, below) to conduct a comprehensive assessment of whether MPD officers have ties to white supremacist or other hate groups that may affect the officers' ability to carry out their duties properly and fairly or may undermine public trust in MPD. The report shall include recommendations to reform or improve MPD's hiring and training practices, policies, practice, and disciplinary system to better prevent, detect, and respond to white supremacist or other hate group ties among Department officers and staff. The report, including recommendations, must be submitted to the Mayor and Council no later than December 31, 2023.

Subtitle S – The subtitle creates new restrictions around MPD's ability to use motor vehicles to pursue suspects also in a motor vehicle. Any pursuit must be immediately necessarily to protect another person from serious injury or death and is limited to suspects who have committed or attempted a

violent crime. The pursuit itself must not be likely to cause serious injury or death to any person. The subtitle outlines all the circumstances that must be considered in any judicial proceeding regarding a vehicular pursuit. Finally, the subtitle defines six vehicular pursuit techniques and classifies five of them as a "serious use of force" and classifies "ramming" as a "deadly use of force."

Subtitle T – The subtitle adds police incident data to the school discipline data that each Local Education Agency (LEA) is required to report annually to the Office of the State Superintendent for Education (OSSE). The data must include the reason for involving law enforcement officers and the type and count of weapons, controlled substances, or other contraband recovered. The subtitle also requires MPD to keep records on the number of times an officer was dispatched to, or requested by, a school, disaggregated by school. The data must include the reason for dispatch; number of arrests; the type and count of controlled substances, weapons or contraband recovered, and demographic data for the persons involved in the incident. MPD must publish the data on its website annually. (MPD previously validated data through their School Resource Officer which are not gone. Also loops in transportation to school. OCTO will update its school address layer in GIS.

Subtitle U – The subtitle makes the provisions of the Opioid Overdose Prevention Emergency Amendment Act of 2022 permanent. District government employees and contractors acting within the scope of their official duties will be authorized to distribute drug testing equipment, specifically, fentanyl test strips, to prevent opioid overdose deaths.

Subtitle V – The subtitle makes the provisions of the Metropolitan Police Department Overtime Spending Accountability Emergency Act of 2020 permanent. MPD must provide a written report every two pay periods on MPD's overtime pay spending to the Council that describes the amount spent year-to-date on overtime pay, and a description of the staffing plan and conditions justifying the overtime pay.

Subtitle W - The Metropolitan Police Department (MPD) Cadet Program is a specialized program for under 25-year-old Washingtonians to serve part-time as uniformed, civilian employees. MPD Cadets spend part of their time working specific job assignments for MPD while also working toward their college degree. To be eligible to enroll in the MPD Cadet Program, individuals must be seniors in a District high school or graduates of a District high school. The bill removes[1] the requirement that the high school of a Cadet's enrollment or graduation be located in the District to expand the pool of eligible applicants to the program.

Subtitle X – The subtitle provides that disciplinary records of police at MPD, DCHAPD and OIG are subject to disclosure under FOIA and mandates a new database of disciplinary records. The subtitle details information which may be redacted from a FOIA disclosure, including employee addresses, information which would identify a victim, witness, complainant or whistleblower, and whether the employee used any employee assistance program. OPC shall create a publicly accessible database of sustained allegations of police misconduct occurring after January 1, 2017, including officer rank, file, badge number, current duty status and discipline imposed. The database must be created by December 31, 2024. Before creating the database, OPC is required to establish and consult with an advisory group to provide recommendations regarding the database and FOIA disclosure. The eleven

[1] By amending Section 2(a) of the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982, effective March 9, 1983 (D.C. Law 4-172; D.C. Official Code § 5-109.01(a)).

required members of the advisory group are outlined in the bill, and include representatives from the police departments affected, OAG, the Public Defender Service, the Fraternal Order of Police, and specified groups advocating for privacy, open government, civil liberties, the press and victim advocates.

Subtitle Y – The subtitle allows MPD to provide adult arrest records to employees or contractors working within the following District agencies:

(a) The Criminal Justice Coordinating Council;
(b) The Office of Gun Violence Prevention;
(c) The Office of Neighborhood Safety and Engagement;
(d) The Office of the Attorney General (OAG); and
(e) The Office of Victim Services and Justice Grants.

The subtitle further grants OAG the authority to analyze and publish all arrest data that MPD transfers to OAG, and it requires MPD to cooperate with reasonable requests for information about that arrest data.

Subtitle Z – The subtitle creates the position of the Deputy Auditor for Public Safety within the Office of the District of Columbia Auditor (ODCA) and establishes the position's minimum qualifications. The Deputy Auditor for Public Safety should collaborate with the PCB and OPC to conduct periodic reviews of the complaint review process and the management of officers that may affect police misconduct, such as training and discipline. These reviews should include demographic information of complainants and involved officers and the proposed and actual discipline imposed on an officer after a sustained complaint. The Deputy Auditor should also periodically review all use of force incidents, serious use of force incidents, serious physical injury incidents and in-custody deaths occurring at MPD, DCHAPD and OIG.

Financial Plan Impact

Funds are not sufficient in the fiscal year 2023 through fiscal year 2026 budget and financial plan to implement the bill. The bill will cost $1.23 million in fiscal year 2023 and $4.99 million over the four-year financial plan.

MPD will absorb many of the bill's new requirements. These include updating its training and continuing education for tactics needing to be changed because of provisions in the bill, providing adult arrest records for District agencies and bodies working on violence prevention, and reporting additional BWC data. MPD requires funding for nine new staff positions. A management analyst is required to manage increased communication and workload with the Office of Police Complaints in the areas of investigations and discipline. A policy writer will liaise with the PCB on the bill's new requirement for MPD to send all draft policy directives to PCB for review and approval. An attorney is required to support the expansion of records subject to FOIA (and any associated appeals) under Subtitle X, as well as to support the increased audits conducted by the new Deputy Auditor for Public Safety. Finally, to address an expected influx of FOIA requests related to Subtitle X, MPD will need five new FOIA specialists and one FOIA supervisor.

Metropolitan Police Department Costs Total Costs					
	FY 2023	FY 2024	FY 2025	FY 2026	Total
Salaries and Fringe	$984,000	$1,002,000	$1,021,000	$1,040,000	$4,047,000

Metropolitan Police Department Costs Total Costs					
	FY 2023	FY 2024	FY 2025	FY 2026	Total
Equipment	$23,000	$0	$0	$0	$23,000
Total MPD Costs	$1,007,000	$1,002,000	$1,021,000	$1,040,000	$4,070,000

OPC will require two new staff positions – a policy analyst and a senior investigator – to perform the additional reviews required under the bill and exercise the bill's additional authorities. Salaries, fringe expenses and associated equipment for the two new employees will cost OPC an average of $204,000 annually. OPC also requires $25,000 for IT software to post and maintain the required publicly accessible misconduct database. In total, the bill will cost OPC $227,000 in fiscal year 2023 and $917,000 over the four-year financial plan.

Office of Police Complaints Costs Total Costs					
	FY 2023	FY 2024	FY 2025	FY 2026	Total
Salaries and Fringe	$197,000	$200,000	$204,000	$208,000	$809,000
Equipment	$5,000	$0	$0	$0	$5,000
Software	$25,000	$25,000	$26,000	$26,000	$102,000
Total OPC Costs	$227,000	$225,000	$230,000	$234,000	$917,000

OADC has sufficient funding to create the Deputy Auditor for Public Safety and complete the audits specified in the subtitle. The Deputy Auditor for Public Safety position and eight supporting staff were included in OCDA's fiscal year 2023 budget. OADC also has sufficient funding for the costs of a contractor to complete the report required by Subtitle R.

Costs for the District of Columbia Housing Authority (DCHA) Police Department have not been included in this fiscal impact statement. The Fiscal Year 2023 budget for the District provided $4,2 million of operating support for DCHA public safety functions through the Housing Authority Subsidy. Any impacts on DCHA from the bill could be covered through an increase in the subsidy, but they are not required to be.

Comprehensive Police and Justice Reform Amendment Act of 2022 Total Costs					
	FY 2023	FY 2024	FY 2025	FY 2026	Total
MPD Costs	$1,007,000	$1,002,000	$1,021,000	$1,040,000	$4,070,000
OPC Costs	$227,000	$225,000	$230,000	$234,000	$917,000
Total Costs	$1,234,000	$1,228,000	$1.251,000	$1,274,000	$4,987,000

ATTACHMENT W

November 30, 2022

The racial equity impact assessments for the following bills are not included in this document.

Human Services

B24-0120, the "Emergency Rental Assistance Reform and Career Mobility Action Plan Program Establishment Amendment Act of 2021"

Judiciary and Public Safety

B24-0063, the "Second Chance Amendment Act of 2022"
B24-0076, the "Corrections Oversight Improvement Omnibus Amendment Act of 2022"
B24-0320, the "Comprehensive Policing and Justice Reform Amendment Act of 2022"

Transportation and Environment

B24-0785, the "Greener Government Buildings Amendment Act of 2022"
B24-0950, the "Local Solar Expansion Amendment Act of 2022"

We, the Council Office of Racial Equity, commit to publishing the completed racial equity impact assessments (REIAs) by the bills' final readings. Like all completed REIAs, the published assessments will be available on our website as part of our REIA database.

Until that time, this document will serve as a placeholder to satisfy the Council Period 24 Rules and not block the bills' consideration in the legislative process.

Given the volume of legislation being moved, we require more time to conduct our assessment of how these bills will impact Black residents, Indigenous residents, and other residents of color in the District of Columbia.

Once we have had adequate time with the bills named above to apply the diligence and rigor that a racial equity impact assessment requires, we will publish our completed REIAs.

Namita Mody
Director, Council Office of Racial Equity

ATTACHMENT X

OFFICE OF THE GENERAL COUNSEL
Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 4
Washington, DC 20004
(202) 724-8026

MEMORANDUM

TO: **Councilmember Charles Allen**

FROM: **Nicole L. Streeter, General Counsel** *NLS*

DATE: **November 29, 2022**

RE: **Legal sufficiency determination for Bill 24-320, the Comprehensive Policing and Justice Reform Amendment Act of 2022**

The measure is legally and technically sufficient for Council consideration.

The bill would:

- Amend the Limitation on the Use of the Chokehold Act of 1985 to prohibit the use of a prohibited technique and failure to render first aid or request emergency medical service if a law enforcement officer is able to observe another law enforcement officer's use of a prohibited technique;
- Amend the Federal Law Enforcement Officer Cooperation Act of 1999 to make conforming changes;
- Amend the Body-Worn Camera Regulation and Reporting Requirements and Chapter 39 of Title 24 of the District of Columbia Municipal Regulations to regulate the release of body-worn camera recordings;
- Amend the Office of Citizen Complaint Review Establishment Act of 1998 to provide that the Police Complaints Board shall be composed of 9 members, 8 each from a different Ward, one at-large, and to clarify the complaint process;
- Establish a Use of Force Review Board, which shall review uses of force, as set forth by the Metropolitan Police Department in its written directives, and shall consist of 13 voting members;
- Amend the Confirmation Act of 1978 to make conforming changes;
- Amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to repeal a law that criminalizes mask wearing in certain situations;

- Amend Chapter 5 of Title 23 of the District of Columbia Official Code to provide, in cases where a search is based solely on the subject's consent to that search, require law enforcement officers to, prior to conducting a search of a person, vehicle, home, or property, explain the search, advise the subject that a search will not be conducted if the subject declines to consent, obtain consent without any threats or promises, confirm that the subject understands the information provided, and use interpretation services in certain situations;
- Amend the Metropolitan Police Department Application, Appointment, and Training Requirements of 2000 to require additional continuing education for Metropolitan Police Department officers;
- Amend the First Amendment Assemblies Act of 2004 to require the uniforms and helmets of officers policing a First Amendment assembly to identify the officers' affiliation with local law enforcement;
- Amend D.C. Official Code § 16-705 to provide the right to a jury trial when the defendant is charged with certain offenses and the person who is alleged to have been the victim of the offense is a law enforcement officer;
- Amend the Revised Statutes of the District of Columbia to repeal a provision that made it unlawful for a member of the police force to neglect making any arrest for an offense against the laws of the United States committed in his presence;
- Amend the Omnibus Police Reform Amendment Act of 2000 to provide circumstances in which an applicant shall be ineligible for appointment as a sworn member of the Metropolitan Police Department;
- Amend the District of Columbia Government Comprehensive Merit Personnel Act of 1978 to provide that all matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable;
- Amend the Omnibus Public Safety Agency Reform Amendment Act of 2004 to extend the time during which the Metropolitan Police Department may bring corrective or adverse action against an employee, if the case involves the serious use of force or potential criminal conduct;
- Restrict the circumstances in which a law enforcement officer may use non-deadly force and deadly force;
- Prohibit District law enforcement agencies from acquiring certain weaponry through any program operated by the federal government;

- Amend the First Amendment Assemblies Act of 2004 to restrict the use of riot gear, chemical irritants, and less-lethal projectiles at First Amendment assemblies;
- Amend An Act relating to crime and criminal procedure in the District of Columbia to provide that a law enforcement officer's failure to comply with D.C. Official Code § 5-331.07 shall be a defense in prosecutions for violations of certain offenses;
- Require District law enforcement agencies to publish certain information when they seek to purchase or acquire less-lethal weapons;
- Amend the Office of Citizen Complaint Review Establishment Act of 1998 to require the Executive Director of the Office of Police Complaints ("Office") to conduct a study to determine whether the Metropolitan Police Department ("MPD") engaged in biased policing when it conducted threat assessments before or during assemblies within the District, to require the Office to maintain a publicly accessible database that contains certain information related to sustained allegations of misconduct, and to require the Office to establish and consult with an advisory group;
- Require the Office of the District of Columbia Auditor to conduct a comprehensive assessment of whether MPD officers have ties to white supremacist or other hate groups;
- Restrict when a law enforcement officer may use a motor vehicle to engage in a vehicular pursuit of a suspect motor vehicle;
- Amend the Attendance Accountability Amendment Act of 2013 to require local education agencies and entities operating a publicly funded community-based organization to maintain data for each student that includes certain discipline data;
- Amend section 386 of the Revised Statutes of the District of Columbia to require the Mayor to cause the MPD to keep certain records relating to school police incidents, to require MPD to publish certain information on its website, and to require MPD to provide a report to the Council every 2 pay periods on MPD's overtime pay spending;
- Amend the Drug Paraphernalia Act of 1982 to provide that it shall not be unlawful for District government employees, contractors, and grantees, acting within the scope of their employment, contract, or grant, to deliver, or possess with the intent to deliver, drug paraphernalia for the personal use of a controlled substance;

- Amend the Police Officer and Firefighter Cadet Program Funding Authorization and Human Rights Act of 1977 Amendment of 1982 to make changes to the cadet program;
- Amend the Freedom of Information Act of 1976 to provide for the release and redaction of certain disciplinary records;
- Amend section 1004 of Title I of the District of Columbia Municipal Regulations to provide that nothing in the section shall prohibit MPD from providing unexpurgated adult arrest records to certain employees or contacts within certain agencies;
- Amend the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010 to permit the Office of the Attorney General ("OAG") to analyze and publish all arrest data that MPD transfers to it;
- Amend the District of Columbia Auditor Subpoena and Oath Authority Act of 2004 to establish within the Office of the District of Columbia Auditor the position of Deputy Auditor for Public Safety; and
- Amend the Revised Criminal Code Act to provide that an employee of the Office of the Inspector General who, as part of their official duties, conducts investigations of alleged felony violations shall be considered a law enforcement officer.

I am available if you have any questions.

ATTACHMENT Y

Comparative Committee Print
B24-0320
Committee on the Judiciary and Public Safety
November 30, 2022

Title 1

Subtitle A

Section 101

D.C. Official Code § 5–125.01

(a) The Council of the District of Columbia finds that law enforcement officers' use of neck restraints, or any other technique that causes asphyxiation, presents an unnecessary danger to the public and constitutes excessive force.

(b) On November 1, 2015, Alonzo Smith died after an altercation with 2 special police officers. During the incident, Smith was placed facedown with his hands cuffed behind his back as one special police officer held Smith's head down and another kneeled on his back. The Office of the Chief Medical Examiner ruled Smith's death a homicide.

(c) On May 25, 2020, Minneapolis Police Department officer Derek Chauvin murdered George Floyd by applying a neck restraint to Floyd with his knee for 8 minutes and 46 seconds. Hundreds of thousands, if not millions, of people across the world, including in the District, took to the streets to peacefully protest injustice, racism, white supremacy, and police brutality against Black people and other people of color. Chauvin was ultimately found guilty of second-degree unintentional murder, third-degree murder, and second-degree manslaughter.

(d) Police brutality is abhorrent and antithetical to the District's values. It is the intent of the Council that this act unequivocally strengthen the 1985 ban on the use of neck restraints and other techniques that can cause asphyxiation by law enforcement officers. ~~The Council of the District of Columbia finds and declares that the use of restraints generally known as chokeholds by law enforcement officers constitutes the use of lethal force, and that the unrestricted use of force presents an unnecessary danger to the public. These conclusions are based upon the testimony presented at the police oversight hearing conducted by the Committee on the Judiciary on February 23, 1984. During the hearing, statistics were revealed indicating that there have been 2 civilian deaths in as many years caused by an officer's use of the chokehold. Therefore, it is the intent of the Council in the enactment of this subchapter to specify the circumstances and procedures under which these restraints shall be permitted and to classify the chokehold as a service weapon.~~

D.C. Official Code § 5-125.02. Definitions.

For the purposes of this subchapter, the term:

~~(1) A "trachea hold," "arm bar hold," or "bar-arm hold" means any weaponless technique or any technique using the officer's arm, a long or short police baton, or a flashlight or other firm object that attempts to control or disable a person by applying force or pressure against the trachea, windpipe, or the frontal area of the neck with the purpose or intent of controlling a~~

~~person's movement or rendering a person unconscious by blocking the passage of air through the windpipe.~~

~~(2) A "carotid artery hold," "sleeper hold," or "v hold" means any weaponless technique which is applied in an effort to control or disable a person by applying pressure or force to the carotid artery or the jugular vein or the sides of the neck with the intent or purpose of controlling a person's movement or rendering a person unconscious by constricting the flow of blood to and from the brain.~~

(3) "Asphyxiating restraint" means:

(A) The use of any body part or object by a law enforcement officer against a person with the purpose, intent, or effect of controlling or restricting the person's airway or breathing, except in cases where the law enforcement officer is acting in good faith to provide medical care or treatment, such as by providing cardiopulmonary resuscitation; or

(B) The placement of a person by a law enforcement officer in a position in which that person's airway is restricted.

(4) "Law enforcement officer" means:

(A) An officer or member of the Metropolitan Police Department or of any other police force operating in the District;

(B) An investigative officer or agent of the United States;

(C) An on-duty, civilian employee of the Metropolitan Police Department;

(D) An on-duty, licensed special police officer;

(E) An on-duty, licensed campus police officer;

(F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services;

(G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division; and

(H) An employee of the Office of the Inspector General who, as part of their official duties, conducts investigations of alleged felony violations.

(5) "Neck restraint" means the use of any body part or object by a law enforcement officer to apply pressure against a person's neck, including the trachea, carotid artery, or jugular vein, with the purpose, intent, or effect of controlling or restricting the person's movement, blood flow, or breathing.

(6) "Prohibited technique" means an:

(A) Asphyxiating restraint; or

(B) Neck restraint.

D.C. Official Code § 5–125.03. Use of prohibited techniques. ~~Trachea hold prohibited; carotid artery hold restricted.~~

(a) It shall be unlawful:

(1) To use a prohibited technique; or

(2) If a law enforcement officer is able to observe another law enforcement officer's use of a prohibited technique, to fail to immediately, for the person on whom the prohibited technique was used:

(A) Render, or cause to be rendered, first aid; or

(B) Request emergency medical services.

(b) Use of a prohibited technique shall also be subject to any civil remedies related to a violation of standards set forth in the police manual or general orders of the Metropolitan Police Department. ~~(a) The use of the trachea hold by any police officer shall be prohibited under any circumstances and the carotid artery hold shall be prohibited except under those circumstances and conditions under which the use of lethal force is necessary to protect the life of a civilian or a law enforcement officer, and has been effected to control or subdue an individual, and the Metropolitan Police Department has issued procedures and policies which require, at a minimum, all the following:~~

~~(1) That an officer shall have satisfactorily completed a course of training on the carotid artery hold;~~

~~(2) That the officer who has applied the carotid hold on an individual render that person immediate first aid and emergency medical treatment if the person becomes unconscious as a result of the hold pending immediate transport of the person to the hospital;~~

~~(3) That upon resuscitation of the unconscious person, the individual shall be transported immediately to an emergency medical facility for examination, treatment, and observation by a competent and qualified emergency medical technician or physician within a reasonable period of time not to exceed 1 hour; and~~

~~(4) That where the person rendered unconscious through the use of a hold is unconscious for a period of 3 minutes or more, or appears to be under the influence of alcohol or drugs, or has shown signs of acute mental disturbance, that person shall be immediately transported to an emergency medical or acute care facility for examination, treatment, or observation by competent and qualified medical personnel within a reasonable period not to exceed 1 hour.~~

~~(b) The failure to provide immediately appropriate medical aid as required in subsection (a)(3) and (4) of this section to a person who has been rendered unconscious or subdued by the use of a hold shall for purposes of civil liability create a presumption, affecting the burden of proof, of willful negligence and reckless disregard for the safety and well-being of that person.~~

~~(c)(1) Every police officer who under color of authority willfully and intentionally violates the standards prescribed in this section or any regulations issued pursuant to this subchapter shall, upon conviction, be subject to a fine of $5,000, or imprisonment not exceeding 1 year, or both, and removal from office.~~

~~(2) Such conduct shall also be subject to any civil remedies related to a violation of standards set forth in the police manual or general orders of the Metropolitan Police Department.~~

~~(d) The trachea hold is prohibited and the carotid artery hold shall be classified as a service weapon and all relevant Metropolitan Police Department general orders, special orders, and circulars shall be applicable.~~

Section 102

D.C. Official Code § 5-302

Officers when acting under the authority granted in § 5-301(a) shall be subject to the restrictions imposed on MPD officers under the laws codified in Chapter 1 of this title. These restrictions include, but are not limited to, arrests under § 5-115.01, use of unnecessary or wanton force under § 5-123.02, and the use of use of prohibited techniques, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-

77; D.C. Official Code § 5-125.02(6))~~trachea and carotid artery holds under §§ 5-125.02 and 5-125.03.~~

Subtitle B

Section 103

D.C. Official Code § 5–116.33. Body-Worn Camera Program; reporting requirements; access.

(a) By October 1, 2015, and every 6 months thereafter, the Mayor shall collect, and make available in a publicly accessible format, data on the Metropolitan Police Department's Body-Worn Camera Program, including:

(1) How many hours of body-worn camera recordings were collected;

(2) How many times body-worn cameras failed while officers were on shift and the reasons for the failures;

(3) How many times internal investigations were opened for a failure to turn on body-worn cameras during interactions, and the results of those internal investigations, including any discipline imposed;

(4) How many times body-worn camera recordings were used by the Metropolitan Police Department in internal affairs investigations;

(5) How many times body-worn camera recordings were used by the Metropolitan Police Department to investigate complaints made by an individual or group;

(6) How many body-worn cameras are assigned to each police district and police unit for the reporting period;

(7) How many Freedom of Information Act requests the Metropolitan Police Department ("Department") received for body-worn camera recordings during the reporting period, the outcome of each request, including any reasons for denial, ~~and the cost to the department for complying with each request, including redaction~~ any costs invoiced to the requestor, the cost to the Department for complying with each request, including redaction, and the length of time between the initial request and the Department's final response; and

(8) How many recordings were assigned to each body-worn camera recording category.

(b) The Metropolitan Police Department shall provide the Office of Police Complaints with direct access to body-worn camera recordings.

(c) Notwithstanding any other law:

(1) Within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Metropolitan Police Department, the Metropolitan Police Department shall provide unredacted copies of the requested body-worn camera recordings to the Chairperson. Such body-worn camera recordings shall not be publicly disclosed by the Chairperson or the Council; except, that the Councilmember representing the Ward in which the incident occurred may jointly view the recordings; and

(2) The Mayor:

(A) Shall, except as provided in paragraph (2) of this subsection:

(i) Within 5 business days after an officer-involved death or the serious use of force, publicly release:

(I) The names and body-worn camera recordings of all officers directly involved in the officer-involved death or serious use of force; and

(II) A description of the incident; and

(ii) Maintain, on the website of the Metropolitan Police Department in a format readily accessible and searchable by the public, the names and body-worn camera recordings of all officers who were directly involved in an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

(B) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the Office of the Attorney General, and the United States Attorney's Office for the District of Columbia, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request or subparagraph (A) of this paragraph.

(3)(A) The Mayor shall not release a body-worn camera recording pursuant to paragraph (1)(A) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

(i) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and

(ii) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

(B)(i) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (A) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

(ii) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interests of justice.

(d) Before publicly releasing a body-worn camera recording of an officer-involved death, the Metropolitan Police Department shall:

(1) Consult with an organization with expertise in trauma and grief on best practices for providing the decedent's next of kin with a reasonable opportunity view the body-worn camera recording privately in a non-law enforcement setting prior to its release; and

(2) In a manner that is informed by the consultation described in paragraph (1) of this subsection:

(A) Provide actual notice to the decedent's next of kin at least 24 hours before the release, including the date on which it will be released;

(B) Offer the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting; and

(C) If the next of kin accepts the offer in subparagraph (B) of this paragraph, provide the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting.

(e)(1) Metropolitan Police Department officers shall not review their body-worn camera recordings or body-worn camera recordings that have been shared with them to assist in initial report writing.

(2) Officers shall indicate, when writing any subsequent reports, whether the officer viewed body-worn camera footage prior to writing the subsequent report and specify what body-worn camera footage the officer viewed.

(f) When releasing body-worn camera recordings, the likenesses of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, shall not be redacted or otherwise obscured.

(g) For the purposes of this section, the term:

"(1) "FOIA" means Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 et seq.).

(2) "Next of kin" means the priority for next of kin as provided in Metropolitan Police Department General Order 401.08, or its successor directives.

(3) "Serious use of force" means any:

(A) Firearm discharges by a Metropolitan Police Department officer, with the exception of range and training incidents;

(B) Head strikes by a Metropolitan Police Department officer with an impact weapon;

(C) Uses of force by a Metropolitan Police Department officer:

(i) Resulting in serious physical injury;

(ii) Resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ;

(iii) Involving the use of a prohibited technique, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6)); and

(iv) Resulting in a death; and

(D) Incidents in which a Metropolitan Police Department canine bites a person.

Subtitle C

Section 104

3900 GENERAL PROVISIONS

3900.1 The purposes of this chapter are to establish rules for the Metropolitan Police Department's Body-Worn Camera Program ("BWC Program") and to implement Section 3003 of the Fiscal Year 2016 Budget Support Act of2015, effective October 22, 2015 (D.C. Law 21- 36; 62 DCR 10905 (August 14, 2015)).

3900.2 The intent of the BWC Program is to promote accountability and transparency, foster improved police-community relations, and ensure the safety of both MPD members ("members") and the public.

3900.3 In addition to these regulations, the Chief of Police of MPD may issue policy directives to members; those policy directives shall be published on the Department's website at http://mpdc.dc.gov/page/written-directives-general-orders.

3900.4 Members shall successfully complete MPD-offered or approved BWC training before being issued a BWC.

3900.5 When practicable, members shall inform contact subjects that they are being recorded at the beginning of the contact and shall provide language access services to all limited and non-English proficient persons in a timely and effective manner.

3900.6 Members may record First Amendment assemblies for the purpose of documenting violations of law and police actions, as an aid to future coordination and deployment of law enforcement units, and for training purposes; provided, that recording First Amendment assemblies shall not be conducted for the purpose of identifying and recording the presence of participants who are engaged in lawful conduct.

3900.7 Members shall not create BWC recordings when they are at a school and are engaged in non-critical contacts with students or mediating minor incidents involving students. For the purposes of this subsection, "school" means a facility devoted to primary or secondary education.

3900.8 When reviewing BWC recordings, members shall immediately notify Department officials upon observing, or becoming aware of, an alleged violation of Department policies, laws, rules, regulations, or directives.

3900.9 (a) Members shall not review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing.

(b) Members shall indicate, when writing any subsequent reports, whether the member viewed BWC footage prior to writing the subsequent report and specify what BWC footage the member viewed. ~~Members may review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing, except in cases involving a police shooting.~~

3900.10 (a) Notwithstanding any other law, the Mayor:

(1) Shall, except as provided in paragraph (b) of this subsection:

(A) Within 5 business days after an officer-involved death or the serious use of force, publicly release:

(i) The names and body-worn camera recordings of all officers directly involved in the officer-involved death or serious use of force; and

(ii) A description of the incident; and

(B) Maintain, on the website of the Metropolitan Police Department in a format readily accessible and searchable by the public, the names and body-worn camera recordings of all officers who were directly involved in an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

(2) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the Office of the Attorney

General, and the United States Attorney's Office for the District of Columbia, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request or paragraph (a)(1)(A) of this subsection.

(b)(1) The Mayor shall not release a body-worn camera recording pursuant to paragraph (a)(1)(A) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

(A) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and

(B) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

(2)(A) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (1) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

(B) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interests of justice.

(c) Before publicly releasing a body-worn camera recording of an officer-involved death, the Metropolitan Police Department shall:

(1) Consult with an organization with expertise in trauma and grief on best practices for providing the decedent's next of kin with a reasonable opportunity view the body-worn camera recording privately in a non-law enforcement setting prior to its release; and

(2) In a manner that is informed by the consultation described in subparagraph (1) of this paragraph:

(A) Provide actual notice to the decedent's next of kin at least 24 hours before the release, including the date on which it will be released;

(B) Offer the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting; and

(C) If the next of kin accepts the offer in sub-subparagraph (B) of this subparagraph, provide the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting .~~The Mayor may, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the United States Attorney's Office for the District of Columbia, and the Office of the Attorney General, release BWC recordings that would otherwise not be releasable pursuant to a FOIA request. Examples of matters of significant public interest include officer-involved shootings, serious use of force by an officer, and assaults on an officer requiring hospitalization.~~

3901 RETENTION OF BODY-WORN CAMERA RECORDINGS

3901.1 Unless subject to the requirements of § 3901.2, a BWC recording shall be retained by the Department for not more than ninety (90) calendar days from the date the recording was created. All metadata shall be retained by the Department for not less than five (5) years.

3901.2 The Department shall, through a policy directive, establish and make available on its website retention schedules for BWC recordings that contain the following:

(a) Recordings related to a criminal investigation;

(a-1) Recordings related to a request from or investigation by the Chairperson of the Council Committee with jurisdiction over the Department;

(b) Recordings involving conduct by a member or civilian employee that is under investigation or the subject of a complaint;

(c) Recordings related to a death investigation;

(d) Recordings that the Department has actual or constructive knowledge may be:

(1) Subject to a civil litigation hold;

(2) Subject to a FOIA request; or

(3) Used for training purposes by the Department; and

(e) Any other category of recordings that the Chief of Police determines should be retained.

3902 ACCESS TO BODY-WORN CAMERA VIDEO

3902.1 The Department shall make unredacted BWC recordings available to the United States Attorney's Office for the District of Columbia, the Office of the Attorney General, and the Office of Police Complaints.

3902.2 The Department shall make BWC recordings available to law enforcement or investigatory agencies, such as the Office of the Inspector General and the Office of the District of Columbia Auditor, pursuant to the officers' or agencies' official duties. Nothing in this subsection shall be construed to limit those entities' authority under existing law. The cost of any required redactions shall be borne by the Department.

3902.3 A FOIA request for a BWC recording shall only be submitted to the Department ~~MPD~~.

3902.4 Notwithstanding any other law, within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Department, the Department shall provide unredacted copies of the requested BWC recordings to the Chairperson. Such BWC recordings shall not be publicly disclosed by the Chairperson or the Council; except, that the Councilmember representing the Ward in which the incident occurred may jointly view the recordings. ~~The Department shall make unredacted BWC recordings available to the appropriate oversight committee or committees of the Council of the District of Columbia upon request~~

~~of the committee or committees. BWC recordings in the possession of the Council shall not be publicly disclosed.~~

3902.5 (a) Pursuant to policy directives adopted under the authority of § 3900.3, the Department shall schedule a time for the following individuals to view a BWC recording:

(1) Any subject of the BWC recording;

(2) The subject's legal representative;

(3) If the subject is a minor, the subject's parent or legal guardian; or

(4) If the subject is deceased, the subject's parent, legal guardian, next of kin, and their respective legal representatives.

(b) Notwithstanding paragraph (a) of subsection:

(1) None of the individuals listed in paragraph (a) of subsection may make a copy of the BWC recording; and

(2)The Department may not schedule a time to view the BWC recording if access to the unredacted BWC recording would violate a recognized privacy right of another subject.

~~(a) Pursuant to policy directives adopted under the authority of § 3900.3, the Department shall schedule a time for any subject of a BWC recording, the subject's legal representative, and the subject's parent or legal guardian if the subject is a minor, to view the BWC recording at the police station in the police district where the incident occurred; provided, that:~~

~~(1) Neither the subject, the subject's legal representative, nor the subject's parent or legal guardian if the subject is a minor shall make a copy of the BWC recording;~~

~~(2) Access to the unredacted BWC recording would not violate the individual privacy rights of any other subject; and~~

~~(3) Access to the unredacted BWC recording would not jeopardize the safety of any other subject.~~

~~(b)~~

~~(1) To receive a copy of a BWC recording viewed pursuant to paragraph (a) of this subsection, an individual shall file a FOIA request with the Department; provided, that there shall be no cost to the individual for the production of the BWC recording.~~

~~(2) Upon receipt of the copy of the BWC recording, the individual may further copy or distribute the BWC recording.~~

3902.6 An individual seeking to obtain a copy of a BWC recording not covered by § 3902.5 may submit a FOIA request to the Department for a copy of the BWC recording.

3902.7 The Department shall engage academic institutions and organizations to analyze the BWC Program; provided, that any such relationships shall require the protection of any information or unredacted BWC recordings.

3902.8 The Department shall, through a policy directive, develop procedures to implement this section and District law.

3902.9 When releasing body-worn camera recordings, the likenesses of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, shall not be redacted or otherwise obscured.

3999 DEFINITIONS

3999.1 When used in this chapter, the following terms and phrases shall have the meanings ascribed:

"Body-worn camera" or "BWC"- means a camera system with secured internal memory for storage of recorded audio and video that is designed to be worn on the clothing of or otherwise secured to a person.

"Department" or "MPD" - means the Metropolitan Police Department.

"FOIA" - means Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code §§ 2-531 *et seq*.).

"Metadata" - means descriptors that identify the time, date, location, badge number linked to the creation of the record, and officer interaction/offense categorization of BWC recordings.

"Next of kin" shall mean the priority for next of kin as provided in MPD General Order 401.08, or its successor directive.

"Serious use of force" means any:

(1) Firearm discharges by a Metropolitan Police Department officer, with the exception of range and training incidents;

(2) Head strikes by a Metropolitan Police Department officer with an impact weapon;

(3) Uses of force by a Metropolitan Police Department officer:

(A) Resulting in serious physical injury;

(B) Resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ;

(C) Involving the use of a prohibited technique, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act

of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6)); and

(D) Resulting in a death; and

(4) Incidents in which a Metropolitan Police Department canine bites a person.

"Subject" - means an individual who is not an on-duty law enforcement officer at the time of the BWC recording and who has been recorded by a BWC.

"Use of force" - means any physical contact used to effect, influence, or persuade an individual to comply with an order from an officer. The term shall not include unresisted handcuffing or hand control procedures that do not result in injury.

Section 105

D.C. Official Code § 5–1101. Findings.

The Council of the District of Columbia finds that:

(1) The District of Columbia delegated to the Metropolitan Police Department ("MPD") the vital task of protecting the safety of persons and property in the District of Columbia. This task is difficult, dangerous, and sensitive.

(2) Most members of the MPD perform their duties with diligence, devotion, and sensitivity. From time to time, however, some members of the MPD do not act in accordance with the high standards of conduct that the people of the District of Columbia have a right to expect. On other occasions, honest misunderstandings arise between police officers and members of the public with whom they interact.

(3) Because police officers have been given extraordinary powers, it is essential that there be an effective and efficient system for reviewing their exercise of police powers. Further, it is essential that both police officers and members of the public have confidence that this system of review is fair and unbiased. Members of the public must be aware of this system and have easy access to its processes.

(3A) Members of the District of Columbia Housing Authority Police Department ("DCHAPD") are also authorized to make arrests, carry a firearm, and perform other functions normally reserved for members of the Metropolitan Police Department. Since the powers of DCHAPD officers closely resemble the powers of MPD officers, an effective system of police oversight must include a process for resolving allegations concerning DCHAPD officers.

(3B) Similarly, employees of the Office of the Inspector General ("OIG") are authorized to carry a firearm, make warrantless arrests for felony violations of the law, and serve as affiants for search warrants. Again, since the powers of this specific class of OIG employees have powers that closely resemble the powers of MPD officers, an effective system of police oversight must include a process for resolving allegations concerning OIG employees conducting felony investigations.

(4) The need for independent review of police activities is recognized across the nation. Effective independent review enhances communication and mutual understanding between the

police and the community, reduces community tensions, deters police misconduct, and increases the public's confidence in their police force.

(5) Some complaints against police officers involve serious charges requiring formal disciplinary proceedings. Many, though, can be resolved through conciliation, mediation, or other dispute resolution techniques. An effective and efficient review mechanism should encompass a variety of procedures for dealing with different complaints in an appropriate manner.

D.C. Official Code § 5–1102. Purpose.

The purpose of this subchapter is to establish an effective, efficient, and fair system of independent review of ~~citizen~~ complaints against law enforcement ~~police~~ officers in the District of Columbia, which will:

(1) Be visible to and easily accessible to the public;

(2) Investigate promptly and thoroughly claims of police misconduct;

(3) Encourage the mutually agreeable resolution of complaints through conciliation and mediation where appropriate;

(4) Provide adequate due process protection to officers accused of misconduct;

(5) Provide fair and speedy determination of cases that cannot be resolved through conciliation or mediation;

(6) Render just determinations;

(7) Foster increased communication and understanding and reduce tension between the police and the public; and

(8) Improve the public safety and welfare of all persons in the District of Columbia.

D.C. Official Code § 5–1103. Definitions.

For purposes of this subchapter, the term:

(1) "Board" means the Police Complaints Board.

(2) "Complaint examiner" means the person designated by the Executive Director to determine the merits of a complaint.

(2A) "DCHA" means the District of Columbia Housing Authority.

(2B) "DCHAPD" means the District of Columbia Housing Authority Police Department.

(2C) "Designated agency principal" means:

(A) The Police Chief, for cases in which the subject police officer or employee is a member of the MPD;

(B) The DCHA Director, for cases in which the subject police officer or employee is a member of the DCHAPD; or

(C) The Inspector General, for cases in which the subject police officer or employee is a member of the OIG authorized to conduct felony investigations.

(3) "Executive Director" means the head of the Office of Police Complaints.

(3A) "Gender identity or expression" shall have the same meaning as provided in § 2-1401.02(12A).

(3B) "MPD" means the Metropolitan Police Department.

(4) "Office" means the Office of Police Complaints.

(5) "OIG" means the Office of the Inspector General.

D.C. Official Code § 5–1104. Police Complaints Board.

(a)(1) There is established a Police Complaints Board ("Board"). The Board shall be composed of 9 members, which shall include one member from each Ward and one at-large member, none of whom shall have a current or prior affiliation with law enforcement, including being employed by a law enforcement agency or law enforcement union. ~~5 members, one of whom shall be a member of the MPD, and 4 of whom shall have no current affiliation with any law enforcement agency. All members of the Board shall be residents of the District of Columbia. The members of the Board shall be appointed by the Mayor, subject to confirmation by the Council. The Mayor shall submit a nomination to the Council for a 90-day period of review, excluding days of Council recess. If the Council does not approve the nomination by resolution within this 90-day review period, the nomination shall be deemed disapproved.~~

(2) The Board members shall be District residents and represent the District's geographic, demographic, and cultural diversity.

(3)(A) The members of the Board shall be appointed by the Mayor, subject to confirmation by the Council.

(B) The Mayor shall submit a nomination to the Council for a 90-day period of review, excluding days of Council recess.

(C) If the Council does not approve the nomination by resolution within this 90-day review period, the nomination shall be deemed disapproved.

(b) Board members first appointed after March 26, 1999 shall serve as follows: 2 shall serve for a 3-year term; 2 shall serve for a 2-year term; and one shall serve for a 1-year term. Thereafter, Board members shall serve for a term of 3 years or until a successor has been appointed. All board members shall serve without compensation. A Board member may be reappointed. The Board shall select a chairperson from among its members. The Mayor may remove a member of the Board from office for cause. ~~The Mayor shall designate the chairperson of the Board, and may remove a member of the Board from office for cause.~~ A person appointed to fill a vacancy on the Board occurring prior to the expiration of a term shall serve for the remainder of the term or until a successor has been appointed.

(c) A quorum for the transaction of business shall be 5 ~~3~~ members of the Board.

(d) The Board shall conduct periodic reviews of the complaint review process, and shall make recommendations, where appropriate, to the Mayor, the Council, and the designated agency principal concerning the status and the improvement of the complaint process and the management of the MPD and the DCHAPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers. ~~The Board shall conduct periodic reviews of the citizen complaint review process, and shall make recommendations, where appropriate, to the Mayor, the Council, the Chief of the Metropolitan Police Department ("Police Chief"), and the Director of the District of Columbia Housing Authority ("DCHA Director") concerning the status and the improvement of the citizen complaint process. The Board shall, where appropriate, make recommendations to the above-named entities concerning those elements of management of the MPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers.~~

(d-1) The Board may, where appropriate, monitor and evaluate MPD's handling of, and response to, First Amendment assemblies, as defined in § 5-333.02, held on District streets, sidewalks, or other public ways, or in District parks.

(d-2)(1) The Board shall review the following, with respect to the MPD, the DCHAPD, or the OIG:

(A) The number, type, and disposition of ~~citizen~~ complaints received, investigated, sustained, or otherwise resolved;

(B) The race, national origin, gender, and age of the complainant, if known, and the subject officer or officers;

(C) The proposed discipline and the actual discipline imposed on a police officer as a result of any sustained ~~citizen~~ complaint;

(D) All use of force incidents, serious use of force incidents, and serious physical injury incidents ~~as defined in MPD General Order 907.07~~; and

(E) Any in-custody death.

(2) The Executive Director, acting on behalf of the Board, shall have timely and complete access to information and supporting documentation specifically related to the Board's duties under paragraph (1) of this subsection.

~~(3) The Executive Director shall keep confidential the identity of all persons named in any documents transferred from the MPD to the Office pursuant to paragraph (1) of this subsection.~~

(4) The disclosure or transfer of any public record, document, or information from the MPD, the DCHAPD, or the OIG to the Office pursuant to paragraph (1) of this subsection shall not constitute a waiver of any privilege or exemption that otherwise could be asserted by the MPD, the DCHAPD, or the OIG to prevent disclosure to the general public or in a judicial or administrative proceeding.

(5) A Freedom of Information Act request for public records collected pursuant to paragraph (1) of this subsection may only be submitted to the MPD, the DCHAPD, or the OIG.

(6) Beginning on December 31, 2017, and by December 31 of each year thereafter, the Board shall deliver a report to the Mayor and the Council that analyzes the information evaluated by the Board under paragraph (1) of this subsection.

(7) In its review of in-custody deaths described in paragraph (1)(E), the Board shall issue findings related to, and recommendations in response to, each death.

(d-3)(1) The Board or any entity selected by the Board shall cause to be conducted an independent review of the activities of MPD's Narcotics and Specialized Investigations Division, and any of its subdivisions ("NSID"), from January 1, 2017, through December 31, 2019.

(2) By April 30, 2021, the Board shall submit to the Mayor and Council a report summarizing the findings of the review, including:

(A) A description of the NSID's operations, management, and command structure;

(B) An evaluation of stops and searches conducted by NSID officers, including an analysis of the records identified in § 5-113.01(a)(4B);

(C) An evaluation of ~~citizen~~ complaints received by the Office regarding the alleged conduct of NSID officers;

(D) An evaluation of the adequacy of discipline imposed by the Metropolitan Police Department on NSID officers as a result of a sustained allegation of misconduct pursuant to § 5-1112; and

(E) Recommendations, informed by best practices for similar entities in other jurisdictions, for improving the NSID's policing strategies, providing effective oversight over NSID officers, and improving community-police relations.

(3)(A) The Executive Director, acting on behalf of the Board, shall have access to all books, accounts, records, reports, findings, and all other papers, things, or property belonging to or in use by any department, agency, or other instrumentality of the District government that are necessary to facilitate the review.

(B) If the Executive Director is denied access to any books, accounts, records, reports, findings, or any other papers, things, or property, the reason for the denial shall:

(i) Be submitted in writing to the Executive Director no later than 7 days after the date of the Executive Director's request;

(ii) State the specific reasons for the denial, including citations to any law or regulation relied upon as authority for the denial; and

(iii) State the names of the public officials or employees responsible for the decision to deny the request.

(4) Employees of the MPD shall cooperate fully with the Office or any entity selected by the Office to conduct the review. Upon notification by the Executive Director that an MPD employee has not cooperated as requested, the Police Chief shall cause appropriate disciplinary action to be instituted against the employee and shall notify the Executive Director of the outcome of such action.

(5) The Executive Director shall keep confidential the identity of all persons named in any documents transferred from the MPD to the Office pursuant to this subsection.

(6) The disclosure or transfer of any books, accounts, records, reports, findings or any papers, things, or property from the MPD to the Office pursuant to this subsection shall not constitute a waiver of any privilege or exemption that otherwise could be asserted by the MPD to prevent disclosure to the general public or in a judicial or administrative proceeding.

(7) A Freedom of Information Act request for any books, accounts, records, reports, findings or any papers, things, or property obtained by the Office from the MPD pursuant to this subsection may only be submitted to the MPD.

(d-4)(1) The Police Chief shall, prior to issuing a new, or amending an existing, written directive, submit the new or amended written directive to the Board for feedback.

(2) The Board shall, within 14 days of receipt of the new or amended written directive, provide the Police Chief written feedback, which shall include consideration of whether the proposed written directive:

(A) Reduces the likelihood of confrontations between law enforcement officers and residents and visitors;

(B) Increases transparency, accountability, and procedural justice in policing;

(C) Promotes racial equity;

(D) Increases public confidence in law enforcement agencies; and

(E) Complies with local and federal law.

(3)Notwithstanding paragraph (1) of this subsection, the Police Chief may issue a new, or amend an existing, written directive prior to receiving feedback from the Board if the Police Chief submits a written rationale to the Board explaining why an exigency exists.

(4) For the purposes of this subsection, the term “written directives” means any rules or regulations issued by the Mayor or Police Chief applicable to MPD employees including

general orders, special order, circulars, standard operating procedures, and bureau or division orders, that are not purely administrative.

(d-5)(1) The Executive Director, or an entity selected by the Executive Director, shall conduct a study to determine whether the Metropolitan Police Department ("MPD") engaged in biased policing when it conducted threat assessments before or during assemblies within the District.

(2) At a minimum, the study shall:

(A) Examine MPD's use of threat assessments before or during assemblies in the District from January 2017 through January 2021;

(B) Determine whether MPD engaged in biased policing when they conducted threat assessments before or during assemblies in the District from January 2017 through January 2021;

(C) Provide a detailed analysis of MPD's response to each assembly in the District between January 2017 through January 2021, including:

(i) Number of arrests made;

(ii) Number of civilian and officer injuries;

(iii) Type of injuries;

(iv) Number of fatalities;

(v) Number of officers deployed;

(vi) What type of weaponry and crowd control tactics were used;

(vii) Whether riot gear was used; and

(viii) Whether any of the individuals involved in the assembly were on the Federal Bureau of Investigation's terrorist watchlist;

(D) If there is a finding that biased policing has occurred, determine whether MPD's response varied based on the race, color, religion, sex, national origin, or gender of those engaged in the assembly; and

(E) Provide recommendations based on the findings in the study, including:

(i) If biased policing occurred, how to prevent bias from impacting whether MPD conducts a threat assessment and how to ensure bias does not impact a threat assessment going forward;

(ii) If biased policing has not been found to have occurred, how to ensure that there is not a disparity in MPD's response to all assemblies across all groups, of proportionate size and characteristics, in the District in the future; or

(iii) If the study is inconclusive on the occurrence of biased policing, what additional steps must be taken to reach a conclusion.

(3) Any collaborating outside partners shall meet the following criteria:

(A) Be nonpartisan;

(B) Have expertise and knowledge of law enforcement practices in the District, bias in policing, homegrown domestic terrorism in the United States, and intelligence data sharing practices;

(C) Have a history of conducting studies and evaluations of law enforcement procedures, regulations, and practices; and

(D) Have experience developing solutions to policy or legal challenges.

(4) The Executive Director shall submit a report on the study to the Council no later than 12 months after the effective date of the Comprehensive Policing and Justice Reform

Amendment Act of 2022, as approved by the Committee on the Judiciary and Public Safety on November 30, 2022 (Committee print of Bill 24-320).

(e) Within 60 days of the end of each fiscal year, the Board shall transmit to the entities named in subsection (d) of this section an annual report of the operations of the Board and the Office of Police Complaints.

(f) The Board is authorized to apply for and receive grants to fund its program activities in accordance with laws and regulations relating to grant management.

D.C. Official Code § 5–1106. Duties of the Executive Director.

(a)(1) The Executive Director shall employ qualified persons or utilize the services of qualified volunteers, as necessary, to perform the work of the Office, including the investigation of complaints.

(2) The Executive Director may employ persons on a full-time or part-time basis, or retain the services of contractors for the purpose of resolving a particular case or cases, as may be determined by the Executive Director, except that complaint investigators may not be persons currently or formerly employed by the:

(A) MPD;

(B) DCHAPD; or

(C) OIG, if the current or former employee was authorized to conduct felony investigations.

(3) The District of Columbia Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*), shall apply to the Executive Director and other employees of the Office. ~~The Executive Director shall employ qualified persons or utilize the services of qualified volunteers, as necessary, to perform the work of the Office, including the investigation of complaints. The Executive Director may employ persons on a full-time or part-time basis, or retain the services of contractors for the purpose of resolving a particular case or cases, as may be determined by the Executive Director, except that complaint investigators may not be persons currently or formerly employed by the MPD. Chapter 6 of Title 1 shall apply to the Executive Director and other employees of the Office.~~

(b) The Executive Director shall supervise all employees and volunteers of the Office, and shall ensure that all rules, regulations, and orders are carried out properly, and that all records of the Office are maintained properly.

(c)(1) Subject to approval of the Board, the Executive Director shall establish a pool of qualified persons who shall be assigned by the Executive Director to carry out the mediation and complaint determination functions set forth in this act.

(2) In selecting a person to be a member of this pool, the Executive Director shall take into consideration each person's education, work experience, competence to perform the functions required of a dispute mediator or complaint hearing examiner, and general reputation for competence, impartiality, and integrity in the discharge of his responsibilities.

(3) No member of the pool shall be a current or former employee of the:

(A) MPD;

(B) DCHAPD; or

(C) OIG, if the current or former employee was authorized to conduct felony investigations.

(4) For their services, the members of this pool shall be entitled to such compensation as the Executive Director, with the approval of the Board, shall determine; provided that the compensation shall be on a per-case basis, not a per-hour, basis. ~~Subject to approval of the Board, the Executive Director shall establish a pool of qualified persons who shall be assigned by the Executive Director to carry out the mediation and complaint determination functions set forth in this chapter. In selecting a person to be a member of this pool, the Executive Director shall take into consideration each person's education, work experience, competence to perform the functions required of a dispute mediator or complaint hearing examiner, and general reputation for competence, impartiality, and integrity in the discharge of his responsibilities. No member of the pool shall be a current or former employee of the MPD. For their services, the members of this pool shall be entitled to such compensation as the Executive Director, with the approval of the Board, shall determine, provided that the compensation shall be on a per-case basis, not a per-hour, basis.~~

(d) The Board shall have the authority to promulgate rules to implement the provisions of this subchapter. Such rules shall be promulgated in accordance with subchapter I of Chapter 5 of Title 2, and shall be subject to review and approval by the Board before becoming effective.

D.C. Official Code § 5–1107. Authority of the Office and processing of complaint.

(a) The MPD and the Office shall have the authority to receive a ~~citizen~~ complaint against a member or members of the MPD, and any other agency pursuant to subsection (j) of this section that alleges abuse or misuse of police powers by such member or members, including:

(1) Harassment;

(2) Use of unnecessary or excessive force;

(3) Use of language or conduct that is insulting, demeaning, or humiliating;

(4) Discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, physical disability, matriculation, political affiliation, source of income, or place of residence or business;

(5) Retaliation against a person for filing a complaint pursuant to this chapter; ~~or~~

(6) Failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public; or ~~.~~

(7) Recklessly making false statements in applications for search warrants, arrest warrants, or in sworn testimony before a court of competent jurisdiction.

(a-1) If the MPD, the DCHAPD, or the OIG receives a complaint under subsection (a) of this section, the designated agency principal shall cause the complaint to be transmitted to the Office within 3 business days after receipt. ~~If the MPD receives a citizen complaint under subsection (a) of this section, the MPD shall transmit the citizen complaint to the Office within 3 business days after receipt.~~

(b) If a complaint alleges misconduct that is not within the authority of the Office to review, the Executive Director shall refer the allegation to the designated agency principal ~~Police Chief for further processing by the MPD or the District of Columbia Housing Authority Police Department ("HAPD"), as appropriate~~.

(b-1) The Office shall have the sole authority to dismiss, conciliate, mediate, adjudicate, or refer for further action to the MPD, the DCHAPD, or the OIG, ~~or the HAPD~~ a ~~citizen~~ complaint received under subsection (a) or (b) of this section.

(c) Any individual having personal knowledge of alleged police misconduct may file a complaint with the Office on behalf of a victim.

(d) To be timely, a complaint must be received by the Office within 120 ~~90~~ days from the date of the incident that is the subject of the complaint. The Executive Director may extend the deadline for good cause.

(e) Each complaint shall be submitted in writing to the Office and may be:

(1) Signed by the complainant; or

(2) Submitted anonymously. ~~reduced to writing and signed by the complainant.~~

(f) Complaint forms shall conclude with the following words: "I hereby certify that to the best of my knowledge, and under penalty of perjury, the statements made herein are true.".

(g) The Executive Director shall screen each complaint and may request additional information from the complainant, if known. Within 7 working days of the receipt of the complaint, or within 7 working days of the receipt of additional information requested from the complainant, the Executive Director shall take one of the following actions:

(1) Dismiss the complaint, with the concurrence of one member of the Board;

(2) Refer the complaint to the United States Attorney for the District of Columbia for possible criminal prosecution;

(3) Attempt to conciliate the complaint;

(4) Refer the complaint to mediation;

(5) Refer the complaint for investigation; or

(6) Refer the subject police officer or officers to complete appropriate policy training by the MPD, the DCHAPD, or the OIG ~~or the HAPD~~.

(g-1)(1) If the Executive Director discovers any evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint, the Executive Director may:

(A) Initiate the Executive Director's own complaint against the subject police officer; and

(B) Take any of the actions described in subsection (g)(2) through (6) of this section.

(2) Evidence of abuse or misuse of police powers includes circumstances in which the subject police officer failed to:

(A) Intervene in or subsequently report any use of force incident in which the subject police officer observed another law enforcement officer utilizing excessive force or engaging in any type of misconduct, pursuant to MPD General Order 901.07, its successor directive, or a similar local or federal directive; or

(B) Immediately report to their supervisor any violations of the rules and regulations of the MPD committed by any other MPD officer, and each instance of their use of force or a use of force committed by another MPD officer, pursuant to MPD General Order 201.26, or any successor directive.

(h)(1) The Executive Director shall notify in writing the complainant, if known, and the subject police officer or officers of the action taken under subsection (g) or (g-1) of this section.

(2) If the complaint is dismissed, the notice shall be accompanied by a brief statement of the reasons for the dismissal, and the Executive Director shall notify the complainant, if known, that the complaint may be brought to the attention of the designated agency principal, who may direct that the complaint be investigated and that appropriate action be taken. ~~The Executive Director shall notify in writing the complainant and the subject police officer or officers of the action taken under subsection (g) of this section. If the complaint is dismissed, the notice~~

~~shall be accompanied by a brief statement of the reasons for the dismissal, and the Executive Director shall notify the complainant that the complaint may be brought to the attention of the Police Chief who may direct that the complaint be investigated and that appropriate action be taken.~~

(h-1) The MPD, the DCHAPD, and the OIG ~~and the HAPD~~, shall notify the Executive Director when a subject police officer or officers completes policy training pursuant to subsection (g)(6) of this section.

(h-2)(1) The Office shall have the authority to audit complaints referred to the MPD, the DCHAPD, or the OIG for further action. ~~The Office shall have the authority to audit citizen complaints referred to the MPD or the HAPD for further action.~~

(2) The Executive Director, acting on behalf of the Board, shall have timely and complete access to information and supporting documentation specifically related to the Board's auditing duties under paragraph (1) of this subsection.

(3) The Executive Director shall keep confidential the identity of all persons named in any documents transferred from the MPD or the HAPD to the Office pursuant to paragraph (1) of this subsection.

(4) A Freedom of Information Act request for public records collected under paragraph (1) of this subsection may only be submitted to the MPD or the HAPD.

(5) Beginning on December 31, 2017, and by December 31 of each year thereafter, the Board shall deliver a report to the Mayor and the Council that analyzes the information evaluated by the Board under paragraph (1) of this subsection.

~~(i) For purposes of § 1-616.01 [repealed], the receipt by the Office of an oral or written complaint shall not constitute knowledge or cause to know of acts, occurrences, or allegations contained in such complaint. For purposes of § 1-616.01, the MPD shall be deemed to know or have cause to know of the acts, occurrences, or allegations in a complaint received by the Office at the time the MPD receives written notice from the Office that an allegation in a complaint processed by the Office has been sustained.~~

(j) This act shall also apply to the DCHAPD, the OIG, and to any federal law enforcement agency that, pursuant to the Federal Law Enforcement Officer Cooperation Act of 1999, effective May 9, 2000 (D.C. Law 13-100; D.C. Official Code § 5-301 *et seq.*), has a cooperative agreement with the MPD that requires coverage by the Office; provided, that the Chief of the respective law enforcement department or agency or the designated agency principal, where applicable, shall perform the duties of the MPD Chief of Police for the members of their respective departments or agencies. ~~This subchapter shall also apply to the [HAPD] and to any federal law enforcement agency that, pursuant to Chapter 3 of this title, has a cooperative agreement with the MPD that requires coverage by the Office; provided, that the Chief of the respective law enforcement department or agency shall perform the duties of the MPD Chief of Police for the members of their respective departments.~~

(k) By February 1 of each year, the Office of Police Complaints shall provide a report to the Council on the effectiveness of the Metropolitan Police Department's Body-Worn Camera Program, including an analysis of use of force incidents.

D.C. Official Code § 5–1108. Dismissal of complaint.

(a) A complaint may be dismissed on the following grounds:

(1) The complaint is deemed to lack merit;

(2) The complainant, if known, refuses to cooperate with the investigation; or

(3) If, after the Executive Director refers a complaint for mediation, the complainant, willfully fails to participate in good faith in the mediation process.

(b) A complainant shall not be deemed to have refused to cooperate with the investigation solely because the complainant submitted a complaint anonymously as described in section 8(e)(2). ~~A complaint may be dismissed on the following grounds:~~

~~(1) The complaint is deemed to lack merit;~~

~~(2) The complainant refuses to cooperate with the investigation; or~~

~~(3) If, after the Executive Director refers a complaint for mediation, the complainant willfully fails to participate in good faith in the mediation process.~~

D.C. Official Code § 5–1109. Referral of complaint to the United States Attorney.

(a) When, in the determination of the Executive Director, there is reason to believe that the misconduct alleged in a complaint or disclosed by an investigation of the complaint may be criminal in nature, the Executive Director shall refer the matter to the United States Attorney for the District of Columbia for possible criminal prosecution. The referral shall be accompanied by a copy of all of the Office's files relevant to the matter being referred.

(b) The Executive Director shall give written notification of such referral to the:

(1) Designated agency principal;

(2) Complainant, if known; and

(3) Subject officer or officers. ~~The Executive Director shall give written notification of such referral to the Police Chief, the complainant, and the subject officer or officers. The receipt of notification by the Police Chief that a matter has been referred to the United States Attorney for the District of Columbia shall not constitute knowledge or cause to know of acts, occurrences, or allegations contained in such referral for purposes of § 1-616.01 [repealed].~~

(c) The Executive Director shall maintain a record of each referral, and ascertain and record the disposition of each matter referred to the United States Attorney.

(d) If the United States Attorney declines in writing to prosecute, the Office shall resume its processing of the complaint, and thereafter the Executive Director may dismiss the complaint in accordance with §§ 5-1107 and 5-1108, conciliate the complaint, refer the complaint to mediation, or refer the complaint for investigation, as appropriate.

D.C. Official Code § 5–1110. Conciliation and mediation.

(a) If deemed appropriate by the Executive Director, and if the parties agree to participate in a conciliation process, the Executive Director may attempt to resolve a complaint by conciliation.

(b)(1) The conciliation of a complaint shall be evidenced by a written agreement signed by the Executive Director and the parties which may provide for oral apologies or assurances, written undertakings, or any other terms satisfactory to the parties. No oral or written statements made in conciliation proceedings may be used as a basis for any discipline or recommended discipline against a subject police officer or officers or in any civil or criminal litigation.

(2) The parties may agree in writing that a written conciliation agreement shall not be a public document and shall not be available to the public, as would normally be required pursuant to subchapter II of Chapter 5 of Title 2.

(c) If conciliation efforts are unsuccessful, the Executive Director may dismiss the complaint in accordance with §§ 5-1107 and 5-1108, refer the complaint to mediation, or refer the complaint for investigation.

(d) If the Executive Director refers the complaint to mediation, the Executive Director shall assign the matter to a member of the pool who is experienced in mediation, shall schedule an initial mediation session for the earliest convenient time, and shall notify the complainant and subject police officer or officers in writing of the date, time, and location of the initial mediation session.

(e) The complainant, the subject police officer or officers, and the mediator shall be present at mediation sessions. Alternatively, the mediator may meet individually with the complainant and the subject police officer or officers. Except as provided in this subsection, no other person may be present or participate in mediation sessions, except as determined by the mediator to be required for a fair and expeditious mediation of the complaint. An interpreter shall be present when necessary for effective communication and shall be provided by the Office when timely requested by a party. When the complainant is under 18 years of age or is an adult who, because of mental, physical, or emotional condition or disability, cannot participate competently in mediation, a parent, guardian, conservator, or other responsible adult must be present at mediation sessions.

(f) The mediation process shall continue as long as the mediator believes it may result in the resolution of the complaint, except that it may not extend beyond 30 days from the date of the initial mediation session without the approval of the Executive Director. No oral or written statement made during the mediation process may be used by the Office or the MPD, the DCHAPD, or the OIG as a basis for any discipline or recommended discipline of the subject police officer or officers, nor in any civil or criminal litigation, except as otherwise provided by the rules of court or the rules of evidence.

(g) If mediation is successful, the mediator and the parties shall sign a mediation agreement resolving the complaint. The Executive Director shall place a copy of the mediation agreement in the complaint file and shall forward a copy of the mediation agreement to the designated agency principal ~~Police Chief~~. The designated agency principal ~~Police Chief~~ shall monitor the conduct of the police officer or officers to determine that the police officer complies with the terms of an agreement reached after mediation.

(h) The parties may agree in writing that a mediation agreement shall not be a public document and shall not be available to the public, as would normally be required pursuant to subchapter II of Chapter 5 of Title 2.

(i) If mediation efforts are unsuccessful, the Executive Director may dismiss the complaint in accordance with §§ 5-1107 and 5-1108, may refer the complaint for investigation, or may refer the complaint for adjudication if the Executive Director determines that further investigation is unnecessary.

(j) If, after the Executive Director refers a complaint to mediation, the complainant willfully fails to participate in good faith in the mediation process, the Executive Director may dismiss the complaint in accordance with §§ 5-1107 and 5-1108, may refer the complaint for investigation, or may refer the complaint to a complaint examiner for adjudication of the merits of the complaint if the Executive Director determines that further investigation is unnecessary.

(k) If, after the Executive Director refers a complaint to mediation, any police officer subject to the complaint refuses to participate in the mediation process in good faith, such refusal

or failure shall constitute cause for discipline by the designated agency principal ~~Police Chief~~. The designated agency principal ~~Police Chief~~ shall cause appropriate disciplinary action to be instituted against the police officer for such a violation and shall notify the Executive Director of the outcome of such action. In the event that the subject police officer refuses to participate in the mediation process or fails to participate in the mediation process in good faith, the Executive Director shall refer the complaint for investigation, or may refer the complaint for adjudication if further investigation is deemed unnecessary.

D.C. Official Code § 5–1111. Complaint investigation, findings, and determination.

(a) If the Executive Director refers a complaint for investigation, the Executive Director shall assign an investigator to investigate the complaint.

(b) If the complainant refuses to cooperate in the investigation, the Executive Director may dismiss the complaint in accordance with §§ 5-1107 and 5-1108.

(c)(1)(A) The Executive Director is authorized to cause the issuance of subpoenas under the seal of the Superior Court of the District of Columbia compelling the complainant, the subject officer or officers, witnesses, and other persons to respond to written or oral questions, or to produce relevant documents or other evidence as may be necessary for the proper investigation and determination of a complaint.

(B) Notwithstanding subparagraph (A) of this paragraph, the Executive Director shall not seek subpoenas against a complainant who submitted an application anonymously as described in section 8(e)(2).

(2)(A) The service of any such subpoena on a subject police officer or any other employee of the MPD, the DCHAPD, or the OIG may be effected by service on the designated agency principal or their designee, who shall deliver the subpoena to the subject police officer or employee.

(B) The designated agency principal or their designee shall transmit the return of service to the Office.

(3) Statements made pursuant to a subpoena shall be given under oath or affirmation. ~~The Executive Director is authorized to cause the issuance of subpoenas under the seal of the Superior Court of the District of Columbia compelling the complainant, the subject officer or officers, witnesses, and other persons to respond to written or oral questions, or to produce relevant documents or other evidence as may be necessary for the proper investigation and determination of a complaint. The service of any such subpoena on a subject police officer or any other employee of the MPD may be effected by service on the Police Chief or on his designee, who shall deliver the subpoena to the subject police officer or employee. The Police Chief or his designee shall transmit the return of service to the Office. Statements made pursuant to a subpoena shall be given under oath or affirmation.~~

(d)(1)(A) Employees of the MPD, the DCHAPD, and the OIG shall cooperate fully with the Office in the investigation and adjudication of a complaint.

(B) Upon notification by the Executive Director that an MPD, DCHAPD, or OIG employee has not cooperated as requested, the designated agency principal shall cause appropriate disciplinary action to be instituted against the employee, and shall notify the Executive Director of the outcome of such action.

(2)(A) An employee of the MPD, the DCHAPD, or the OIG shall not retaliate, directly or indirectly, against a person who files a complaint under this act.

(B) If a complaint of retaliation is sustained under this act, the subject police officer or employee shall be subject to appropriate penalty, including dismissal; provided, that such disciplinary action shall not be taken with respect to an employee's invocation of the Fifth Amendment privilege against self-incrimination. ~~Employees of the MPD shall cooperate fully with the Office in the investigation and adjudication of a complaint. Upon notification by the Executive Director that an MPD employee has not cooperated as requested, the Police Chief shall cause appropriate disciplinary action to be instituted against the employee, and shall notify the Executive Director of the outcome of such action. An employee of the MPD shall not retaliate, directly or indirectly, against a person who files a complaint under this chapter. If a complaint of retaliation is sustained under this chapter, the subject police officer or employee shall be subject to appropriate penalty, including dismissal. Such disciplinary action shall not be taken with respect to an employee's invocation of the Fifth Amendment privilege against self-incrimination.~~

(e) When the investigator completes the investigation, the investigator shall summarize the results of the investigation in an investigative report which, along with the investigative file, shall be transmitted to the Executive Director. After reviewing the investigative report and the investigative file, the Executive Director may dismiss the complaint in accordance with §§ 5-1107 and 5-1108, may direct the investigator to undertake additional investigation, or may refer the complaint to a complaint examiner designated by the Executive Director to determine the merits of the complaint.

(f) Upon receiving a complaint, a complaint examiner may request that the Executive Director order additional investigation, may proceed to determine the merits of the complaint in a fair and expeditious manner based on the investigative report and the investigative file, or may hold an evidentiary hearing. If the complaint examiner determines that an evidentiary hearing is necessary to determine fairly the merits of a complaint, the testimony at such hearing shall be under oath or affirmation, and the parties may be represented by counsel. A complaint examiner shall have the authority to administer an oath or affirmation to a witness.

(g) If, after the Executive Director assigns a complaint to a complaint examiner, the parties indicate to the complaint examiner that they are willing to resolve the complaint through conciliation or mediation, the complaint examiner may act as a conciliator or mediator. If a party already is represented by counsel, that party may continue to be represented by counsel during this conciliation or mediation process. If one party is represented by counsel and the other party is not so represented, the complaint examiner shall, upon request, give the unrepresented party a reasonable time to obtain counsel before commencing the mediation or conciliation process. Any resulting written conciliation or mediation agreement may be confidential as provided in § 5-1110(h), and neither any such agreement nor any oral nor written statement made by a party during the course of the conciliation or mediation process may be used as a basis for any discipline or recommended discipline of the subject police officer or officers or in any civil or criminal litigation, except as otherwise provided by the rules of court or the rules of evidence.

(h)(1) Upon review of the investigative file and the evidence adduced at any evidentiary hearing, and in the absence of the resolution of the complaint by conciliation or mediation, the complaint examiner shall make written findings of fact regarding all material issues of fact, and shall determine whether the facts found sustain or do not sustain each allegation of misconduct.

(2) In making that determination, the complaint examiner may consider any MPD, DCHAPD, or OIG regulation, policy, or order that prescribes standards of conduct for police officers.

(3) For the purposes of this act, these written findings of fact and determinations by the complaint examiner (collectively, the "merits determination") may not be rejected unless they clearly misapprehend the record before the complaint examiner and are not supported by substantial, reliable, and probative evidence in that record. ~~Upon review of the investigative file and the evidence adduced at any evidentiary hearing, and in the absence of the resolution of the complaint by conciliation or mediation, the complaint examiner shall make written findings of fact regarding all material issues of fact, and shall determine whether the facts found sustain or do not sustain each allegation of misconduct. In making that determination, the complaint examiner may consider any MPD regulation, policy, or order that prescribes standards of conduct for police officers. For purposes of this chapter, these written findings of fact and determinations by the complaint examiner (collectively, the "merits determination") may not be rejected unless they clearly misapprehend the record before the complaint examiner and are not supported by substantial, reliable, and probative evidence in that record.~~

(i)(1)(A) If the complaint examiner determines that one or more allegations in the complaint is sustained, the Executive Director shall transmit the entire complaint file, including the merits determination of the complaint examiner and the Executive Director's recommendation for the discipline to be imposed on the subject police officer, to the designated agency principal for appropriate action.

(B) To assist the Executive Director in making an informed recommendation of the discipline to be imposed a subject police officer, the Executive Director shall have access to:

(i) The most current Table of Offenses and Penalties Guide in General Order 120.21 (Disciplinary Procedures and Processes), or any successor document; and

(ii) The subject police officer's complete personnel file, including any record of prior misconduct and adverse or corrective action.

(2) If the complaint examiner determines that no allegation in the complaint is sustained, the Executive Director shall dismiss the complaint and notify the parties and the designated agency principal in writing of such dismissal with a copy of the merits determination.

~~If the complaint examiner determines that one or more allegations in the complaint is sustained, the Executive Director shall transmit the entire complaint file, including the merits determination of the complaint examiner, to the Police Chief for appropriate action. If the complaint examiner determines that no allegation in the complaint is sustained, the Executive Director shall dismiss the complaint and notify the parties and the Police Chief in writing of such dismissal with a copy of the merits determination.~~

D.C. Official Code § 5–1112. Action by the Metropolitan Police Department.

(a) Upon receipt of a complaint file in which one or more allegations in a complaint has been sustained, the designated agency principal ~~Police Chief~~ shall cause the file to be reviewed within 5 working days after receiving the complaint file. This review shall not be conducted by persons from the same organizational unit as the subject police officer or officers. All persons conducting the review shall be senior in grade or rank to the subject police officer or officers.

(b)(1) The review of the complaint file shall include a review of the personnel file of the subject officer or officers, including any record of prior misconduct by the subject police officer or officers and the Executive Director's recommendation for the discipline to be imposed on the subject police officer as described in section 12(i)(1)(A).

(2)(A) Within 15 working days after receiving the complaint file from the designated agency principal, the reviewing officers shall make a written recommendation, with supporting reasons, to the designated agency principal regarding an appropriate penalty from the Table of Offenses and Penalties Guide in General Order 120.21 (Disciplinary Procedures and Processes), or any successor document

(B) This recommendation may include a proposal for any additional action by the designated agency principal not inconsistent with the intent and purpose of the complaint review process. ~~The review of the complaint file shall include a review of the personnel file of the subject officer or officers, including any record of prior misconduct by the subject police officer or officers. Within 15 working days after receiving the complaint file from the Police Chief, the reviewing officers shall make a written recommendation, with supporting reasons, to the Police Chief regarding an appropriate penalty from the Table of Penalties Guide in General Order 1202.1 (Disciplinary Procedures and Processes). This recommendation may include a proposal for any additional action by the Police Chief not inconsistent with the intent and purpose of the citizen complaint review process.~~

(c) The review may include a proposal that the designated agency principal ~~Police Chief~~ return the merits determination to the Executive Director for review by a final review panel as set forth in subsection (g) of this section, if those charged with the review conclude, with supporting reasons, that, insofar as it sustains one or more allegations in the complaint, the merits determination clearly misapprehends the record before the complaint examiner and is not supported by substantial, reliable, and probative evidence in that record. The staff recommendation may not propose the supplementation of the evidentiary record before the complaint examiner.

(d)(1) Within 5 working days after receiving the staff recommendation, the designated agency principal shall notify the complainant, if known, and the subject police officer or officers in writing of the staff recommendation and the Executive Director's recommendation, and shall afford the complainant and the subject police officer or officers reasonable time to file with the designated agency principal a written response to the staff recommendation.

(2) The designated agency principal shall consider the written responses received from the complainant and the subject police officer or officers and the Executive Director's recommendation before taking final action with regard to the complaint. ~~Within 5 working days after receiving the staff recommendation, the Police Chief shall notify the complainant and the subject police officer or officers in writing of the staff recommendation, and shall afford the complainant and the subject police officer or officers an opportunity to file with the Police Chief, within a reasonable time period set by the Police Chief, a written response to the staff recommendation. The Police Chief shall give full consideration to the written responses received from the complainant and the subject police officer or officers before taking final action with regard to the complaint.~~

(e)(1) Within 15 working days after receiving the written responses of the complainant and the subject officer or officers, or within 15 working days of the deadline set for receipt of such responses, whichever is earlier, the designated agency principal shall issue a decision as to the imposition of discipline upon the subject police officer or officers.

(2) The designated agency principal's decision shall be in writing and shall set forth a concise statement of the reasons therefor, including the rationale for imposing or not imposing the discipline recommended by the Executive Director.

(3) The designated agency principal may not reject the merits determination, in whole or in part.

(4) The designated agency principal may not supplement the evidentiary record. ~~Within 15 working days after receiving the written responses of the complainant and the subject officer or officers, or within 15 working days of the deadline set for receipt of such responses, whichever is earlier, the Police Chief shall issue a decision as to the imposition of discipline upon the subject police officer or officers. The decision of the Police Chief shall be in writing and shall set forth a concise statement of the reasons therefor. The Police Chief may not reject the merits determination, in whole or in part, unless the Police Chief concludes, with supporting reasons, that the merits determination clearly misapprehends the record before the complaint examiner and is not supported by substantial, reliable, and probative evidence in the record before the complaint examiner. The Police Chief may not supplement the evidentiary record.~~

(f) The designated agency principal ~~Police Chief~~ shall notify the Executive Director, the complainant, and the subject police officer or officers in writing of the action taken by the designated agency principal ~~Police Chief~~ within 10 business days after the action is taken, and shall include in such notice a copy of the decision.

(g) The decision of the designated agency principal ~~Police Chief~~ shall be a final decision with no further right of administrative review, other than as provided in § 5-1114(f), except in the following circumstances:

(1) The designated agency principal ~~Police Chief~~ may reopen any closed matter in the interests of fairness and justice; or

(2) If the designated agency principal ~~Police Chief~~ concludes on the basis of a staff recommendation under subsection (c) of this section, or otherwise, that insofar as it sustains one or more allegations of the complaint, the merits determination clearly misapprehends the record before the complaint examiner, and is not supported by substantial, reliable, and probative evidence in the record, the designated agency principal ~~Police Chief~~ shall return the merits determination to the Executive Director for review by a final review panel comprised of 3 complaint examiners (not including the complaint examiner who prepared the merits determination) selected by the Executive Director. Upon review of the record, and without taking any additional evidence, the final review panel shall issue a written decision, with supporting reasons, regarding the correctness of the merits determination to the extent that the designated agency principal ~~Police Chief~~ has concluded that it erroneously sustained one or more allegations of the complaint. The final review panel shall uphold the merits determination as to any allegation of the complaint that the determination was sustained, unless the panel concludes that the determination regarding the allegation clearly misapprehends the record before the original complaint examiner and is not supported by substantial, reliable, and probative evidence in that record. A copy of the decision of the final review panel shall be transmitted to the Executive Director, the complainant, the subject police officer or officers, and the designated agency principal ~~Police Chief~~.

(h) If the final review panel concludes that the merits determination sustaining one or more allegations of the complaint should be reversed in its entirety, the Executive Director shall dismiss the complaint, and notify the parties and the designated agency principal ~~Police Chief~~ in writing of such dismissal. If the final review panel concludes that the merits determination should be upheld as to any allegation of the complaint that the determination has sustained, the designated agency principal ~~Police Chief~~, within 15 working days of receipt of the panel's decision, shall issue a supplemental decision as to the imposition of discipline upon the subject officer or officers that is fully consistent with the panel's decision. The supplemental decision of the designated agency principal ~~Police Chief~~ shall be in writing and shall set forth a concise statement of the

reasons therefor. The designated agency principal ~~Police Chief~~ shall notify the Executive Director, the complainant, and the subject police officer or officers in writing of the action taken by the designated agency principal ~~Police Chief~~, and shall include in such notice a copy of the supplemental decision. The supplemental decision of the designated agency principal ~~Police Chief~~ shall be a final decision with no further right of administrative review, other than as provided in subsection (g) of this section and § 5-1114(f).

Subtitle D

Sec. 106. Use of Force Review Board; membership.

(a) There is established a Use of Force Review Board ("Board"), which shall review uses of force as set forth by the Metropolitan Police Department in its written directives.

(b) The Board shall consist of the following 13 voting members, and may include non-voting members at the Mayor's discretion:

(1) Seven MPD members appointed by the Chief of Police who hold the rank of Inspector or above, or the civilian equivalent;

(2) Three civilian members appointed by the Mayor, pursuant to section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01(e)), with the following qualifications and no current or prior affiliation with law enforcement, including being employed by a law enforcement agency or law enforcement union:

(A) One member who has personally experienced the use of force by a law enforcement officer;

(B) One member of the District of Columbia Bar in good standing; and

(C) One District resident community member;

(3) Two civilian members appointed by the Council with the following qualifications and no current or prior affiliation with law enforcement, including being employed by a law enforcement agency or law enforcement union:

(A) One member with subject matter expertise in criminal justice policy; and

(B) One member with subject matter expertise in law enforcement oversight and the use of force; and

(4) The Executive Director of the Office of Police Complaints.

Section 107

D.C. Official Code § 1–523.01. Mayoral nominees.

(a) The Mayor shall nominate persons to serve as subordinate agency heads in the Executive Service established by subchapter X-A of Chapter 6 of this title [§ 1-610.51 et seq.], subject to the advice and consent of the Council, within 180 calendar days of the date of the establishment of the subordinate agency or the date of a vacancy. A nomination shall be submitted to the Council for a 90-day period of review, excluding days of Council recess. If the Council does not approve or disapprove the nomination by resolution within this 90-day review period, the nomination shall be deemed confirmed.

(1) If the Mayor fails to nominate a person within 180 days of the establishment of the subordinate agency vacancy or the date of vacancy, no District funds may be expended to compensate any person serving in the position.

(2) The Mayor may designate an acting subordinate agency head, but this designation shall not suspend the requirements of this section, or the provisions of § 1-610.59(a).

(b) The Mayor shall not appoint board or commission members to serve in a position that the law requires to be filled by Mayoral appointment with the advice and consent of the Council.

(c) No person shall serve in a hold-over capacity for longer than 180 days after the expiration of the term to which he or she was appointed, in a position that is required by law to be filled by Mayoral appointment with the advice and consent of the Council including to positions on boards and commissions.

(d) The provisions of this section shall not be affected by any provision in subchapter VI of Chapter 3 of this title [§ 1-315.01 et seq.].

(e) Notwithstanding any other provision of law, the Mayor shall transmit to the Council, for a 90-day period of review, excluding days of Council recess, nominations to the boards and commissions listed in this subsection. If the Council does not approve by resolution within the 90-day period a nomination to these boards or commissions, the nomination shall be deemed disapproved.

(1) The Alcoholic Beverage Control Board, established by § 25-104(a);

(2) The District of Columbia Board of Library Trustees, established by § 39-104;

(3) The Board of Trustees of the University of the District of Columbia, established by § 38-1202.01;

(4) The Board of Zoning Adjustment, established by § 6-641.07;

(5) The Police Complaints Board, established by § 5-1104;

(6) The Contract Appeals Board, established by § 2-360.01;

(7) The District of Columbia Board of Elections, established by § 1-1001.03;

(8) The Commission on Human Rights, established by § 2-1404.01;

(9) Repealed.

(10) The District of Columbia Housing Finance Agency Board of Directors, established by § 42-2702.02;

(11) Repealed.

(12) Repealed.

(13) The Historic Preservation Review Board, established by Mayor's Order 83-119, issued May 6, 1983 (30 DCR 3031) in accordance with § 6-1103;

(14) The Metropolitan Washington Airports Authority Board of Directors, established by § 9-1006(e);

(15) Repealed;

(16) The Office of Employee Appeals, established by § 1-606.01;

(17) The Public Employee Relations Board, established by § 1-605.01;

(18) The Public Service Commission, established by § 34-801;

(19) The Rental Housing Commission, established by § 42-3502.01;

(20) The Washington Convention and Sports Authority Board of Directors, established by § 10-1202.05;

(21) The Water and Sewer Authority Board of Directors, established by § 34-2202.04;

(22) The Zoning Commission for the District of Columbia, established by § 6-621.01;

(23) Repealed.

(24) Repealed.

(25) Repealed;

(26) Repealed;

(27) The Board of Commissioners of the District of Columbia Housing Authority, established by § 6-211;

(28) Repealed;

(29) Homeland Security Commission, established by § 7-2271.02;

(30) Repealed.

(31) The Board of Ethics and Government Accountability, established by § 1-1162.02;

(32) Commission on the Arts and Humanities, established by § 39-203;

(33) The Board of Directors of the Washington Metrorail Safety Commission established by Article III.B of § 9-1109.11;

(34) The Green Finance Authority;

(35) The Housing Production Trust Fund Board, established by § 42-2802.01;

(36) The Clemency Board, established by § 24-481.03; and

(37) The Campaign Finance Board, established by § 1-1163.02.

[(38)] The Corrections Information Council, established by § 24-101.01; ~~and~~

[(39)] The District of Columbia Sentencing Commission, established by § 3-101(a); and ~~.~~

(40) Use of Force Review Board, established by section 106 of the Comprehensive Policing and Justice Reform Amendment Act of 2022, as approved by the Committee on the Judiciary and Public Safety on November 30, 2022 (Committee print of Bill 24-320).

(f) Notwithstanding any other provision of law, the Mayor shall transmit to the Council, for a 45-day period of review, excluding days of Council recess, nominations to the boards and commissions listed in this subsection. The Council shall be deemed to have approved a nomination under this subsection if during the 45-day period, no member introduces a resolution disapproving the nomination. If a member introduces a resolution disapproving the nomination within the 45-day period, the Council shall have an additional 45 days, excluding days of Council recess, to disapprove the nomination by resolution, or it will be deemed approved.

(1) The Apprenticeship Council, established by § 32-1402;

(2) The Armory Board, established by § 3-302;

(4) The Board of Dentistry, established by § 3-1202.01;

(5) The Board of Medicine, established by § 3-1202.03;

(6) The Board of Nursing, established by § 3-1202.04;

(7) The Board of Nursing Home Administration, established by § 3-1202.05;

(8) The Board of Psychology, established by § 3-1202.11;

(9) Repealed.

(10) The Child Support Guideline Commission, established by § 16-916.02;

(11) Repealed;

(12) The District of Columbia Boxing and Wrestling Commission, established by § 3-604;

(13) The Multistate Tax Commission, established by § 47-441;
(14) The Public Access Corporation Board of Directors, established by § 34-1253.02;
(15) The Board of Real Estate, established by § 47-2853.06(h);
(16) Repealed;
(17) The Board of Dietetics and Nutrition, established by § 3-1202.02;
(18) The Board of Occupational Therapy, established by § 3-1202.06;
(19) The Board of Optometry, established by § 3-1202.07;
(20) The Board of Pharmacy, established by § 3-1202.08;
(21) The Board of Physical Therapy, established by § 3-1202.09;
(22) The Board of Podiatry, established by § 3-1202.10;
(23) The Board of Social Work, established by § 3-1202.12;
(24) The Board of Professional Counseling, established by § 3-1202.13;
(25) The Board of Respiratory Care, established by § 3-1202.14;
(26) The Board of Massage Therapy, established by § 3-1202.15;
(27) The Board of Chiropractic, established by § 3-1202.16;
(28) The Statewide Health Coordinating Council, established by § 44-403;
(29) The Board of Barber and Cosmetology, established by § 47-2853.06(c);
(30) The Board of Real Estate Appraisers, established by § 47-2853.06(g);
(31) Repealed;
(32) The Board of Funeral Directors, established by § 47-2853.06(f);
(33) Repealed;
(34) Repealed;
(35) The Board of Veterinary Examiners for the District of Columbia, established by § 3-505 [repealed];
(36) Reserved;
(37) The Board of Architecture, Interior Design, and Landscape Architecture, established by § 47-2853.06(a);
(38) The Board of Accountancy, established by § 47-2853.06(b);
(39) The Board of Industrial Trades, established by § 47-2853.06(d);
(40) The Board of Professional Engineering, established by § 47-2853.06(e);
(41) The Housing and Community Development Reform Commission, established by § 6-1032;
(42) The Commission on Asian and Pacific Islander Community Development, established by § 2-1373;
(43) The Board of Marriage and Family Therapy, established by § 3-1202.17;
(44) Repealed;
(45) Repealed;
(46) The Motor Vehicle Theft Prevention Commission, established by § 3-1352;
(47) The Commission on African Affairs, established by § 2-1393;
(48) The Science Advisory Board to the Department of Forensic Sciences, established by § 5-1501.11;
(49) The Commission on African-American Affairs, established by § 3-1441;
(50) Repealed;
(51) Other Post-Employment Benefits Fund Advisory Committee, established by § 1-621.51;

(52) The Commission on Fathers, Men, and Boys, established pursuant to § 3-731;
(53) The Commission on Health Equity, established by § 7-756.01;
(54) Youth Apprenticeship Advisory Committee, established by § 32-1412.01;
(55) The District of Columbia State Athletics Commission, established pursuant to Chapter 26A-i of Title 38;
(56) The Commission on Out of School Time Grants and Youth Outcomes, established pursuant to subchapter III-B of Chapter 15 of Title 2;
(57) The Adult Career Pathways Task Force, established by § 32-1661;
(58) Repealed.
(59) Not Funded;
(60) The Maternal [Mortality] Review Committee, established by § 7-671.02;
(61) The Child Fatality Review Committee, established by § 4-1371.03;
(62) The Violence Fatality Review Committee, established by § 5-1431.01;
(63) The Domestic Violence Fatality Review Board, established by § 16-1052;
(64) Expired;
(65) The Commission on Nightlife and Culture established pursuant to § 3-664(a); and
(66) Repealed.
(67) The Students in the Care of D.C. Coordinating Committee established pursuant to subchapter VIII of Chapter 15 of Title 2;
(68) The Commission on Fashion Arts and Events, established by § 3-651;
(69) The Perinatal and Infant Health Advisory Committee, established by § 7-858.05;
(70) The Commission on Poverty, established by [§ 3-641.02]; and
(71) The Perinatal Mental Health Task Force, established by Chapter 12C of Title 7.

(g) Notwithstanding any other provision of law, the Mayor shall directly appoint members to boards and commissions, without the advice and consent of the Council, to the boards and commissions not contained in subsections (e) and (f) of this section.

(h) This section shall not apply to positions on boards and commissions that are designated by law for the Mayor, his or her designee, or another member of the executive branch or his or her designee.

Subtitle E

Section 108

D.C. Official Code § 22–3312.03. Wearing hoods or masks.

~~(a) No person or persons over 16 years of age, while wearing any mask, hood, or device whereby any portion of the face is hidden, concealed, or covered as to conceal the identity of the wearer, shall:~~

~~(1) Enter upon, be, or appear upon any lane, walk, alley, street, road highway, or other public way in the District of Columbia;~~

~~(2) Enter upon, be, or appear upon or within the public property of the District of Columbia; or~~

~~(3) Hold any manner of meeting or demonstration.~~

~~(b) The provisions of subsection (a) of this section apply only if the person was wearing the hood, mask, or other device:~~

~~(1) With the intent to deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing for all persons within the District of Columbia equal protection of the law;~~

~~(2) With the intent, by force or threat of force, to injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;~~

~~(3) With the intent to intimidate, threaten, abuse, or harass any other person;~~

~~(4) With the intent to cause another person to fear for his or her personal safety, or, where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability; or~~

~~(5) While engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification.~~

D.C. Official Code § 22–3312.04. Penalties.

(a) Any person who violates any provision of § 22-3312.01 shall be fined not less than $250 and not more than the amount set forth in § 22-3571.01, or imprisoned for a period not to exceed 180 days, or both. Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of the provisions of § 22-3312.01, pursuant to Chapter 8 of Title 8.

(b) Any person who violates any provision of § 22-3312.02 ~~or § 22-3312.03~~ shall be guilty of a misdemeanor punishable by a fine not more than the amount set forth in § 22-3571.01, or imprisonment not to exceed 180 days, or both.

(c) In addition to the penalties provided in subsection (a) of this section, a person convicted of violating any provision of § 22-3312.01 may be required to perform community service as provided in § 16-712.

(d) Any person who willfully places graffiti on property without the consent of the owner shall be subject to the sanctions in subsection (a) of this section.

(e) Any person who willfully possesses graffiti material with the intent to place graffiti on property without the consent of the owner shall be fined not less than $100 or more than $1,000.

(f) In addition to any fine or sentence imposed under this section, the court shall order the person convicted to make restitution to the owner of the property, or to the party responsible for the property upon which the graffiti has been placed, for the damage or loss caused, directly or indirectly, by the graffiti, in a reasonable amount and manner as determined by the court.

(g) The District of Columbia courts shall find parents or guardians civilly liable for all fines imposed or payments for abatement required if the minor cannot pay within a reasonable period of time established by the court.

Section 109

D.C. Official Code § 23–581. Arrests without warrant by law enforcement officers.

(a)(1) A law enforcement officer may arrest, without a warrant having previously been issued therefor —

(A) a person who he has probable cause to believe has committed or is committing a felony;

(B) a person who he has probable cause to believe has committed or is committing an offense in his presence;

(C) a person who he has probable cause to believe has committed or is about to commit any offense listed in paragraph (2) and, unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence; and

(D) a person whom he has probable cause to believe has committed any offense which is listed in paragraph (3) of this section, if the officer has reasonable grounds to believe that, unless the person is immediately arrested, reliable evidence of alcohol or drug use may become unavailable or the person may cause personal injury or property damage.

(2) The offenses referred to in subparagraph (C) of paragraph (1) are the following:

(A) The following offenses specified in the Act entitled "An Act to establish a code of law for the District of Columbia", approved March 3, 1901, and listed in the following table:

Offense:	**Specified in -**
Assault	section 806 (D.C. Code, sec. 22-404).
Unlawful entry	section 824 (D.C. Code, sec. 22-3302).
Malicious burning, destruction or injury of another's property	section 848 (D.C. Code, sec. 22-303).

(B) The following offense specified in the Omnibus Public Safety Amendment Act of 2006, effective April 24, 2007 (D.C. Law 16-306; 53 DCR 8610):

Offense:	**Specified in -**
Voyeurism	section 105 (D.C. Code, sec. 22-3531).

(C) The following offenses specified in the District of Columbia Theft and White Collar Crimes Act of 1982, and listed in the following table:

Offense:	**Specified in -**
Theft of property valued less than $250	section 111 [D.C. Official Code, § 22-3211].
Receiving stolen property	section 132 [D.C. Official Code, § 22-3232].
Shoplifting	section 113 [D.C. Official Code, § 22-3213].

(D) Attempts to commit the following offenses specified in the Act and listed in the following table:

Offense:	Specified in -
Theft of property valued in excess of $250	section 111 [D.C. Official Code, § 22-3211].
Unauthorized use of vehicles	section 115 [D.C. Official Code, § 22-3215].

(E) The following offenses specified in the Illegal Dumping Enforcement Act of 1994 [Chapter 9 of Title 8], and listed in the following table:

Offense:	Specified in -
Unauthorized Disposal of Solid Waste	Section 3. [D.C. Official Code, § 8-902]

(F) The following offenses specified in section 113.7 of Title 12A of the District of Columbia Municipal Regulations (12A DCMR § 113.7).

Offense:	Specified in -
Illegal construction	section 113.7 (12A DCMR § 113.7)

(3) The offenses which are referred to in paragraph (1)(D) of this section are the following offenses specified in the District of Columbia Traffic Act of 1925, approved March 3, 1925 (43 Stat. 1119; D.C. Official Code § 50-2201.01 et seq.), and listed in the following table:

Offense:	Specified in -
Aggravated reckless driving	section 9(b-1) (D.C. Official Code § 50-2201.04(b-1))
Fleeing from the scene of an accident	section 10(a) (D.C. Official Code § 50-2201.05(a))
Operating or physically controlling a vehicle when under the influence of intoxicating liquor or drugs, when operating ability is impaired by intoxicating liquor, or when the operator's blood, breath, or urine contains the amount of alcohol which is prohibited by section 10(b)	section 10(b) (D.C. Official Code § 50-2201.05(b))
Operating a motor vehicle when the operator's permit is revoked or suspended	section 13(e) (D.C. Official Code § 50-1403.01(e)).

(a-1) A law enforcement officer may arrest a person without an arrest warrant if the officer has probable cause to believe the person has committed an intrafamily offense as provided in section 16-1031(a).

(a-2) A law enforcement officer may arrest a person without an arrest warrant if the officer has probable cause to believe the person has committed an offense as provided in Chapter 23 of Title 22.

(a-3) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed an offense as provided in sections 22-3312.01 and ~~,~~ 22-3312.02~~, and 22-3312.03~~.

(a-4) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed the offense of unlawful entry of a motor vehicle as provided in [§ 22-1341].

(a-5) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed the offense of tampering with a detection device as provided in [§ 22-1211].

(a-6) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed the offense of engaging in an unlawful protest targeting a residence as provided in [§ 22-2752].

(a-7) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed the offense of misdemeanor sexual abuse, misdemeanor sexual abuse of a child or minor, or lewd, indecent, or obscene acts, or sexual proposal to a minor, as provided in §§ 22-3006, 22-3010.01, and 22-1312.

(a-8) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed the offense of stalking as provided in § 22-3133.

(a-9) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe the person has committed the offense of presenting a fraudulent identification document for the purpose of entering an establishment possessing an on-premises retailer's license, an Arena C/X license, or a temporary license as provided in § 25-1002(b)(2).

(a-10) A law enforcement officer may arrest a person without a warrant if the officer has probable cause to believe the person has been directed by a releasing official pursuant to § 23-584(d)(1) as a condition of release on citation to stay away from a particular place or a particular person, and the person has violated that condition.

(b) A law enforcement officer may, even if his jurisdiction does not extend beyond the District of Columbia, continue beyond the District, if necessary, a pursuit commenced within the District of a person who has committed an offense or who he has probable cause to believe has committed or is committing a felony, and may arrest that person in any State the laws of which contain provisions equivalent to those of section 23-901.

Subtitle F

Section 110

D.C. Official Code § 23–526. Limitations on consent searches.

(a) For the purposes of this section, the term "consent search" means a search of a person, vehicle, home, or property:

(1) Based solely on the subject's consent to that search;

(2) Not executed pursuant to a warrant; and

(3) Not conducted pursuant to an applicable exception to the warrant requirement as described in United States or District of Columbia case law, excluding the exception for consent searches.

(b) When seeking to perform a consent search, sworn members of District Government law enforcement agencies shall:

(1) Prior to the search of a person, vehicle, home, or property:

(A) Explain, using plain and simple language delivered in a calm demeanor, that the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to a search;

(B) Advise the subject that:

(i) A search will not be conducted if the subject refuses to provide consent to the search; and

(ii) The subject has a legal right to decline to consent to the search;

(C) Obtain consent to search without threats or promises of any kind being made to the subject;

(D) Confirm that the subject understands the information communicated by the officer; and

(E) Use interpretation services when seeking consent to conduct a search of a person who:

(i) Cannot adequately understand or express themselves in spoken or written English; or

(ii) Is deaf or hard of hearing; and

(2) If the sworn member is unable to obtain consent from the subject, refrain from conducting the search.

(c) The requirements of subsection (b) of this section shall not apply to searches executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement.

(d)(1) If a defendant moves to suppress any evidence obtained in the course of the search for an offense prosecuted in the Superior Court of the District of Columbia, the court shall consider an officer's failure to comply with the requirements of this section as a factor in determining the voluntariness of the consent.

(2) There shall be a presumption that a search was nonconsensual if the evidence of consent, including the warnings required in subsection (b) of this section, is not captured on body-worn camera or provided in writing.

(e) Nothing in this section shall be construed to create a private right of action.

Subtitle G

Section 111

D.C. Official Code § 5–107.02. Mandatory continuing education program for sworn members of the Metropolitan Police Department.

(a) The Department shall implement a program of continuing education for its sworn members, which shall consist of a minimum of 32 hours of training each year.

(b) The continuing education required by subsection (a) of this section shall include, at a minimum, instruction on:

(1) Community policing;

(2) Recognizing and preventing biased-based policing, racism, and white supremacy;

(3) ~~The~~ Limiting the use of force and employing de-escalation tactics;

(4) Prohibited techniques, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6)) ~~Limitations on the use of chokeholds and neck restraints~~;

(4A) Best practices for identifying, and interacting with individuals living with, Alzheimer's Disease or other dementias, and the risks such individuals face, such as wandering and elder abuse[;]

(5) Mental and behavioral health awareness; ~~and~~

(6) Linguistic and cultural competency; ~~.~~

(7) The prohibition on the use of consent searches, as described in D.C. Official Code § 23-526; and

(8) The duty of a sworn officer to report, and the method for reporting, suspected misconduct or excessive use of force by a law enforcement officer that a sworn member observes or that comes to the sworn member's attention, as well as any governing District laws and regulations and Department written directives.

D.C. Official Code § 5–107.03. Establishment of District of Columbia Police Officers Standards and Training Board.

(a) There is hereby established the ~~District of Columbia~~ Police Officers Standards and Training Board ("Board").

(b) Membership on the Board shall consist of the following 15 ~~11~~ persons who shall be voting members:

(1) The Mayor or the Mayor's designee;

(2) Chief of Police, Metropolitan Police Department or the Chief of Police's designee;

(2A) Executive Director of the Office of Police Complaints or the Executive Director's designee;

(3) The Attorney General for the District of Columbia or the Attorney General's designee ~~Corporation Counsel for the District of Columbia or the Corporation Counsel's designee~~;

(4) United States Attorney for the District of Columbia or the United States Attorney's designee;

(5) Assistant Director in Charge, Washington Field Office, Federal Bureau of Investigation or the Assistant Director's designee;

(6) Representative of the District of Columbia Superior Court appointed by the Mayor in consultation with the Chief Judge of the Superior Court;

(7) One criminal justice educator appointed by the Mayor;

(8) One police representative appointed by the certified collective bargaining agent, and one police representative appointed by the Mayor in consultation with the Chief of Police; and ~~.~~

(9) Five community representatives appointed by the Mayor, one each with expertise in the following areas:

(A) Oversight of law enforcement;

(B) Juvenile justice reform;

(C) Criminal defense;

(D) Gender-based violence or LGBTQ social services, policy, or advocacy; and

(E) Violence prevention or intervention. ~~Two community representatives appointed by the Mayor~~.

(b-1) The Mayor, in consultation with the Chief of Police, shall appoint one Metropolitan Police Department Reserve Corps representative as an advisory, nonvoting member of the Board.

(c) The following persons may be advisory, nonvoting members of the Board:

(1) The Executive Director, Maryland Police and Correctional Training Commissions; and

(2) The Director, Division of Training and Standards, Virginia Department of Criminal Justice.

(d) The appointments to the Board shall be for a 3-year term.

(e) No member shall serve beyond the time when he or she holds the office or employment by reason of which he or she was initially eligible for appointment and any member chosen to fill a vacancy created otherwise than by expiration of a term shall be appointed for the unexpired portion of the term of the member whom he or she succeeds.

(f) The members shall receive no salary but members shall be reimbursed for their expenses lawfully incurred in the performance of their official functions.

(g) Members appointed to the Board by the Mayor may be removed by the Mayor for incompetence, neglect of duty, or misconduct.

(h) The Chairperson shall be appointed by the Mayor from among the voting members of the Board and the vice chair shall be elected from among the voting members.

(i) The Board shall hold its initial meeting by September 1, 2020 ~~promptly after the appointment and qualification of its members~~. Thereafter, the Board shall meet a minimum of twice each calendar year and at other times as it or the Board's Chairperson may determine. The majority of the voting members of the Board shall constitute a quorum for the transaction of business, the performance of duties or for the exercise of any of its authority. Advisory members shall be entitled to participate in the business and deliberation of the Board, but shall not be entitled to vote. The Board shall establish its own procedures and requirements with respect to the place and conduct of its meetings.

D.C. Official Code § 5–107.04. Duties of the Board.

(a) The Board shall establish minimum application and appointment criteria for the Metropolitan Police Department that include the following:

(1) That an applicant be a citizen or national of, or person lawfully admitted for permanent residence in, ~~of~~ the United States at the time of application;

(2) Age limits;

(3) Height and weight guidelines;

(4) Physical fitness and health standards;

(5) Psychological fitness and health standards;

(6) The completion of a criminal background investigation;

(7) The consideration to be placed on an applicant's participation in court-ordered community supervision or probation for any criminal offense at any time from application through appointment;

(8) The consideration to be placed on an applicant's criminal history, including juvenile records;

(9) The completion of a background investigation;

(10) Military discharge classification information; ~~and~~

(11) Information on prior service with the Metropolitan Police Department; and ~~.~~

(12 If the applicant has prior service with another law enforcement or public safety agency in the District or another jurisdiction, information on any alleged or sustained misconduct or discipline imposed by that law enforcement or public safety agency.

(b) Notwithstanding the minimum standards established by the Board in accordance with subsection (a) of this section, the Chief of Police may deny employment to any applicant based upon conduct occurring while the applicant was a minor if, considering the totality of the circumstances, the Chief of Police determines that the applicant has not displayed the good moral character or integrity necessary to perform the duties of a sworn member of the Metropolitan Police Department.

(c) Each applicant selected for appointment as a sworn member of the Metropolitan Police Department shall successfully complete an initial training program and initial firearms training program before deployment, including minimum requirements developed by the Board, unless the applicant receives a waiver pursuant to subsection (e) of this section.

(d) The Board shall determine minimum requirements for the initial training program and initial firearms training program for Metropolitan Police Department recruits, including the appropriate sequence, content, and duration of each program, and:

(1) The minimum number of hours required;

(2) If and under what circumstances the initial training program will include temporary deployment of the applicant before regular deployment as a sworn member; and

(3) The subjects to be included as part of every applicant's initial training.

(e) The Chief of Police may modify or waive the initial training program and initial firearms training program requirements for either of the following:

(1) Any applicant who is a former sworn member of the Metropolitan Police Department who has been separated from employment with the Metropolitan Police Department for less than 3 years; or

(2) Any former member of a federal, state, or local law enforcement agency who has completed training similar to the Metropolitan Police Department's initial training program and initial firearms training program and who has been separated from employment with a federal, state, or local law enforcement agency for less than 3 years.

(f) The Board shall determine minimum requirements for a continuing education program for sworn members of the Metropolitan Police Department, including:

(1) Requirements for a continuing education firearms training program; and

(2) The appropriate consequence, including ineligibility for promotion, if a member fails to satisfy the continuing education requirement.

(f-1) The Board shall develop and operate a training program, in coordination with the Department of Health, the Department of Aging and Community Living, and the Office of the Attorney General, that includes:

(1) Instruction on best practices for identifying, and interacting with individuals living with, Alzheimer's Disease or other dementias, and the risks such individuals face, such as wandering and elder abuse;

(2) Initial training, required to be completed after appointment, that covers the following topics:

(A) Neurological, psychiatric, and behavioral symptoms of Alzheimer's Disease and other dementias;

(B) Communication issues, including how to communicate respectfully and effectively with individuals living with Alzheimer's Disease or other dementias in order to determine the most appropriate response, and effective communication techniques to enhance collaboration with caregivers;

(C) Techniques for understanding and approaching behavioral symptoms and identifying alternatives to physical restraints;

(D) Identifying and reporting incidents of abuse, neglect, and exploitation to Adult Protective Services;

(E) Protocols for contacting caregivers when an individual living with Alzheimer's Disease or other dementias is found wandering or during emergency or crisis situations; and

(F) Local caregiving resources that are available for individuals living with Alzheimer's Disease or other dementias; and

(3) Required continuing education that covers the subjects described in paragraph (2) of this subsection.

(g) The Metropolitan Police Department may utilize the services of other law enforcement agencies or organizations engaged in the education and training of law enforcement personnel to satisfy any portion of the initial training program, the initial firearms training program, or the continuing education program pursuant to this section.

(h) The Board shall establish the minimum requirements for any instructor of any component of the Metropolitan Police Department’s initial training program, continuing education program, or firearms training program.

(i) The Board shall establish minimum selection and training standards for members of the District of Columbia Housing Authority Police Department.

(j) The Board shall also review and make recommendations to the Chief of Police, the Mayor, and the Council, regarding:

(1) The Metropolitan Police Department’s tuition assistance program;

(2) The optimal probationary period for new members of the Metropolitan Police Department pursuant to subsection (q) of this section;

(3) The issue of creating separate career tracks for patrol and investigations;

(4) Minimum standards for continued level of physical fitness for sworn members of the Metropolitan Police Department; and

(5) The Metropolitan Police Department Reserve Corps program’s training and standards.

(k) The minimum standards set by the Board pursuant to subsections (a), (d), (f), and (h) of this section shall not preclude the Metropolitan Police Department from establishing higher standards, including standards regarding its application, initial training, and continuing education programs at the department.

(l) The minimum standards set by the Board pursuant to subsection (i) of this section shall not preclude the District of Columbia Housing Authority Police Department from establishing higher standards.

(m) Not later than December 31 of each calendar year, the Board, through the Chief of Police, shall deliver a report to the Mayor and the Council concerning the Metropolitan Police Department's initial training program, continuing education program, and firearms training program. The report shall include:

(1) The number of:

(A) Applicants who have successfully completed the application process;

(B) Applicants who have completed the initial training program;

(C) Sworn members who have completed the continuing education and firearms training programs;

(2) An assessment of the Metropolitan Police Department's compliance with the Board's prescribed minimum standards for each of its application and training programs pursuant to this section;

(3) Recommendations where the Board believes that the Metropolitan Police Department's current standards for applicants, initial training including firearms training, and continuing education can be improved; and

(4) An overall assessment of the Metropolitan Police Department's current and planned recruiting efforts in light of public safety needs in the District.

(n) The administrative work of the Board shall be carried out by members of the Metropolitan Police Department as appointed by the Chief of Police.

(o) Any applicant who met the age requirement at the time of application and who was denied appointment on the basis of racial discrimination, as determined by the Director of the Office of Human Rights, may be appointed notwithstanding the applicant's age at the time of that determination.

(p) Applications for appointment to the Metropolitan Police Department shall be made on forms furnished by the Metropolitan Police Department.

(q) Appointments to the Metropolitan Police Department shall be for a probationary period to be determined by the Chief of Police. Continuation of service after the expiration of that period shall be dependent upon the conduct of the appointee and his or her capacity for the performance of the duties to which assigned, as indicated by reports of superior officers. The probationary period shall be an extension of the examination period.

(r) If the Police and Fire Clinic shall find any probationer physically or mentally unfit to continue his or her duties, that probationer shall be required to appear before the Police and Firefighters Retirement and Relief Board. That Board shall make any findings as are required pursuant to § 5-713, and those findings shall be incorporated in a recommendation submitted to the Mayor.

(s) Each police officer appointed shall maintain a level of physical fitness to be determined by the Chief of Police. The final determination with respect to inappropriate fitness levels shall be made by the Medical Director of the Police and Fire Clinic.

(t)(1) The Mayor, pursuant to subchapter I of Chapter 5 of Title 2 [§ 2-501 et seq.], may issue rules to implement the provisions of this section.

(2) The proposed rules shall be submitted to the Council for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council

does not approve or disapprove the proposed rules, by resolution, within this 45-day review period, the proposed rules shall be deemed approved.

Subtitle H

Section 112

D.C. Official Code § 5–331.09. Identification of MPD personnel policing First Amendment assemblies.

(a) MPD shall:

(1) Implement a method for enhancing the visibility to the public of the name and badge number of District law enforcement officers policing a First Amendment assembly by modifying the manner in which those officers' names and badge numbers are affixed to the officers' uniforms or helmets; and

(2) Ensure that all uniformed District law enforcement officers assigned to police First Amendment assemblies are equipped with the enhanced identification and may be identified even if wearing riot gear.

(b) During a First Amendment assembly, the uniforms and helmets of District law enforcement officers policing the assembly shall prominently identify the officers' affiliation with a District law enforcement agency. ~~The MPD shall implement a method for enhancing the visibility to the public of the name or badge number of officers policing a First Amendment assembly by modifying the manner in which those officers' names or badge numbers are affixed to the officers' uniforms or helmets. The MPD shall ensure that all uniformed officers assigned to police First Amendment assemblies are equipped with the enhanced identification and may be identified even if wearing riot gear.~~

Subtitle I

Section 113

D.C. Official Code § 16–705. Jury trial; trial by court.

(a) In a criminal case tried in the Superior Court in which, according to the Constitution of the United States, the defendant is entitled to a jury trial, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial without a jury, the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury; or ~~.~~

(b) In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if —

(1)(A) The defendant is charged with an offense which is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 180 days (or for more than six months in the case of the offense of contempt of court); ~~or~~

(B) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 2 years; or ~~and~~

(C)(i) The defendant is charged with an offense under:

(I) Section 806(a)(1) of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1322; D.C. Official Code § 22–404(a)(1));

(II) Section 432a of the Revised Statutes of the District of Columbia (D.C. Official Code § 22–405.01); or

(III) Section 2 of An Act To confer concurrent jurisdiction on the police court of the District of Columbia in certain cases, approved July 16, 1912 (37 Stat. 193; D.C. Official Code § 22–407); and

(ii) The person who is alleged to have been the victim of the offense is a law enforcement officer, as that term is defined in section 432(a) of the Revised Statutes of the District of Columbia (D.C. Official Code § 22-405(a)); and

(2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

(b-1) If a defendant in a criminal case is charged with 2 or more offenses and the offenses include at least one jury demandable offense and one non-jury demandable offense, the trial for all offenses charged against that defendant shall be by jury unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial without a jury, the trial shall be by a single judge, whose verdict shall have the same force and effect as that of a jury.

(c) The jury shall consist of twelve persons, unless the parties, with the approval of the court and in the manner provided by rules of the court, agree to a number less than twelve. Even absent such agreement, if, due to extraordinary circumstances, the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court, a valid verdict may be returned by the remaining eleven jurors.

Subtitle J

Section 114

~~**D.C. Official Code § 5–115.03. Neglect to make arrest for offense committed in presence.**~~

~~If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he shall be deemed guilty of a misdemeanor and shall be punishable by imprisonment in the District Jail or Penitentiary not exceeding 2 years, or by a fine not exceeding $500. A member of the police force who deals with an individual in accordance with § 24-604(b) shall not be considered as having violated this section.~~

Subtitle K

Section 115

D.C. Official Code § 5–107.01. Minimum standards for members of the Metropolitan Police Department.

(a) Repealed.

(b) Repealed.

(c) Repealed.

(d) Repealed.

(e) To be eligible for appointment as a sworn member of the Metropolitan Police Department, an applicant shall have either:

(1) Successfully completed 60 hours of post-secondary education at an accredited college or university;

(2) Served in the Armed Forces of the United States, including the Organized Reserves and National Guard, for at least 2 years on active duty and if separated from the military, have received an honorable discharge; or

(3) Served at least 3 years in a full-duty status with a full-service police department in a municipality or state within the United States and have resigned or retired in good standing.

(f) An applicant shall be ineligible for appointment as a sworn member of the Metropolitan Police Department if the applicant:

(1) Was previously determined by a law enforcement agency to have committed serious misconduct, as determined by the Chief by General Order;

(2) Was previously terminated or forced to resign for disciplinary reasons from any commissioned, recruit, or probationary position with a law enforcement agency; or

(3) Previously resigned from a law enforcement agency to avoid potential, proposed, or pending adverse disciplinary action or termination.

Subtitle L

Section 116

D.C. Official Code § 1–608.01. Creation of Career Service.

(a) The Mayor shall issue rules and regulations governing employment, advancement, and retention in the Career Service which shall include all persons appointed to positions in the District government, except persons appointed to positions in the Excepted, Executive, Educational, Management Supervisory, or Legal Service. The Career Service shall also include, after January 1, 1980, all persons who are transferred into the Career Service pursuant to the provisions of subsection (c) of § 1-602.04. The rules and regulations governing Career Service employees shall be indexed and cross referenced to the incumbent classification system and shall provide for the following:

(1) A positive recruitment program designed to meet current and projected personnel needs;

(2) Open competition for initial appointment to the Career Service; provided, that resident District graduates shall receive consideration priority as provided in subsection (b-1) of this section;

(3) Examining procedures designed to achieve maximum objectivity, reliability, and validity through a practical assessment of attributes necessary to successful job performance and career development as provided in subchapter VII of this chapter;

(4) Appointments to be made on the basis of merit by selection from the highest qualified available eligibles based on specific job requirements, from appropriate lists established on the basis of the provisions of paragraphs (1), (2), and (3) of this subsection with appropriate regard for:

(A) Affirmative action goals;

(B) The preferences provided in subsections (e) and (e-1) of this section; and

(C) The veterans preference provided in subchapter VII of this chapter; in its place.

(5) Appointments made without time limitation in accordance with paragraph (4) of this subsection, as permanent Career Service status appointments upon satisfactory completion of a probationary period of at least 1 year;

(6) Temporary, term, and other time-limited appointments, in appropriate cases, which do not confer permanent status but are to be made, insofar as practicable, in accordance with paragraph (4) of this subsection, except that such appointments to positions at the DS-12 level or equivalent or below may be made non-competitively;

(7) Appointments to continuing positions (in the absence of lists of eligibles), which do not confer permanent status, subject to meeting minimum qualification standards and subject to termination as soon as lists of qualified eligibles for permanent appointment can be established in accordance with paragraph (4) of this subsection;

(8) Emergency appointments for not more than 30 days to provide for maintenance of essential services in situations of natural disaster or catastrophes where normal employment procedures are impracticable;

(9) Promotions of permanent employees, giving due consideration to demonstrated ability, quality, and length of service;

(10) Reinstatements, reassignments, and transfers of employees with permanent status;

(11) Establishment of programs, including trainee programs, designed to attract and utilize persons with minimal qualifications, but with potential for development, with special emphasis on resident District graduates as provided in subsection (b-1) of this section, in order to provide career development opportunities for members of disadvantaged groups, persons with disabilities, women, and other appropriate target groups. These programs may provide for permanent appointments to trainee or similar positions through competition limited to these persons;

(12) Reduction-in-force procedures, with:

(A) A prescribed order of separation based on tenure of appointment, length of service, including creditable federal and military service, District residency, veterans preference, and officially documented work performance;

(B) Priority reemployment consideration for employees separated;

(C) Consideration of job sharing and reduced hours; and

(D) Employee appeal rights; and

(13) Separations for cause, which shall be subject to the adverse action and appeal procedures provided for in subchapter XVI-A of this chapter.

(b) Selections to the Career Service shall be made in accordance with equal employment opportunity principles as set forth in subchapter VII of this chapter.

(b-1)(1) For each entry-level job opening, a subordinate agency, or the Department of Human Resources acting on behalf of the subordinate agency, shall:

(A) Directly solicit Career Service applications from resident District graduates through means that effectively target that population:

(B) Accept applications for at least 5 business days;

(C) Use numerical ratings, categorical rankings, or pass-fail ratings to score or rank entry-level job applicants as qualified or the equivalent of qualified, pursuant to regulations issued by the Mayor;

(D) Conduct individual interviews with select candidates as part of its hiring process; and

(E) Exclusively consider hiring resident District graduate applicants who are scored or ranked as at least qualified (or the equivalent of qualified), until that pool of resident District graduate applicants has been exhausted.

(2) If a subordinate agency is unable to fill a position after considering all qualified (or equivalently scored or ranked) resident District graduate applicants, the subordinate agency may consider other candidates.

(3) An applicant who claims resident District graduate consideration priority under this subsection shall submit proof of entitlement to the priority in a manner determined by the Mayor.

(4) Nothing in this subsection shall be interpreted as superseding a collective bargaining agreement that:

(A) Requires a subordinate agency to post vacant Career Service positions internally to allow agency bargaining unit term and temporary employees to apply and compete before posting the positions externally; or

(B) Requires a subordinate agency to give consideration priority for Career Service entry-level jobs to applicants other than resident District graduates.

(5) For the purposes of this subsection, the term "qualified" shall have the same meaning as provided in sections 809 through 810 of Title 6-B of the District of Columbia Municipal Regulations (6-B DCMR §§ 809-810), or subsequent regulations issued by the Mayor.

(4A)(A) Each subordinate agency head shall submit to the Mayor an annual report detailing, for each new employee hired into an entry-level job during the reporting period, whether the employee is a resident District graduate.

(B) The Mayor shall integrate into each subordinate agency's annual performance objectives the target percentage of new hires into entry-level jobs who are resident District graduates.

(C)(i) The Mayor shall conduct annual audits of each subordinate agency's personnel records to ensure that all persons receiving resident District graduate consideration priority submitted requisite proof of entitlement.

(ii) Audit reports shall be submitted annually to the Council.

(c) Repealed.

(d) The Mayor may issue separate rules and regulations concerning the personnel system affecting members of the uniform services of the ~~Police and~~ Fire and Emergency Medical Services Department~~s~~ ("FEMS") which may provide for a probationary period of at least 1 year. Other such separate rules and regulations may only be issued to carry out provisions of this chapter which accord such member of the uniform services of ~~the Police and Fire Departments~~ FEMS separate treatment under this chapter. Such separate rules and regulations are not a bar to collective

bargaining during the negotiation process between the Mayor and the recognized labor organizations for ~~the Metropolitan Police and Fire Departments~~ FEMS, but shall be within the parameters of § 1-617.08.

(d-1) For members of the Metropolitan Police Department and notwithstanding § 1-632.03(a)(1)(B) or any other law or regulation, the Assistant Chiefs of Police, Deputy Chiefs of Police, and inspectors shall be selected from among the lieutenants and captains of the force and shall be returned to the same civil service rank when the Mayor so determines.

(d-2)(1) The Chief of Police shall recommend to the Director of Personnel criteria for Career Service promotions and Excepted Service appointments to the positions of Inspector, Commander, and Assistant Chief of Police that address the areas of education, experience, physical fitness, and psychological fitness. The recommended criteria shall be the same for Career Service promotions and Excepted Service appointments to these positions. When establishing the criteria, the Chief of Police shall review national standards, such as the Commission on Accreditation for Law Enforcement Agencies.

(2) All candidates for the positions of Inspector, Commander, and Assistant Chief of Police shall be of good standing with no disciplinary action pending or administered resulting in more than a 14-day suspension or termination within the past 3 years.

(d-3)(1) The Fire Chief shall recommend to the Mayor criteria for Career Service promotions and Excepted Service appointments to the positions of Assistant Fire Chief, Deputy Fire Chief, and Battalion Fire Chief that address the areas of education, experience, physical fitness, and psychological fitness. The recommended criteria shall be the same for Career Service promotions and Excepted Service appointments to these positions. When establishing the criteria, the Fire Chief shall review national standards, such as the National Fire Protection Association's Standard on Fire Officer Professional Qualifications.

(2) All candidates for the positions of Battalion Fire Chief and Deputy Fire Chief shall be of good standing with no disciplinary action pending or administered resulting in more than a 14-day suspension or termination within the past 3 years.

(3) Members of the Fire and Emergency Medical Services Department appointed pursuant to this subsection shall be returned to the immediate previous civil service rank, or to the rank of Captain, when the Mayor so determines.

(e)(1) Notwithstanding any provision of Unit A of Chapter 14 of Title 2, and in accordance with § 1-515.02, an applicant for District government employment in the Career Service who is a District resident at the time of application shall be awarded a 10-point hiring preference over a nonresident applicant; provided, that the applicant claims the preference.

(2)(A) Failure to maintain District residency for a period of 7 consecutive years from the individual's effective date of hire into the position for which the individual claimed the residency preference shall result in forfeiture of District government employment.

(B) Verification and enforcement of residency shall occur pursuant to § 1-515.04.

(C) Beginning on May 23, 2019, waivers for residency requirements applicable to employees in the Career Service shall be governed by § 1-515.05.

(3) Any individual hired under a previous residency law who was subject to a residency requirement shall be treated as if the individual claimed a preference and was hired pursuant to the Residency Preference Amendment Act of 1988 [D.C. Law 7-203].

(4) In reductions-in-force, a resident District employee shall be preferred for retention and reinstatement of employment over a non-resident District employee. For purposes of

this paragraph only, a non-resident District employee hired prior to January 1, 1980, shall be considered a District resident. When the provisions of this paragraph conflict with an effective collective bargaining agreement, the terms of the collective bargaining agreement shall govern.

(5) A District employee hired in the Career Service prior to March 16, 1989, who elects to apply for a competitive promotion in the Career Service and to claim a preference, shall be bound by the provisions of paragraph (2) of this subsection.

(5A)(A) An individual entitled to a hiring preference under subsection (e-1)(1)(B) of this section, regardless of place of residency, shall be deemed to be a District resident and shall be eligible for the District resident hiring preference described in paragraph (1) of this subsection.

(B) If an individual covered by subsection (e-1)(1)(B) claims the residency preference under paragraph (1) of this subsection, the individual shall become a District resident within 180 days after separation from the foster care program and be subject to the requirements of § 1-515.02.

(C) Within 180 days of May 23, 2019, the Mayor shall, pursuant to subchapter I of Chapter 5 of Title 2, issue final rules to implement the preference system established by this paragraph.

(6) The Mayor shall, pursuant to subchapter I of Chapter 5 of Title 2, issue proposed rules to implement the preference system established by this subsection. The proposed rules shall be submitted to the Council no later than February 1, 1989, for a 45-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules, in whole or in part, by resolution within this 45-day review period, the proposed rules shall be deemed approved.

(7)(A) Except as provided in § 1-515.03(a)(6), and subparagraph (B) of this paragraph, the Mayor may not require an individual to reside in the District of Columbia as a condition of employment in the Career Service.

(B) The Mayor shall provide notice to each employee in the Career Service of the provisions of this subsection that require an employee claiming a residency preference to maintain District residency for 7 consecutive years, and shall only apply such provisions with respect to employees claiming a residency preference on or after March 16, 1989.

(e-1)(1) Notwithstanding any provision of Unit A of Chapter 14 of Title 2 [§ 2-1401.01 et seq.], an applicant for District government employment in the Career Service shall be awarded a 10-point hiring preference; provided, that the applicant claims the preference, if, at the time of application, the applicant:

(A) Is within 5 years of leaving foster care under the Child and Family Services Agency and is a resident of the District; or

(B)(i) Is currently in the foster care program administered by the Child and Family Services Agency; and

(ii) Is at least 18 years old and not more than 21 years old, regardless of residency.

(2) An applicant claiming a hiring preference pursuant to this subsection shall submit proof of eligibility for the preference by submitting to the hiring authority a letter or other document issued by the Child and Family Services Agency or the Family Court of the Superior Court of the District of Columbia showing that the applicant is or was in foster care or showing the date the applicant left court supervision.

(3) An applicant who receives a hiring preference pursuant to this subsection and who is a resident of the District shall remain eligible to receive any other preference available under this chapter in addition to the preference received pursuant to this subsection.

(4) For the purposes of this subsection, the term "foster care" shall have the same meaning as provided in § 4-342(2).

(5) The Mayor, pursuant to subchapter I of Chapter 5 of Title 2 [§ 2-501 et seq.], shall issue rules to implement the provisions of this subsection. The proposed rules shall be submitted to the Council for a 30-day period of review, excluding Saturdays, Sundays, legal holidays, and days of Council recess. If the Council does not approve or disapprove the proposed rules by resolution within the 30-day review period, the proposed rules shall be deemed approved.

(f) Repealed.

(g) Repealed.

D.C. Official Code § 1–617.08. Management rights; matters subject to collective bargaining.

(a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations:

(1) To direct employees of the agencies;

(2) To hire, promote, transfer, assign, and retain employees in positions within the agency and to suspend, demote, discharge, or take other disciplinary action against employees for cause;

(3) To relieve employees of duties because of lack of work or other legitimate reasons;

(4) To maintain the efficiency of the District government operations entrusted to them;

(5) To determine:

(A) The mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty;

(B) The number, types, and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty;

(C) The technology of performing the agency's work; and

(D) The agency's internal security practices; and

(6) To take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

(a-1) An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.

(b) All matters shall be deemed negotiable except those that are proscribed by this subchapter. Negotiations concerning compensation are authorized to the extent provided in § 1-617.16.

(c)(1) All matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable through bargaining, including substantive or impacts-and-effects bargaining.

(2)(A) This subsection shall apply to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020, and to any existing collective bargaining agreements automatically renewed

after the effective date of the Comprehensive Policing and Justice Reform Amendment Act of 2022, as approved by the Committee on the Judiciary and Public Safety on November 30, 2022 (Committee print of Bill 24-320).

(B) The negotiated grievance process shall only be applied to the discipline of sworn law enforcement personnel for matters in which the Metropolitan Police Department has issued a final agency decision.

Subtitle M

Section 117

D.C. Official Code § 5–1031. Commencement of corrective or adverse action.

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause.

~~(a-1)(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.~~

~~(2) For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.~~

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General~~,~~ or the Office of the District of Columbia Auditor, ~~or the Office of Police Complaints,~~ the 90-day period for commencing a corrective or adverse action under subsection (a) ~~or (a-1)~~ of this section shall be tolled until the conclusion of the investigation.

Section 118

DCMR 6-A1001. Investigations and Findings.

1001.1 The board shall investigate all cases clearly and justly; any one of the members shall ask questions as may suggest themselves to the charge as specified looking to that end and require a positive and direct answer thereto.

1001.2 The trial board shall forward to the Chief of Police its findings and recommendations, together with the papers in each case, and at the same time

shall notify the accused of its findings, and the fact that the notification has been sent shall be included in the report of the board.

1001.3 The findings of a trial board shall be final and conclusive unless an appeal be taken therefrom in writing to the Mayor within five (5) days, exclusive of Sundays and legal holidays, after notice is sent.

1001.4 If an appeal is taken, a copy of the findings, all records, and a complete transcript of the hearing shall be forwarded to the Mayor within sixty (60) days after notice of findings is sent.

1001.5 Upon receipt of the trial board's findings and recommendations, and no appeal to the Mayor has been made, the Chief of Police may either confirm the findings and impose the penalty recommended, reduce or increase the penalty, or may declare the board's proceedings void and refer the case to another regularly appointed trial board.

1001.6 The fact that a member of the force has been charged with and is awaiting trial for a criminal offense involving matters prima facie prejudicial to the reputation and good order of the force, in this or any other jurisdiction, shall not be a bar to his or her immediate trial by a police trial board.

1001.7 Three convictions before trial boards or any summary hearings as authorized by the Mayor, or both, within a period of twelve (12) months upon charges involving violations of the rules and regulations of the department shall be prima facie evidence of inefficiency. Commanding officers shall, upon the third conviction within a period of twelve (12) months of any member of their command, either submit a report recommending to the Chief of Police that the officer be cited before a police trial board for inefficiency, or submit a report giving the reasons why the officer should not be cited on the charge of inefficiency.

Subtitle N

Section 119

Sec. 119. Use of deadly force.

(a) For the purposes of this section, the term:

(1) "Deadly force" means any force that is likely or intended to cause serious bodily injury or death.

(2) "Deadly weapon" means any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use, is likely to cause serious bodily injury or death.

(3) "Serious bodily injury" means extreme physical pain, illness, or impairment of physical condition, including physical injury, that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

(b) A law enforcement officer shall not use deadly force against a person unless:

(1) The law enforcement officer actually and reasonably believes that deadly force is immediately necessary to protect the law enforcement officer or another person, other than the subject of the use of deadly force, from the threat of serious bodily injury or death;

(2) The law enforcement officer's actions are reasonable, given the totality of the circumstances; and

(3) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(c) In any grand jury, criminal, delinquency, or civil proceeding where an officer's use of deadly force is a material issue, the trier of fact shall consider:

(1) The reasonableness of the law enforcement officer's belief and actions from the perspective of a reasonable law enforcement officer; and

(2) The totality of the circumstances, which shall include:

(A) Whether the subject of the use of deadly force:

(i) Possessed or appeared to possess a deadly weapon; and

(ii) Refused to comply with the law enforcement officer's lawful order to surrender an object believed to be a deadly weapon prior to the law enforcement officer using deadly force;

(B) Whether the law enforcement officer engaged in de-escalation measures prior to the use of deadly force, including taking cover, requesting support from mental health, behavioral health, or social workers, waiting for back-up, trying to calm the subject of the use of force, or, if feasible, using non-deadly force prior to the use of deadly force; and

(C) Whether any conduct by the law enforcement officer prior to the use of deadly force increased the risk of a confrontation resulting in deadly force being used.

Subtitle O

Section 120

Sec. 120. Limitations on military weaponry acquired by District law enforcement agencies.

(a) Beginning in Fiscal Year 2021, District law enforcement agencies shall not acquire the following property through any program operated by the federal government:

(1) Ammunition of .50 caliber or higher;

(2) Armed or armored vehicles, including aircraft and watercraft;

(3) Bayonets;

(4) Explosives or pyrotechnics, including grenades;

(5) Firearm silencers or suppressors;

(6) Firearms of .50 caliber or higher;

(7) Objects designed or capable of launching explosives or pyrotechnics, including grenade launchers, firearms, and firearms accessories; and

(8) Remotely piloted, powered aircraft without a crew aboard, including drones.

(b) If a District law enforcement agency:

(1) Requests property through a program operated by the federal government, the District law enforcement agency shall publish notice of the request on a publicly accessible website within 14 days after the date of the request; or

(2) Acquires property through a program operated by the federal government, the District law enforcement agency shall publish notice of the acquisition on a publicly accessible website within 14 days after the date of the acquisition.

(c) Within 180 days after the effective date of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, effective July 22, 2020 (D.C. Act 23-336; 67 DCR 9148), District law enforcement agencies shall:

(1) Return or dispose of any property described in subsection (a) of this section that the agencies currently possess; and

(2) Publish an inventory of the property returned or disposed of as described in paragraph (1) of this subsection on a publicly accessible website.

Subtitle P

Section 121

D.C. Official Code § 5–331.02. Definitions.

For the purposes of this subchapter, the term:

(1) "Chemical irritant" means any:

(A) Chemical that can rapidly produce sensory irritation or disabling physical effects in humans, which disappear within a short time following termination of exposure, including tear gas; or

(B) Substance prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, effective April 29, 1997, for law enforcement purposes or as a method of warfare.

(2)~~(1)~~ "First Amendment assembly" means a demonstration, rally, parade, march, picket line, or other similar gathering conducted for the purpose of persons expressing their political, social, or religious views.

(3) "Less-lethal projectile" means any munition that can cause bodily injury or death through the transfer of kinetic energy and blunt force trauma, including rubber or foam-covered bullets and stun grenades.

(4) "Less-lethal weapons" means:

(A) Chemical irritants; and

(B) Less-lethal projectiles.

(5)~~(2)~~ "MPD" means the Metropolitan Police Department.

D.C. Official Code § 5–331.03. Policy on First Amendment assemblies.

(a) It is the declared public policy of the District of Columbia that:

(1) Persons and groups have a right to organize and participate in peaceful First Amendment assemblies on the streets, sidewalks, and other public ways, and in the parks of the District of Columbia, and to engage in First Amendment assembly near the object of their protest

so they may be seen and heard, subject to reasonable restrictions designed to protect public safety, persons, and property, and to accommodate the interest of persons not participating in the assemblies to use the streets, sidewalks, and other public ways to travel to their intended destinations, and use the parks for recreational purposes; and

(2) MPD shall not engage in mass arrests of groups that include First Amendment assemblies or that began as a First Amendment assembly unless MPD:

(A) Determines that the assembly has transformed, in substantial part or in whole, into an activity subject to dispersal or arrest; and

(B) Has issued an order to disperse as described in sections 107(e) and (e-1).

~~It is the declared public policy of the District of Columbia that persons and groups have a right to organize and participate in peaceful First Amendment assemblies on the streets, sidewalks, and other public ways, and in the parks of the District of Columbia, and to engage in First Amendment assembly near the object of their protest so they may be seen and heard, subject to reasonable restrictions designed to protect public safety, persons, and property, and to accommodate the interest of persons not participating in the assemblies to use the streets, sidewalks, and other public ways to travel to their intended destinations, and use the parks for recreational purposes.~~

D.C. Official Code § 5–331.07. Police handling and response to First Amendment assemblies.

(a) The MPD's handling of, and response to, all First Amendment assemblies shall be designed and implemented to carry out the District policy on First Amendment assemblies established in § 5-331.03.

(b)(1) Where participants in a First Amendment assembly fail to comply with reasonable time, place, and manner restrictions, the MPD shall, to the extent reasonably possible, first seek to enforce the restrictions through voluntary compliance and then seek, as appropriate, to enforce the restrictions by issuing citations to, or by arresting, the specific non-compliant persons, where probable cause to issue a citation or to arrest is present.

(2) Nothing in this subsection is intended to restrict the authority of the MPD to arrest persons who engage in unlawful disorderly conduct, or violence directed at persons or property; provided, that there is individualized probable cause for arrest.

(c) Where participants in a First Amendment assembly, or other persons at the location of the assembly, engage in unlawful disorderly conduct, violence toward persons or property, or unlawfully threaten violence, the MPD shall, to the extent reasonably possible, respond by identifying and dispersing, controlling, or arresting the persons particular engaging in such conduct, and not by issuing a general order to disperse, thus allowing the First Amendment assembly to continue.

(d) The MPD shall not issue a general order to disperse to participants in a First Amendment assembly except where:

(1) A significant number or percentage of the assembly participants fail to adhere to the imposed time, place, and manner restrictions, and either the compliance measures set forth in subsection (b) of this section have failed to result in substantial compliance or there is no reasonable likelihood that the measures set forth in subsection (b) of this section will result in substantial compliance;

(2) A significant number or percentage of the assembly participants are engaging in, or are about to engage in, unlawful disorderly conduct or violence toward persons or property; or

(3) A public safety emergency has been declared by the Mayor that is not based solely on the fact that the First Amendment assembly is occurring, and the Chief of Police determines that the public safety concerns that prompted the declaration require that the First Amendment assembly be dispersed.

(e) If the MPD determines that a lawful First Amendment assembly, riot, or part thereof, should be dispersed, the MPD shall:

(1) Where there:

(A) Is not an imminent danger of bodily injury or significant damage to property, issue at least three clearly audible and understandable orders to disperse using an amplification system or device, waiting at least 2 minutes between the issuance of each warning; or

(B) Is imminent danger of bodily injury or significant damage to property, issue at least one clearly audible and understandable order to disperse using an amplification system or device;

(2) Provide the participants a reasonable and adequate time to disperse and a clear and safe route for dispersal; and

(3) Capture on body-worn camera each component of the order to disperse described in subsection (e-1) of this section. ~~(1) If and when the MPD determines that a First Amendment assembly, or part thereof, should be dispersed, the MPD shall issue at least one clearly audible and understandable order to disperse using an amplification system or device, and shall provide the participants a reasonable and adequate time to disperse and a clear and safe route for dispersal.~~

~~(2) Except where there is imminent danger of personal injury or significant damage to property, the MPD shall issue multiple dispersal orders and, if appropriate, shall issue the orders from multiple locations. The orders shall inform persons of the route or routes by which they may disperse and shall state that refusal to disperse will subject them to arrest.~~

~~(3) Whenever possible, MPD shall make an audio or video recording of orders to disperse.~~

(e-1) An order to disperse shall:

(1) Be issued by an official at the rank of Lieutenant or above;

(2) Inform the persons to be dispersed of the law, regulation, or policy that they have violated that serves as the basis for the order to disperse:

(3) Warn the persons to be dispersed that they may be arrested if they do not obey the dispersal order or abandon their illegal activity; and

(4) Identify reasonable exit paths for participants to use to leave the area that will be dispersed.

(e-2) When dispersing a First Amendment assembly, MPD shall, to the extent possible:

(1) Position all arresting officers at the rear of the crowd so they can hear the order to disperse; and

(2) Have the arresting officers positioned at the rear of the crowd provide verbal confirmation or a physical indication that the warnings were audible.

(f)(1) Where a First Amendment assembly is held on a District street, sidewalk, or other public way, or in a District park, and an assembly plan has not been approved, the MPD shall,

consistent with the interests of public safety, seek to respond to and handle the assembly in substantially the same manner as it responds to and handles assemblies with approved plans.

(2) An order to disperse or arrest assembly participants shall not be based solely on the fact that a plan has not been approved for the assembly.

(3) When responding to and handling a First Amendment assembly for which a plan has not been approved, the MPD may take into account any actual diminution, caused by the lack of advance notice, in its ability, or the ability of other governmental agencies, appropriately to organize and allocate their personnel and resources so as to protect the rights of both persons exercising free speech and other persons wishing to use the streets, sidewalks, other public ways, and parks.

D.C. Official Code § 5–331.16. Use of riot gear, chemical irritants, or less-lethal projectiles; reporting requirements ~~and riot tactics at First Amendment assemblies~~.

(a) For the purposes of this section:

(1) "Bodily injury" means physical pain, physical injury, illness, or impairment of physical condition.

(2) "Significant bodily injury" means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer, and, in addition, the following injuries constitute at least a significant bodily injury: a fracture of a bone; a laceration that is at least one inch in length and at least one quarter of an inch in depth; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.

(b) Law enforcement officers shall not be deployed in riot gear unless:

(1) An officer at the rank of Commander or higher actually and reasonably believes there is an impending risk to law enforcement officers of significant bodily injury;

(2) The deployment is not being used to disperse a First Amendment assembly and is consistent with the District's policy on First Amendment assemblies;

(3) The deployment of officers in riot gear is reasonable, given the totality of the circumstances; and

(4) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(c) Law enforcement officers shall not deploy less-lethal weapons at a First Amendment Assembly or riot unless:

(1) The law enforcement officer actually and reasonably believes that the deployment of less-lethal weapons is immediately necessary to protect the law enforcement officer or another person from the threat of bodily injury or damage to property;

(2) The deployment of less-lethal weapons is not being used to disperse a lawful First Amendment assembly and is consistent with the District's policy on First Amendment assemblies;

(3) The law enforcement officer has received training on the proper use of less-lethal weapons in the context of crowds;

(4) The law enforcement officer's actions are reasonable, given the totality of the circumstances; and

(5) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(d) In any grand jury, criminal, delinquency, or civil proceeding where an officer's use of riot gear or less-lethal weapons is a material issue, the trier of fact shall consider:

(1) The reasonableness of the law enforcement officer's belief and actions from the perspective of a reasonable law enforcement officer; and

(2) The totality of circumstances, which shall include whether:

(A) The law enforcement officer engaged in de-escalation measures prior to the deployment of less-lethal weapons or riot gear, including issuing an order to disperse and providing individuals a reasonable opportunity to disperse, as described in section 107(e) and (e-1);

(B) Any conduct by the law enforcement officer prior to the deployment of less-lethal weapons increased the risk of a confrontation resulting in less-lethal weapons being deployed;

(C) The use of less-lethal weapons was limited to the people for whom MPD had individualized probable cause for arrest; and

(D) The less-lethal weapon was deployed in a frequency, manner, and intensity that is objectively reasonable.

(e) Following any deployment of officers in riot gear as described in subsection (b) of this section, the deployment of less-lethal weapons as described in subsection (c) of this section, or upon request by the Chairperson of the Council Committee with jurisdiction over the Metropolitan Police Department:

(1) The highest ranking official at the scene of the deployment shall make a written report to the Chief of Police, within 48 hours after the deployment, that describes the deployment of riot gear or less-lethal weapons, including, where applicable:

(A) The number of officers deployed in riot gear;

(B) The number of officers who deployed less-lethal weapons;

(C) The type, quantity, and amount of less-lethal weapons deployed;

(D) The number of people against whom any other use of force was deployed;

(E) The justification for the deployment of officers in riot gear, the deployment of less-lethal weapons, or any other uses of force; and

(F) Whether the deployment of officers in riot gear, or the deployment of less-lethal weapons or any other uses of force, met the requirements of this act; and

(2) MPD shall publish the report on a publicly accessible website within 72 hours after the deployment.

(f) The Mayor shall request that any federal law enforcement agency operating in the District follow the requirements of this section.

~~(a) Officers in riot gear shall be deployed consistent with the District policy on First Amendment assemblies and only where there is a danger of violence. Following any deployment of officers in riot gear, the commander at the scene shall make a written report to the Chief of Police within 48 hours and that report shall be available to the public on request.~~

~~(b)(1) Large scale canisters of chemical irritant shall not be used at First Amendment assemblies absent the approval of a commanding officer at the scene, and the chemical irritant is reasonable and necessary to protect officers or others from physical harm or to arrest actively resisting subjects.~~

~~(2) Chemical irritant shall not be used by officers to disperse a First Amendment assembly unless the assembly participants or others are committing acts of public disobedience endangering public safety and security.~~

~~(3) A commanding officer who makes the determination specified in paragraph (1) of this subsection shall file with the Chief of Police a written report explaining his or her action within 48 hours after the event.~~

Section 122

D.C. Official Code § 22–1322. Rioting or inciting to riot.

(a) A riot in the District of Columbia is a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.

(b) Whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than 180 days or a fine of not more than the amount set forth in § 22-3571.01, or both.

(c) Whoever willfully incites or urges other persons to engage in a riot shall be punished by imprisonment for not more than 180 days or a fine of not more than the amount set forth in § 22-3571.01, or both.

(d) If in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of $5,000, every person who willfully incited or urged others to engage in the riot shall be punished by imprisonment for not more than 10 years or a fine of not more than the amount set forth in § 22-3571.01, or both.

(e) A law enforcement officer's failure to comply with the requirements of section 107 of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.07), shall be a defense in prosecutions for violations of subsection (b) or (c) of this section.

Section 123

Sec. 123. Limitations on less-lethal weapons acquired by District law enforcement agencies; reporting requirements.

If a District law enforcement agency seeks to purchase or acquire less-lethal weapons, as that term is defined in section 102(4) of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.02(4)), the District law enforcement agency shall publish the following information on a publicly accessible website at least 28 days prior to acquiring or purchasing the less-lethal weapons:

(1) A description of the less-lethal weapon sought, including:

(A) How the less-lethal weapon is used or deployed;

(B) The physiological and psychological effect the less-lethal weapon has on people; and

(C) Whether the less-lethal weapon is indiscriminate in nature or if it can be targeted at specific individuals in a crowd;

(2) Any technical documentation issued or published by the manufacturer or distributor of the less-lethal weapon;

(3) An explanation for the law enforcement agency's need to acquire the less-lethal weapon;

(4) A description of the personnel who will use, be equipped with, or have access to less-lethal weapons sought;

(5) A description of the training those personnel will receive on how to use or deploy the less-lethal weapon, including how the training addresses the requirements of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.01 *et seq*.);

(6) The number, quantity, or amount of less-lethal weapons sought; and

(7) The unit price and total price of the less-lethal weapons sought.

Subtitle Q

Section 124

D.C. Official Code § 5–1104. Police Complaints Board.

(a) There is established a Police Complaints Board ("Board"). The Board shall be composed of 5 members, one of whom shall be a member of the MPD, and 4 of whom shall have no current affiliation with any law enforcement agency. All members of the Board shall be residents of the District of Columbia. The members of the Board shall be appointed by the Mayor, subject to confirmation by the Council. The Mayor shall submit a nomination to the Council for a 90-day period of review, excluding days of Council recess. If the Council does not approve the nomination by resolution within this 90-day review period, the nomination shall be deemed disapproved.

(b) Board members first appointed after March 26, 1999 shall serve as follows: 2 shall serve for a 3-year term; 2 shall serve for a 2-year term; and one shall serve for a 1-year term. Thereafter, Board members shall serve for a term of 3 years or until a successor has been appointed. All board members shall serve without compensation. A Board member may be reappointed. The Mayor shall designate the chairperson of the Board, and may remove a member of the Board from office for cause. A person appointed to fill a vacancy on the Board occurring prior to the expiration of a term shall serve for the remainder of the term or until a successor has been appointed.

(c) A quorum for the transaction of business shall be 3 members of the Board.

(d) The Board shall conduct periodic reviews of the citizen complaint review process, and shall make recommendations, where appropriate, to the Mayor, the Council, the Chief of the Metropolitan Police Department ("Police Chief"), and the Director of the District of Columbia Housing Authority ("DCHA Director") concerning the status and the improvement of the citizen complaint process. The Board shall, where appropriate, make recommendations to the above-named entities concerning those elements of management of the MPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers.

(d-1) The Board may, where appropriate, monitor and evaluate MPD's handling of, and response to, First Amendment assemblies, as defined in § 5-333.02, held on District streets, sidewalks, or other public ways, or in District parks.

(d-2)(1) The Board shall review, with respect to the MPD:

(A) The number, type, and disposition of citizen complaints received, investigated, sustained, or otherwise resolved;

(B) The race, national origin, gender, and age of the complainant and the subject officer or officers;

(C) The proposed discipline and the actual discipline imposed on a police officer as a result of any sustained citizen complaint;

(D) All use of force incidents, serious use of force incidents, and serious physical injury incidents as defined in MPD General Order 907.07; and

(E) Any in-custody death.

(2) The Executive Director, acting on behalf of the Board, shall have timely and complete access to information and supporting documentation specifically related to the Board's duties under paragraph (1) of this subsection.

(3) The Executive Director shall keep confidential the identity of all persons named in any documents transferred from the MPD to the Office pursuant to paragraph (1) of this subsection.

(4) The disclosure or transfer of any public record, document, or information from the MPD to the Office pursuant to paragraph (1) of this subsection shall not constitute a waiver of any privilege or exemption that otherwise could be asserted by the MPD to prevent disclosure to the general public or in a judicial or administrative proceeding.

(5) A Freedom of Information Act request for public records collected pursuant to paragraph (1) of this subsection may only be submitted to the MPD.

(6) Beginning on December 31, 2017, and by December 31 of each year thereafter, the Board shall deliver a report to the Mayor and the Council that analyzes the information evaluated by the Board under paragraph (1) of this subsection.

(d-3)(1) The Board or any entity selected by the Board shall cause to be conducted an independent review of the activities of MPD's Narcotics and Specialized Investigations Division, and any of its subdivisions ("NSID"), from January 1, 2017, through December 31, 2019.

(2) By April 30, 2021, the Board shall submit to the Mayor and Council a report summarizing the findings of the review, including:

(A) A description of the NSID's operations, management, and command structure;

(B) An evaluation of stops and searches conducted by NSID officers, including an analysis of the records identified in § 5-113.01(a)(4B);

(C) An evaluation of citizen complaints received by the Office regarding the alleged conduct of NSID officers;

(D) An evaluation of the adequacy of discipline imposed by the Metropolitan Police Department on NSID officers as a result of a sustained allegation of misconduct pursuant to § 5-1112; and

(E) Recommendations, informed by best practices for similar entities in other jurisdictions, for improving the NSID's policing strategies, providing effective oversight over NSID officers, and improving community-police relations.

(3)(A) The Executive Director, acting on behalf of the Board, shall have access to all books, accounts, records, reports, findings, and all other papers, things, or property belonging to or in use by any department, agency, or other instrumentality of the District government that are necessary to facilitate the review.

(B) If the Executive Director is denied access to any books, accounts, records, reports, findings, or any other papers, things, or property, the reason for the denial shall:

(i) Be submitted in writing to the Executive Director no later than 7 days after the date of the Executive Director's request;

(ii) State the specific reasons for the denial, including citations to any law or regulation relied upon as authority for the denial; and

(iii) State the names of the public officials or employees responsible for the decision to deny the request.

(4) Employees of the MPD shall cooperate fully with the Office or any entity selected by the Office to conduct the review. Upon notification by the Executive Director that an MPD employee has not cooperated as requested, the Police Chief shall cause appropriate disciplinary action to be instituted against the employee and shall notify the Executive Director of the outcome of such action.

(5) The Executive Director shall keep confidential the identity of all persons named in any documents transferred from the MPD to the Office pursuant to this subsection.

(6) The disclosure or transfer of any books, accounts, records, reports, findings or any papers, things, or property from the MPD to the Office pursuant to this subsection shall not constitute a waiver of any privilege or exemption that otherwise could be asserted by the MPD to prevent disclosure to the general public or in a judicial or administrative proceeding.

(7) A Freedom of Information Act request for any books, accounts, records, reports, findings or any papers, things, or property obtained by the Office from the MPD pursuant to this subsection may only be submitted to the MPD.

(d-4)(1) The Police Chief shall, prior to issuing a new, or amending an existing, written directive, submit the new or amended written directive to the Board for feedback.

(2) The Board shall, within 14 days of receipt of the new or amended written directive, provide the Police Chief written feedback, which shall include consideration of whether the proposed written directive:

(A) Reduces the likelihood of confrontations between law enforcement officers and residents and visitors;

(B) Increases transparency, accountability, and procedural justice in policing;

(C) Promotes racial equity;

(D) Increases public confidence in law enforcement agencies; and

(E) Complies with local and federal law.

(3)Notwithstanding paragraph (1) of this subsection, the Police Chief may issue a new, or amend an existing, written directive prior to receiving feedback from the Board if the Police Chief submits a written rationale to the Board explaining why an exigency exists.

(4) For the purposes of this subsection, the term "written directives" means any rules or regulations issued by the Mayor or Police Chief applicable to MPD employees including general orders, special order, circulars, standard operating procedures, and bureau or division orders, that are not purely administrative.

(d-5)(1) The Executive Director, or an entity selected by the Executive Director, shall conduct a study to determine whether the Metropolitan Police Department ("MPD") engaged in biased policing when it conducted threat assessments before or during assemblies within the District.

(2) At a minimum, the study shall:

(A) Examine MPD's use of threat assessments before or during assemblies in the District from January 2017 through January 2021;

(B) Determine whether MPD engaged in biased policing when they conducted threat assessments before or during assemblies in the District from January 2017 through January 2021;

(C) Provide a detailed analysis of MPD's response to each assembly in the District between January 2017 through January 2021, including:

(i) Number of arrests made;

(ii) Number of civilian and officer injuries;

(iii) Type of injuries;

(iv) Number of fatalities;

(v) Number of officers deployed;

(vi) What type of weaponry and crowd control tactics were used;

(vii) Whether riot gear was used; and

(viii) Whether any of the individuals involved in the assembly were on the Federal Bureau of Investigation's terrorist watchlist;

(D) If there is a finding that biased policing has occurred, determine whether MPD's response varied based on the race, color, religion, sex, national origin, or gender of those engaged in the assembly; and

(E) Provide recommendations based on the findings in the study, including:

(i) If biased policing occurred, how to prevent bias from impacting whether MPD conducts a threat assessment and how to ensure bias does not impact a threat assessment going forward;

(ii) If biased policing has not been found to have occurred, how to ensure that there is not a disparity in MPD's response to all assemblies across all groups, of proportionate size and characteristics, in the District in the future; or

(iii) If the study is inconclusive on the occurrence of biased policing, what additional steps must be taken to reach a conclusion.

(3) Any collaborating outside partners shall meet the following criteria:

(A) Be nonpartisan;

(B) Have expertise and knowledge of law enforcement practices in the District, bias in policing, homegrown domestic terrorism in the United States, and intelligence data sharing practices;

(C) Have a history of conducting studies and evaluations of law enforcement procedures, regulations, and practices; and

(D) Have experience developing solutions to policy or legal challenges.

(4) The Executive Director shall submit a report on the study to the Council no later than 12 months after the effective date of the Comprehensive Policing and Justice Reform Amendment Act of 2022, as approved by the Committee on the Judiciary and Public Safety on November 30, 2022 (Committee print of Bill 24-320).

(e) Within 60 days of the end of each fiscal year, the Board shall transmit to the entities named in subsection (d) of this section an annual report of the operations of the Board and the Office of Police Complaints.

(f) The Board is authorized to apply for and receive grants to fund its program activities in accordance with laws and regulations relating to grant management.

Subtitle R

Section 125

Sec. 125. Definitions.

For the purposes of this subtitle, the term:

(1) "Hate group" means an organization or group of individuals whose goals, activities, and advocacy are primarily or substantially based on a shared antipathy, hatred, hostility, or violence towards people of one or more other different races, ethnicities, religions, nationalities, genders, or sexual or gender identities.

(2) "MPD" means the Metropolitan Police Department.

(3) "ODCA" means Office of the District of Columbia Auditor.

(4) "White supremacy" means a hate group whose shared antipathy, hatred, hostility, or violence is based on the belief that white people are innately superior to other races.

Sec. 126. White supremacy in policing assessment and recommendations.

(a) ODCA and any entities selected by the District of Columbia Auditor ("D.C. Auditor") shall cause to be conducted a comprehensive assessment of whether MPD officers have ties to white supremacist or other hate groups that may affect the officers' ability to carry out their duties properly and fairly or may undermine public trust in MPD.

(b) In conducting the assessment, the ODCA or the entities selected by the D.C. Auditor shall:

(1) Investigate MPD officers':

(A) Organizational affiliations and memberships;

(B) Social media engagement, including any published statements, photographs, or video footage; and

(C) Sustained allegations of misconduct against the officers, as determined by the Metropolitan Police Department or the Office of Police Complaints; and

(2) Conduct interviews with officers, witnesses, or other relevant stakeholders.

(c)(1) Any entity selected by the ODCA shall be nonpartisan and have expertise in:

(A) Civil rights and racial equity;

(B) The threat of white supremacist and other hate groups, movements, and organizing efforts; or

(C) Law enforcement and intelligence oversight and reform or in conducting investigations and evaluations of law enforcement procedures, policies, and practices.

(2) At least one entity shall have additional expertise in local, federal, and constitutional law, as it relates to freedoms of speech and association.

(d) If, during the course of the assessment, the ODCA determines that criminal activity or other wrongdoing has occurred or is occurring, they shall, as soon as practicable, report the facts that support such information to the appropriate prosecuting authority and MPD.

(e)(1) The ODCA shall submit a report describing the comprehensive assessment, relevant findings, and recommendations to the Mayor and Council no later than 18 months after the effective date of this act.

(2) The report shall include recommendations to reform or improve MPD's hiring and training practices, policies, practice, and disciplinary system to better prevent, detect, and respond to white supremacist or other hate group ties among Department officers and staff that suggest they are not able to enforce the law fairly, and to better investigate and discipline officers for such behavior.

Subtitle S

Section 127

Sec. 127. Definitions.

(a) For the purposes of this subtitle, the term:

(1) "Boxing in" means any practice or tactic in which law enforcement officers intentionally surround a suspect motor vehicle with pursuit vehicles and then reduce the traveling speed of the pursuit vehicles with the intent to stop or slow the suspect motor vehicle.

(2) "Caravanning" means any practice or tactic in which a law enforcement officer operates a pursuit vehicle without maintaining a reasonable distance between another pursuit vehicle.

(3) "Crime of violence" shall have the same meaning as provided in D.C. Official Code § 23-1331(4).

(4) "Deploying a roadblock" means any tactic or practice in which a law enforcement officer intentionally places a vehicle or object in the path of the suspect vehicle with the intent to stop the suspect motor vehicle.

(5)(A) "Deploying a tire deflation device" means any tactic or practice in which a law enforcement officer intentionally places or activates a device that extends across the roadway with the intent to slow or stop a suspect vehicle.

(B) The term "deploying a tire deflation device" does not include raising bollards or other barricades when:

(i) The bollard or barricade is clearly visible to the operator of the suspect motor vehicle; and

(ii) The bollard or barricade is raised in a manner that provides the operator of the suspect motor vehicle adequate time to safely avoid the bollard or barricade.

(6) "Law enforcement officer" shall have the same meaning as provided in D.C. Official Code § 23-501(2).

(7) "Motor vehicle" means any automobile, all-terrain vehicle, motorcycle, moped, or other vehicle designed to be propelled only by an internal-combustion engine or electricity.

(8) "Paralleling" means any practice or tactic in which a law enforcement officer operates a pursuit vehicle in the same direction, and at approximately the same speed, as the suspect motor vehicle using another street or highway parallel to the direction or route of the suspect motor vehicle.

(9) "Pursuit vehicle" means any motor vehicle operated by a law enforcement officer during a vehicular pursuit of a fleeing suspect.

(10) "Ramming" means any tactic in which a law enforcement officer intentionally causes a pursuit vehicle to come into physical contact with a suspect motor vehicle with the intent to damage, slow, or stop the suspect motor vehicle, regardless of the speed of the pursuit vehicle.

(11) “Serious bodily injury” means a bodily injury or significant bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

Section 128

Sec. 128. Law enforcement vehicular pursuit reform.

(a) A law enforcement officer shall not use a motor vehicle to engage in a vehicular pursuit of a suspect motor vehicle, unless the law enforcement officer actually and reasonably believes:

(1) The fleeing suspect:

(A) Has committed or attempted to commit a crime of violence; or

(B) Poses an immediate threat of death or seriously bodily injury to another person;

(2) The vehicular pursuit is:

(A) Immediately necessary to protect another person, other than the fleeing suspect, from the threat of serious bodily injury or death; and

(B) Not likely to cause death or serious bodily injury to any person; and

(3) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(b) In any grand jury, criminal, delinquency, or civil proceeding where an officer’s use of a vehicular pursuit is a material issue, the trier of fact shall consider:

(1) The reasonableness of the law enforcement officer’s belief and actions from the perspective of a reasonable law enforcement officer; and

(2) The totality of the circumstances, which shall include:

(A) Whether the identity of the suspect was known;

(B) Whether the suspect could have been apprehended at a later time;

(C) The likelihood of a person, including the suspect motor vehicle’s occupants, being endangered by the vehicular pursuit, including the type of area, the time of day, the amount of vehicular and pedestrian traffic, and the speed of the vehicular pursuit;

(D) The availability of other means to apprehend or track the fleeing suspect, such as helicopters;

(E) Whether circumstances arose during the vehicular pursuit that rendered the pursuit futile or would have required the vehicular pursuit to continue for an unreasonable time or distance, including:

(i) The distance between the pursuing law enforcement officers and the fleeing motor vehicle; and

(ii) Whether visual contact with the suspect motor vehicle was lost, or the suspect motor vehicle’s location was no longer known;

(F) Whether the law enforcement officer's pursuit vehicle sustained damage or a mechanical failure that rendered it unsafe to operate;

(G) Whether the law enforcement officer was directed to terminate the pursuit by the pursuit supervisor or a higher ranking supervisor;

(H) The law enforcement officer's training and experience;

(I) Whether anyone in the suspect motor vehicle:

(i) Appeared to possess, either on their person or in a location where it is readily available, a dangerous weapon; and

(ii) Was afforded an opportunity to comply with an order to surrender any suspected dangerous weapons;

(J) Whether the law enforcement officer engaged in de-escalation measures;

(K) Whether any conduct by the law enforcement officer prior to the vehicular pursuit increased the risk of a confrontation resulting in a vehicular pursuit; and

(L) Whether the law enforcement officer made all reasonable efforts to prevent harm, including abandoning efforts to apprehend the suspect.

(c)(1) The following practices or tactics employed by a law enforcement officer shall constitute a serious use of force:

(A) Boxing in;

(B) Caravanning;

(C) Deploying a roadblock;

(D) Deploying a tire deflation device; and

(E) Paralleling.

(2) Ramming shall constitute a deadly use of force.

Subtitle T

Section 129

D.C. Official Code § 38–236.01. Definitions.

For the purposes of this part, the term:

(1) "Bodily injury" means a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.

(2) "Community-based organization" shall have the same meaning as provided in § 38-271.01(1A).

(3) "Disciplinary unenrollment" means the expulsion or involuntary transfer of a student from a school.

(4) "Emergency removal" means the immediate out-of-school suspension or disciplinary unenrollment of a student based on the school's reasonable belief that the student's presence poses an immediate and continuing danger to other students or school staff.

(5) "Emotional distress" means mental suffering or distress that requires more than trivial treatment or counseling.

(6) "Exclusion" means the removal of a student from the student's daily class schedule for disciplinary reasons and includes a suspension or a disciplinary unenrollment.

(7) "Expulsion" means the removal of a student from the student's school of enrollment for disciplinary reasons for the remainder of the school year or longer, in accordance with local education agency policy.

(8) "In-school suspension" means temporarily removing a student from the student's regular class schedule as a disciplinary consequence, during which time the student remains on school grounds under the supervision of school personnel who are physically in the same location as the student.

(9) "Involuntary dismissal" means the removal of the student from school attendance for less than 1/2 of a school day for disciplinary reasons, during which time the student is not under the supervision of school personnel and is not allowed on school grounds.

(10) "Involuntary transfer" means the removal of a student from the student's school of enrollment for disciplinary reasons for the remainder of the school year, or longer, and the student's enrollment in another school within the same local education agency, in accordance with local education agency policy.

(10A) “Law enforcement officer” means:

(A) An officer or member of the Metropolitan Police Department or any other police force operating in the District;

(B) An on-duty, civilian employee of the Metropolitan Police Department;

(C) An investigative officer or agent of the United States;

(D) An on-duty, licensed special police officer or security guard;

(E) An on-duty, licensed campus police officer;

(F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services;

(G) An on-duty employee of the Pretrial Services Agency, Court Services and Offender Supervision Agency, or Superior Court Family Court Social Services Division; or

(H) An employee of the Office of the Inspector General who, as part of their official duties, conducts investigations of alleged felony violations.

(11) "Local education agency" means the District of Columbia Public Schools system or any individual or group of public charter schools operating under a single charter.

(12) "OSSE" means the Office of the State Superintendent of Education established by § 38-201.

(13) "Out-of-school suspension" means the temporary removal of a student from school attendance to another setting for disciplinary reasons, during which time the student is not under the supervision of the school's personnel and is not allowed on school grounds.

(A) The term "out-of-school suspension" includes an involuntary dismissal.

(B) For students with disabilities, the term "out-of-school suspension" includes a removal in which no individualized family service plan or individualized education plan services are provided because the removal is 10 days or fewer as well as removals in which the student continues to receive services according to the student's individualized family service plan or individualized education plan.

(14) "Parent" means a parent, guardian, or other person who has custody or control of a student enrolled in a school in a local education agency.

(15) "Referral to law enforcement" means an action by school personnel to report a student to a law enforcement agency or official, including a school police unit, for an incident that occurs on school grounds, during off-campus school activities, or while taking school transportation.

(16) "School-based intervention" means temporarily removing a student from the student's regular class schedule for the purpose of providing the student with school-based targeted

supports, such as behavioral therapy, in response to student conduct that would otherwise warrant an in-school suspension.

(17) "School-related arrest" means an arrest of a student that occurred, or was based on ~~for an activity~~ conducte~~d~~ that occurred, at a District of Columbia Public School or public charter school, on ~~school~~ its grounds, within a school vehicle or other form of transportation, or at a school-sponsored activity. ~~during off-campus school activities, while taking school transportation, or due to a referral to law enforcement by the student's school.~~

(18) "Student with a disability" means a student who qualifies as a child with a disability under section 602(3) of the Individuals with Disabilities Education Act, approved December 3, 2004 (118 Stat. 2652; 20 U.S.C. § 1401(3)).

(19) "Suspension" means an in-school suspension or an out-of-school suspension.

(20) "Willful defiance" means disrupting school activities or intentionally defying the valid authority of school staff.

D.C. Official Code § 38–236.09. Annual reporting requirements.

(a) Each local education agency and entity operating a publicly funded community-based organization shall maintain data for each student that includes:

(1) Demographic data including:

(A) The campus attended by the student;

(B) The student's grade level;

(C) The student's gender identification;

(D) The student's race;

(E) The student's ethnicity;

(F) Whether the student receives special education services;

(G) Whether the student is classified as an English language learner; and

(H) Whether the student is considered at-risk as defined in § 38-2901(2A);

(2) Discipline data including:

(A) Total number of in-school suspensions, out-of-school suspensions, involuntary dismissals, and emergency removals experienced by the student during each school year;

(B) Total number of days excluded from school;

(C) Whether the student was referred to an alternative education setting for the duration of a suspension, and whether the student attended;

(D) Whether the student was subject to a disciplinary unenrollment during the school year;

(E) Whether the student voluntarily withdrew or voluntarily transferred from the school during the school year;

(F) Whether the student was subject to referral to law enforcement;

(G) Whether the student was subject to school-related arrest and the reason for involving law enforcement officers; and

(G-i) The type and count of weapons, controlled substances, or other contraband recovered during a school-related arrest; and

(H) A description of the conduct that led to or reasoning behind each suspension, involuntary dismissal, emergency removal, disciplinary unenrollment, voluntary

withdrawal or transfer, referral to law enforcement, school-related arrest, recovery of weapons, recovery of contraband, recovery of controlled dangerous substances, and, for students with disabilities, change in placement; and ~~A description of the misconduct that led to or reasoning behind each suspension, involuntary dismissal, emergency removal, disciplinary unenrollment, voluntary withdrawal or transfer, referral to law enforcement, school-based arrest and, for students with disabilities, change in placement; and~~

(3) Special education services data, including whether a student received during the school year:

(A) A functional behavioral assessment;

(B) An updated behavior improvement plan; or

(C) A manifestation determination review, including the number of suspension days that triggered the review, whether the suspension days were cumulative, and the outcome of the review.

(b) By August 15 of each year, each local education agency or entity operating a publicly funded community-based organization shall submit a report to the Office of the State Superintendent of Education disaggregated by each of the demographic categories identified in subsection (a)(1) of this section. The report shall include:"

(1) The students suspended for:

(A) At least one and no more than 5 days, and whether the suspension was an in-school suspension or an out-of-school suspension;

(B) At least 6 and no more than 10 days and whether the suspension was an in-school suspension or an out-of-school suspension;

(C) More than 10 days and whether the suspension was an in-school suspension or an out-of-school suspension;

(2) The students who received more than one suspension in a school year and whether the suspensions were in-school or out-of-school suspensions;

(3) The students who were referred to an alternative educational setting for the course of a suspension;

(4) The students who received a school-based intervention rather than an in-school suspension, and a description of the school-based intervention;

(5) The students involuntarily dismissed:

(A) At least once and no more than 5 times;

(B) At least 6 times and no more than 10 times;

(C) More than 10 times;

(6) The students subject to emergency removals;

(7) The students subject to a disciplinary unenrollment, disaggregated by type of disciplinary unenrollment;

(8) The students who voluntarily withdrew or transferred;

(9) The students subject to referral to law enforcement;

(10) The students subject to school-related arrest;

(11) A description of the misconduct that led to or reasoning behind each suspension, involuntary dismissal, emergency removal, disciplinary withdrawal, voluntary withdrawal or transfer, referral to law enforcement, school-based arrest, and, for students with disabilities, change in placement;

(12) Whether the student received a functional behavior assessment, an updated behavioral improvement plan, or a manifestation determination review, as those terms are used in

the Individuals with Disabilities Education Act, approved December 3, 2004 (118 Stat. 2745; 20 U.S.C. § 1400 et seq.), and the outcomes of those actions; and

(13) Whether the student was subject to suspensions exceeding the time limits described in § 38-236.04(b), and a summary of the written justification provided by the local education agency for those disciplinary actions.

(c)(1) Each local education agency or entity operating a publicly funded community-based organization shall provide the requested data in subsection (b) of this section in a form and manner prescribed by the Office of the State Superintendent of Education.

(2) The OSSE shall collaborate with local education agencies and publicly funded community-based organizations to develop consistent definitions for the types of misconduct and explanations of reasoning required to be maintained or reported pursuant to subsections (a)(2)(H) and (b)(11) of this section.

(d) By December 15 of each year, beginning in 2016, the Office of the State Superintendent of Education shall publicly report on the data provided by local education agencies and community-based organizations in subsection (b) of this section during the preceding school year, including a relevant trend analysis. The report shall include a trend analysis based on available data, including data drawn from the Youth Risk Behavior Survey, school climate surveys, and any other available sources, of the exclusion of students who identify as lesbian, gay, bisexual, questioning of the student's sexual orientation, transgender, gender nonconforming, or questioning of the student's gender identity or expression.

(e) Repealed.

[(f)] The OSSE, pursuant to subchapter I of Chapter 5 of Title 2, may issue rules to implement the provisions of this section.

Section 130

D.C. Official Code § 5–113.01. Records required to be maintained; budget and staffing transparency.

(a) The Mayor of the District of Columbia shall cause the Metropolitan Police force to keep the following records:

(1) General complaint files, in which shall be entered every complaint preferred upon personal knowledge of the circumstances thereof, with the name and residence of the complainant;

(2) Records of lost, missing, or stolen property;

(3) A personnel record of each member of the Metropolitan Police force, which shall contain his name and residence; the date and place of his birth; his marital status; the date he became a citizen, if foreign born; his age; his former occupation; and the dates of his appointment and separation from office, together with the cause of the latter;

(4) Arrest books, which shall contain the following information:

(A) Case number, date of arrest, and time of recording arrest in arrest book;

(B) Name, address, date of birth, color, birthplace, occupation, and marital status of person arrested;

(C) Offense with which person arrested was charged and place where person was arrested;

(D) Name and address of complainant;

(E) Name of arresting officer; and

(F) Disposition of case;

(4A) The Metropolitan Police force shall maintain a computerized record of a civil protection order or bench warrant issued as a result of an intrafamily offense;

(4B) Records of stops, including:

(A) The date, location, and time of the stop;

(B) The approximate duration of the stop;

(C) The traffic violation or violations alleged to have been committed that led to the stop;

(D) Whether a search was conducted as a result of the stop;

(E) If a search was conducted:

(i) The reason for the search;

(ii) Whether the search was consensual or nonconsensual;

(iii) Whether a person was searched, and whether a person's property was searched; and

(iv) Whether any contraband or other property was seized in the course of the search;

(F) Whether a warning, safety equipment repair order, or citation was issued as a result of a stop and the basis for issuing such warning, order, or citation;

(G) Whether an arrest was made as a result of either the stop or the search;

(H) If an arrest was made, the crime charged;

(I) The gender of the person stopped;

(J) The race or ethnicity of the person stopped; and

(K) The date of birth of the person stopped~~.~~;

(4C) Use of force incidents, including:

(A) The total number of use of force incidents and the type of force used;

(B) The total number of officers involved in each use of force incident;

(C) The total number of persons involved in each use of force incident;

(D) The number of civilian complaints filed with the Metropolitan Police Department for excessive use of force, by police district, and the outcome of each complaint, including disciplinary actions;

(E) If an arrest was made, the crime charged;

(F) The gender, race, age, and ethnicity of each person involved in a use of force incident; and

(G) The gender, race, age, and ethnicity of any officer involved in a use force incident; ~~and~~

(4D) For the purposes of this section, the terms "contact", "frisk", and "stop" shall have the meanings ascribed in Metropolitan Police Department General Order 304.10; ~~and~~

(4E) Disaggregated by school:

(A) The number of times a law enforcement officer was dispatched to, or requested by, a school;

(B) The reason for dispatching or requesting the officer;

(C) The number of school-related arrests, as that term is defined in section 201(17) of the Attendance Accountability Amendment Act of 2013, effective August 15, 2018 (D.C. Law 22-157; D.C. Official Code § 38-236.01(17)), involving an officer;

(D) The type and count of weapons, controlled substances, or other contraband recovered from any school-related event, whether or not an arrest occurred;

(E) Demographic data for any student and law enforcement officer involved in a stop or school-based arrest, including:

(i) Race and ethnicity;

(ii) Gender;

(iii) Age; and

(iv) Disability status; and

(5) Such other records as the Council of the District of Columbia considers necessary for the efficient operation of the Metropolitan Police force.

(a-1) The records maintained pursuant to subsection (a)(4B) and (4C) of this section shall be published on the Metropolitan Police Department's website biannually.

(b) The Metropolitan Police force shall cooperate with the Criminal Justice Coordinating Council by sharing records to the extent otherwise permissible under the law for the purpose of preparing the report described in § 22-4234(b-3).

(c) The Metropolitan Police Department ("MPD") shall publish the following information on its website:

(1) Monthly, for the prior 5 fiscal years and the current fiscal year, to date, by month:

(A) A staffing report of the number of sworn officers and civilian employees employed by MPD, by bureau, division, unit, and, if applicable, police service area and rank, with a crosswalk to compare actual staffing to funded and unfunded full-time equivalents in that bureau, division, unit, and if applicable, police service area and rank; and

(B) The number of employees that:

(i) Separated from MPD, by type of separation, broken down by civilian employees, cadets, cadet conversion recruits, non-cadet conversion recruits, officers, and senior police officers; and

(ii) Were hired by MPD, broken down by civilian employees, cadets, cadet conversion recruits, non-cadet conversion recruits, officers, and senior police officers;

(1A) Biannually, aggregated data collected in accordance with subsection (a)(4E) of this section;

(2) Annually:

(A) A listing of all full-time equivalents at MPD, in spreadsheet format, that includes the following fields for each full-time equivalent:

(i) Position number;

(ii) Position title;

(iii) Whether the position is funded or unfunded;

(iv) Whether the position is filled or vacant;

(v) Program;

(vi) Activity;

(vii) Salary; and

(viii) Fringe benefits; and

(B) A report on MPD's overtime spending, which shall include the amount spent fiscal year-to-date, by month, on overtime pay and a description of the staffing plan and conditions justifying the overtime pay; and

(3) Annually, by the date the annual MPD budget is proposed by the Mayor and transmitted to the Council:

(A) The approved, revised, and actual MPD budgets for the prior 5 fiscal years and the current fiscal year, the expenditures for those years, and the proposed MPD budget for the next fiscal year, in spread-sheet format, broken down, at a minimum, by program, activity, comptroller source group, fund source, and service level; and

(B) For the proposed MPD budget for the next fiscal year:

(i) The total proposed budget for hiring personnel;

(ii) The gross and net number of personnel MPD anticipates the proposed budget will allow it to hire, broken down by civilian employees, cadets, cadet conversion recruits, non-cadet conversion recruits, officers, and senior police officers; and

(iii) A crosswalk identifying any proposed actual or paper changes to MPD's internal organization, including its various bureaus, and a narrative rationale for the change.

Subtitle U

Section 131

D.C. Official Code § 48–1103. Prohibited acts.

(a)(1) Except as authorized by Chapter 16B of Title 7 [§ 7-1671.01 et seq.], it is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inhale, ingest, or otherwise introduce into the human body a controlled substance; except that it shall be lawful for any person 21 years of age or older to use, or possess with intent to use, drug paraphernalia to possess or use marijuana if such possession or use is lawful under § 48-904.01(a), or to use, or possess with intent to u se, drug paraphernalia to grow, possess, harvest, or process cannabis plants, the growth, possession, harvesting or processing of which is lawful under § 48-904.01(a).

(1A) Notwithstanding paragraph (1) of this subsection, it shall not be unlawful for a person to use, or possess with the intent to use, drug paraphernalia for the personal use of a controlled substance.

(2) Whoever violates this subsection shall be imprisoned for not more than 30 days or fined not more than the amount set forth in § 22-3571.01, or both.

(b)(1) Except as authorized by Chapter 16B of Title 7 [§ 7-1671.01 et seq.], it is unlawful for any person to deliver or sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell drug paraphernalia, knowingly, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance; except that it shall be lawful for any person to deliver or sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, drug paraphernalia under circumstances in which one knows or has reason to know that such drug paraphernalia will be used solely for use of marijuana that is lawful under § 48-904.01(a), or that such drug paraphernalia will be used solely for growing, possession, harvesting, or processing of cannabis plants that is lawful under § 48-904.01(a).

(1A) Notwithstanding paragraph (1) of this subsection, it shall not be unlawful for a community-based organization, as that term is defined in § 7-404(a)(1), to deliver or sell, or possess with intent to deliver or sell, drug paraphernalia for the personal use of a controlled substance.

(1B) Notwithstanding paragraph (1) of this subsection, it shall not be unlawful for District government employees, contractors, and grantees, acting within the scope of their employment, contract, or grant, to deliver, or possess with intent to deliver, drug paraphernalia for the personal use of a controlled substance.

(2) Whoever violates this subsection shall be imprisoned for not more than 6 months or fined not more than the amount set forth in § 22-3571.01, or both, unless the violation occurs after the person has been convicted in the District of Columbia of a violation of this subchapter, in which case the person shall be imprisoned for not more than 2 years, or fined not more than the amount set forth in § 22-3571.01, or both.

(c) Any person 18 years of age or over who violates subsection (b) of this section by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his or her junior is guilty of a special offense and upon conviction may be imprisoned for not more than 8 years, fined not more than the amount set forth in § 22-3571.01, or both.

(d) Where the violation of the section involves the selling of drug paraphernalia by a commercial retail or wholesale establishment, the court shall revoke the license of any licensee convicted of a violation of this section and the certificate of occupancy for the premises.

(e)(1) Except as provided in paragraphs (2), (3), and (3A) of this subsection, it is unlawful to sell the following products in the District of Columbia:

(A) Cocaine free base kits;

(B) Glass or ceramic tubes less than 6 inches in length and 1 inch in diameter sold or possessed with or without any screen-like device;

(C) Cigarette rolling papers; and

(D) Cigar wrappers, including blunt wraps.

(2) A commercial retail or wholesale establishment may sell cigarette rolling papers if the establishment:

(A) Derives at least 25% of its total annual revenue from the sale of tobacco products; and

(B) Sells loose tobacco intended to be rolled into cigarettes or cigars.

(3) A wholesaler may sell cigarette rolling papers to retail establishments described in paragraph (2) of this subsection.

(3A) A cultivation center or dispensary may sell cigarette rolling papers in accordance with Chapter 16B of Title 7 [§ 7-1671.01 et seq.].

(4) A person who violates this subsection shall be imprisoned for not more than 180 days or fined not more than the amount set forth in § 22-3571.01, or both, unless the violation occurs after the person has been convicted in the District of Columbia of a violation of this subchapter, in which case the person shall be imprisoned for not more than 2 years, or fined not more than the amount set forth in § 22-3571.01, or both.

Subtitle V

Section 131

D.C. Official Code § 5–113.01. Records required to be maintained; budget and staffing transparency.

(a) The Mayor of the District of Columbia shall cause the Metropolitan Police force to keep the following records:

(1) General complaint files, in which shall be entered every complaint preferred upon personal knowledge of the circumstances thereof, with the name and residence of the complainant;

(2) Records of lost, missing, or stolen property;

(3) A personnel record of each member of the Metropolitan Police force, which shall contain his name and residence; the date and place of his birth; his marital status; the date he became a citizen, if foreign born; his age; his former occupation; and the dates of his appointment and separation from office, together with the cause of the latter;

(4) Arrest books, which shall contain the following information:

(A) Case number, date of arrest, and time of recording arrest in arrest book;

(B) Name, address, date of birth, color, birthplace, occupation, and marital status of person arrested;

(C) Offense with which person arrested was charged and place where person was arrested;

(D) Name and address of complainant;

(E) Name of arresting officer; and

(F) Disposition of case;

(4A) The Metropolitan Police force shall maintain a computerized record of a civil protection order or bench warrant issued as a result of an intrafamily offense;

(4B) Records of stops, including:

(A) The date, location, and time of the stop;

(B) The approximate duration of the stop;

(C) The traffic violation or violations alleged to have been committed that led to the stop;

(D) Whether a search was conducted as a result of the stop;

(E) If a search was conducted:

(i) The reason for the search;

(ii) Whether the search was consensual or nonconsensual;

(iii) Whether a person was searched, and whether a person's property was searched; and

(iv) Whether any contraband or other property was seized in the course of the search;

(F) Whether a warning, safety equipment repair order, or citation was issued as a result of a stop and the basis for issuing such warning, order, or citation;

(G) Whether an arrest was made as a result of either the stop or the search;

(H) If an arrest was made, the crime charged;

(I) The gender of the person stopped;

(J) The race or ethnicity of the person stopped; and

(K) The date of birth of the person stopped.

(4C) Use of force incidents, including:

(A) The total number of use of force incidents and the type of force used;

(B) The total number of officers involved in each use of force incident;

(C) The total number of persons involved in each use of force incident;

(D) The number of civilian complaints filed with the Metropolitan Police Department for excessive use of force, by police district, and the outcome of each complaint, including disciplinary actions;

(E) If an arrest was made, the crime charged;

(F) The gender, race, age, and ethnicity of each person involved in a use of force incident; and

(G) The gender, race, age, and ethnicity of any officer involved in a use force incident; and

(4D) For the purposes of this section, the terms "contact", "frisk", and "stop" shall have the meanings ascribed in Metropolitan Police Department General Order 304.10; and

(5) Such other records as the Council of the District of Columbia considers necessary for the efficient operation of the Metropolitan Police force.

(a-1) The records maintained pursuant to subsection (a)(4B) and (4C) of this section shall be published on the Metropolitan Police Department's website biannually.

(b) The Metropolitan Police force shall cooperate with the Criminal Justice Coordinating Council by sharing records to the extent otherwise permissible under the law for the purpose of preparing the report described in § 22-4234(b-3).

(c) The Metropolitan Police Department ("MPD") shall publish the following information on its website:

(1) Monthly, for the prior 5 fiscal years and the current fiscal year, to date, by month:

(A) A staffing report of the number of sworn officers and civilian employees employed by MPD, by bureau, division, unit, and, if applicable, police service area and rank, with a crosswalk to compare actual staffing to funded and unfunded full-time equivalents in that bureau, division, unit, and if applicable, police service area and rank; ~~and~~

(B) The number of employees that:

(i) Separated from MPD, by type of separation, broken down by civilian employees, cadets, cadet conversion recruits, non-cadet conversion recruits, officers, and senior police officers; and

(ii) Were hired by MPD, broken down by civilian employees, cadets, cadet conversion recruits, non-cadet conversion recruits, officers, and senior police officers; and ~~;~~

(C) Copies of the overtime pay spending reports submitted to the Council as described in subsection (d) of this section.

(2) Annually:

(A) A listing of all full-time equivalents at MPD, in spreadsheet format, that includes the following fields for each full-time equivalent:

(i) Position number;

(ii) Position title;

(iii) Whether the position is funded or unfunded;

(iv) Whether the position is filled or vacant;

(v) Program;

(vi) Activity;

(vii) Salary; and

(viii) Fringe benefits; and

(B) A report on MPD's overtime spending, which shall include the amount spent fiscal year-to-date, by month, on overtime pay and a description of the staffing plan and conditions justifying the overtime pay; and

(3) Annually, by the date the annual MPD budget is proposed by the Mayor and transmitted to the Council:

(A) The approved, revised, and actual MPD budgets for the prior 5 fiscal years and the current fiscal year, the expenditures for those years, and the proposed MPD budget for the next fiscal year, in spread-sheet format, broken down, at a minimum, by program, activity, comptroller source group, fund source, and service level; and

(B) For the proposed MPD budget for the next fiscal year:

(i) The total proposed budget for hiring personnel;

(ii) The gross and net number of personnel MPD anticipates the proposed budget will allow it to hire, broken down by civilian employees, cadets, cadet conversion recruits, non-cadet conversion recruits, officers, and senior police officers; and

(iii) A crosswalk identifying any proposed actual or paper changes to MPD's internal organization, including its various bureaus, and a narrative rationale for the change.

(d) MPD shall provide a written report every 2 pay periods on MPD's overtime pay spending to the Council that describes the amount spent year-to-date on overtime pay and the staffing plan and conditions justifying the overtime pay.

Subtitle W

Section 133

D.C. Official Code § 5–109.01. Cadet program authorized; purpose; preference for appointment; appropriations.

(a)(1) The Chief of the Metropolitan Police Department ("MPD") shall establish a police officer cadet program for the purpose of instructing, training, and exposing cadets to:

(A) MPD's operations; and

(B) The duties and responsibilities of serving as an MPD police officer.

(2) The police officer cadet program established in paragraph (1) of this subsection shall be composed of the following persons residing in the District, who shall have substantial ties to the District, such as currently or formerly residing, attending school, or working in the District for a significant period of time:

(A) Senior-year high school students; and

(B) High school graduates under 25 years of age. ~~The Chief of the Metropolitan Police Department shall establish a police officer cadet program, which shall include senior year high school students and young adults under 25 years of age residing in the District of Columbia who are graduates of a high school in the District, for the purpose of instructing, training, and exposing interested persons to the operations of the Metropolitan Police Department and the duties, tasks, and responsibilities of serving as a police officer with the Metropolitan Police Department.~~

(b) A person successfully completing the required training and service in a cadet program established pursuant to this section shall be accorded full preference for appointment as a member of the MPD ~~Metropolitan Police Department~~ or of the Fire and Emergency Medical Services Department, if the person shall have met all other requirements pertaining to membership in the chosen Department.

(c) There may be appropriated the funds necessary for the administration of this section.

Subtitle X

Section 134

D.C. Official Code § 2–534. Exemptions from disclosure.

(a) The following matters may be exempt from disclosure under the provisions of this subchapter:

(1) Trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained;

(2) Information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

(2A) Any body-worn camera recordings recorded by the Metropolitan Police Department:

(A) Inside a personal residence; or

(B) Related to an incident involving domestic violence as defined in § 4-551(1), stalking as defined in § 22-3133, or sexual assault as defined in § 23-1907(a)(7).

(3) Investigatory records compiled for law-enforcement purposes, including the records of Council investigations and investigations conducted by the Office of Police Complaints, but only to the extent that the production of such records would:

(A) Interfere with:

(i) Enforcement proceedings;

(ii) Council investigations; or

(iii) Office of Police Complaints ongoing investigations;

(B) Deprive a person of a right to a fair trial or an impartial adjudication;

(C) Constitute an unwarranted invasion of personal privacy;

(D) Disclose the identity of a confidential source and, in the case of a record compiled by a law-enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(E) Disclose investigative techniques and procedures not generally known outside the government; or

(F) Endanger the life or physical safety of law-enforcement personnel;

(4) Inter-agency or intra-agency memorandums or letters, including memorandums or letters generated or received by the staff or members of the Council, which would not be available by law to a party other than a public body in litigation with the public body.

(5) Test questions and answers to be used in future license, employment, or academic examinations, but not previously administered examinations or answers to questions thereon;

(6) Information specifically exempted from disclosure by statute (other than this section), provided that such statute:

(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(7) Information specifically authorized by federal law under criteria established by a presidential executive order to be kept secret in the interest of national defense or foreign policy which is in fact properly classified pursuant to such executive order;

(8) Information exempted from disclosure by § 28-4505;

(9) Information disclosed pursuant to § 5-417;

(10) Any specific response plan, including any District of Columbia response plan, as that term is defined in § 7-2301(1), and any specific vulnerability assessment, either of which is intended to prevent or to mitigate an act of terrorism, as that term is defined in § 22-3152(1);

(11) Information exempt from disclosure by § 47-2851.06;

(12) Information, the disclosure of which would reveal the name of an employee providing information under subchapter XV-A of Chapter 6 of Title 1 [§ 1-615.51 et seq.] and subchapter XII of Chapter 2 of this title [2-233.01 et seq.], unless the name of the employee is already known to the public;

(13) Information exempt from disclosure by § 7-2271.04;

(14) Information that is ordered sealed and restricted from public access pursuant to Chapter 8 of Title 16;

(15) Any critical infrastructure information or plans that contain critical infrastructure information for the critical infrastructures of companies that are regulated by the Public Service Commission of the District of Columbia;

(16) Information exempt from disclosure pursuant to § 38-2615;

(17) Information exempt from disclosure pursuant to § 50-301.29a(13)(C)(i); and

(18) Information exempt from disclosure pursuant to § 24-481.07(a); and

(19) Information exempt from disclosure under subchapter XIV of Chapter 1A of Title 41.

(a-1)(1) The Council may assert, on behalf of any public body from which it obtains records or information, any exemption listed in subsection (a) of this section that could be asserted by the public body pertaining to the records or information.

(2) Disclosure of any public record, document, or information from a District of Columbia government agency, official, or employee to the following persons or entities shall not constitute a waiver of any privilege or exemption that otherwise could be asserted by the District of Columbia to prevent disclosure to the general public or in a judicial or administrative proceeding:

(A) The Council;

(B) A Council committee;

(C) A member of the Council acting in an official capacity;

(D) The District of Columbia Auditor;

(E) An employee of the Office of the District of Columbia Auditor; or

(F) The Ombudsperson for Children or an employee of the Office of the Ombudsperson for Children.

(b) Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section. In each case, the justification for the deletion shall be explained fully in writing, and the extent of the deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) of this section under which the deletion is made. If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from the Council of the District of Columbia. This section shall not operate to permit nondisclosure of information of which disclosure is authorized or mandated by other law.

(c-1) Notwithstanding any other provision of law, no document or information described in § 2-536(a)(6A) that was created on or after December 7, 2004, shall be exempt from disclosure pursuant to subsections (a)(4) and (e) of this section.

(d)[(1)] The provisions of this subchapter shall not apply to vital records covered by Chapter 2 of Title 7 or Chapter 2A of Title 7.

[[2)] The provisions of this subchapter shall not apply to:

(A) The Violence Fatality Review Committee, established by § 5-1431.01;

(B) The Child Fatality Review Committee, established by § 4-1371.03;

(C) The Maternal [Mortality] Review Committee, established by § 7-671.02; and

(D) The Domestic Violence Fatality Review Board, established by § 16-1052.

(d-1)(1) Notwithstanding any provision of this act, a request under this act for disciplinary records shall not be categorically denied or redacted on the basis that it constitutes an unwarranted invasion of a personal privacy for officers within the Metropolitan Police Department ("MPD"), the District of Columbia Housing Authority Police Department ("HAPD"), or the Office of the Inspector General ("OIG"), except as described in paragraph (3).

(2) For the purposes of this subsection, the term "disciplinary records" means any record created in furtherance of a disciplinary proceeding for, or an Office of Police Complaints investigation of, an MPD, HAPD, or OIG officer, regardless of whether the matter was fully adjudicated or resulted in policy training, including:

(A) The name of the officer complained of, investigated, or charged;

(B) The complaints, allegations, and charges against the officer;

(C) The transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

(D) The disposition of any disciplinary proceeding;

(E) The final written opinion or memorandum supporting the disposition and any discipline imposed, including the MPD's, HAPD's, or OIG's complete factual findings and its analysis of the conduct and appropriate discipline of the officer; and

(F) Any other record or document created by OPC, MPD, HAPD, or OIG in anticipation of, or in preparation for, any disciplinary proceeding.

(3) When providing records or information related to disciplinary records, the responding public body may redact:

(A) With respect to the officer or the complainant, records or information related to:

(i) Technical infractions, solely pertaining to the enforcement of administrative departmental rules that do not involve interactions with members of the public and are not otherwise connected to the officer's investigative, enforcement, training, supervision, or reporting responsibilities;

(ii) Their medical history, except in cases where the medical history is a material issue in the basis of the complaint;

(iii) Their use of an employee assistance program, including mental health treatment, substance abuse treatment service, counseling, or therapy, unless such use is mandated by a disciplinary proceeding that may be otherwise disclosed pursuant to this subsection; and

(B) With respect to any person:

(i) Personal contact information, including home addresses, telephone numbers, and email addresses;

(ii) Any social security numbers;

(iii) Any records or information that preserves the anonymity of whistleblowers, complaints, victims, and witnesses; and

(iv) Any other records or information otherwise exempt from disclosure under this section.

(e) All exemptions available under this section shall apply to the Council as well as agencies of the District government. The deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege are incorporated under the inter-agency memoranda exemption listed in subsection (a)(4) of this section, and these privileges, among other privileges that may be found by the court, shall extend to any public body that is subject to this subchapter.

Section 135

Section 17. Officer disciplinary records database.

(a) Notwithstanding section 3105 of the District of Columbia Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-631.05), by December 31, 2024, the Office shall maintain a publicly accessible database that contains the following information related to sustained allegations of misconduct pertaining to an officer's commission of a crime, the officer's interactions with members of the public, or the officer's integrity in criminal investigations, as determined by the Office, the MPD, the DCHAPD, or the OIG for incidents that occurred on the effective date of this act, or thereafter:

(1) The name, badge number, rank, length of service, and current duty status of an officer against whom an allegation of misconduct has been sustained;

(2) A description of:

(A) The complaint that is the basis of the sustained allegation of misconduct, if initiated by a complaint; or

(B) The conduct that is the basis of the sustained allegation of misconduct, if initiated by another means;

(3) Whether the allegation of misconduct was initiated by:

(A) The MPD;

(B) The DCHAPD'

(C) The OIG;

(D) A complaint submitted to the Office pursuant to section 8(a)

(E) The Executive Director as described in section 8(g-1); or

(F) Any other entity;

(4) A description of the final disposition and a copy of the final order or written determination;

(5) The discipline imposed on the officer in response to the sustained allegation of misconduct and the date on which it was imposed;

(6) If applicable, the discipline recommended by the Office, as described in section 12(i)(1)(A); and

(7) Whether the officer or another entity has requested an appeal regarding the sustained allegation of misconduct.

(b) In the event a sustained allegation is successfully appealed, overturned, vacated, or otherwise invalidated, the Office shall remove database entries related to the initial sustained allegation of misconduct.

(c) The MPD shall maintain records necessary to update the database as needed and furnish that information to the Office as requested.

Section 18. Advisory group on public disclosure of disciplinary records.

(a) The Office shall establish and consult with an advisory group to provide recommendations regarding the public disclosure of disciplinary records through the database described in section 17 or available under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.) on the following topics:

(1) Records retention policies for District law enforcement agencies;

(2) Processes for sending data to the Office for timely inclusion in the officer disciplinary database;

(3) The accessibility and usability of the officer disciplinary database;

(4) Methods to improve the timeliness of responses to requests for records under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.);

(5) Standards for determining whether a record is exempt from disclosure under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.);

(6) Standards for determining when and how to redact records;

(7) Policies for protecting the privacy of witnesses, victims, and juveniles; and

(8) Whether a need exists to modify the provisions related to the contents of the disciplinary database described in section 16 or the disciplinary records available under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.);

(b) The advisory group shall consist of:

(1) One representative from each of the following agencies:

(A) The D.C. Housing Authority Police Department

(B) The Metropolitan Police Department;
(C) The Office of the Attorney General;
(D) The Office of the Inspector General; and
(E) The Public Defender Service; and
(2) One representative from each of the following organizations:
(A) American Civil Liberties Union;
(B) DC Open Government Coalition;
(C) Electronic Privacy Information Center;
(D) Fraternal Order of Police;
(E) Reporters Committee for Freedom of the Press; and
(F) The Network for Victim Recovery of DC.

Subtitle Y

Section 136

DCMR 1-1004. Adult Records.

1004.1 Unexpurgated adult arrest records, as provided under D.C. Official Code § 5-113.02, shall be released to law enforcement agents upon request, without cost and without the authorization of the persons to whom those records relate and without any other prerequisite, provided that the law enforcement agents represent that those records are to be used for law enforcement purposes.

1004.2 The term "law enforcement agent" shall be limited in this context to persons having cognizance of criminal investigations or of criminal proceedings directly involving the individuals to whom the requested records relate. The term includes judges, prosecutors, defense attorneys (with respect to the records of their client defendants), police officers, federal agents having the power of arrest, clerks of courts, penal and probation officers and the like.

1004.3 The term "law enforcement agent" does not include private detectives and investigators; personnel investigators, directors and officers; private security agents or others who do not ordinarily participate in the process involving the detection, apprehension, trial or punishment of criminal offenders.

1004.4 Subject to the provisions of §§ 1004.1-1004.3, adult arrest records, as provided under D.C. Official Code § 5-113.02, shall be released in a form which reveals only entries relating to offenses which have resulted in convictions or forfeitures of collateral in a court proceeding. A forfeiture of collateral in a court proceeding shall not include a forfeiture of collateral that is made pursuant to the post-and-forfeit procedure, as that term is defined in D.C. Official Code § 5-335.01(a).

1004.5 Subject to the provisions of §§ 1004.1-1 004.3, adult arrest records, as provided under D.C. Official Code § 5-113.02, shall be released in a form which reveals only entries relating to offenses for which the sentence was completed not more

than ten (10) years before the date upon which the records are requested or for which collateral was forfeited in a court proceeding not more than ten (10) years before the date upon which the records are requested.

1004.6 Subject to the provisions of §§ 1004.1-1004.3, copies or extracts of adult arrest records, as provided under D.C. Code § 4-132 (1994 Repl.) or statements of the non-existence of those records shall be released to applicants therefor upon the payment of fees to be based upon the cost of editing and producing such copies, extracts or statements.

1004.7 Applicants who are not the persons to whom those records may relate shall, in addition to the required fees, present releases in appropriate form executed by the persons to whom the records may relate.

1004.8 No fee shall be required with respect to any record solicited by any agent of the federal or District of Columbia government for a governmental purpose.

1004.9 Notwithstanding subsections 1004.4 and 1004.5, an individual may request production of his or her arrest record for the purposes of determining eligibility for sealing or expunging that record pursuant to § 16-801 et seq. or similar sealing statutes in the District or in another jurisdiction and may request production of his or her arrest record for filing a sealing or expungement motion. For the purposes of this subsection, an "arrest record" shall contain a listing of all adult arrests, regardless of the disposition of each arrest, and regardless of the date on which the arrest, conviction, or completion of the sentence occurred.

1004.10. Nothing in this section shall prohibit the Metropolitan Police Department from providing unexpurgated adult arrest records to employees or contractors working to reduce gun violence, or serve individuals at high risk of being involved in gun violence, within the following District agencies:

(a) The Criminal Justice Coordinating Council;
(b) The Office of Gun Violence Prevention;
(c) The Office of Neighborhood Safety and Engagement;
(d) The Office of the Attorney General; and
(e) The Office of Victim Services and Justice Grants.

Section 137

Section 122. Publication of arrest data.

(a) To facilitate the Office of the Attorney General's ("OAG") ability to publish data about its prosecution practices, including data about how its prosecution decisions break down by race and other demographic factors, OAG shall be permitted to analyze and publish all arrest data that the Metropolitan Police Department ("MPD") transfers to OAG, regardless of whether it transfers that data via electronic or other means.

(b) MPD shall cooperate with OAG's reasonable requests for information about the arrest data that it transfers to OAG, including requests for information about how MPD cleans and publishes its arrest data on its own website.

Subtitle Z

Section 138

Sec. 4b. Deputy Auditor for Public Safety.

(a) There is established within the Office of the District of Columbia Auditor the position of Deputy Auditor for Public Safety.

(b) The Deputy Auditor for Public Safety shall be appointed by the Auditor.

(c) In addition to other qualifications the Auditor deems necessary, the Deputy Auditor for Public Safety shall, at a minimum, have knowledge of law enforcement and corrections policies and practices, particularly regarding internal investigations for officer misconduct and uses of force.

Sec. 4c. Duties of the Deputy Auditor for Public Safety.

The Deputy Auditor for Public Safety shall, in addition to any other responsibilities assigned by the Auditor or by law:

(1) Conduct periodic reviews of the complaint review process and make recommendations, where appropriate, to the Mayor, the Council, and the designated agency principal concerning the status and the improvement of the complaint process and the management of the MPD and the DCHAPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers; and

(2) Periodically review the following with respect to the MPD, the DCHAPD, or the OIG:

(A) The number, type, and disposition of complaints received, investigated, sustained, or otherwise resolved;

(B) The race, national origin, gender, and age of the complainant, if known, and the subject officer or officers;

(C) The proposed discipline and the actual discipline imposed on a police officer as a result of any sustained complaint;

(D) All use of force incidents, serious use of force incidents, and serious physical injury incidents; and

(E) Any in-custody death.

Section 139

D.C. Official Code § 1–609.03. Number of Excepted Service employees; redelegation of authority to appoint; publication requirement.

(a) Under qualifications issued pursuant to § 1-609.01, each appropriate personnel authority may appoint persons to the Excepted Service as follows:

(1) The Mayor may appoint no more than 220 persons;

(2) The Members of the Council of the District of Columbia may appoint persons to their staffs, except those permanent technical and clerical employees appointed by the Secretary or General Counsel and those in the Legal Service;

(2A) The Attorney General may appoint no more than 30 persons;

(3) The Inspector General may appoint no more than 15 persons;

(4) The District of Columbia Auditor may appoint no more than ~~4~~ 5 persons;

(5) The Chief of Police may appoint no more than 6 persons;

(6) The Chief of the Fire and Emergency Medical Services Department may appoint no more than 6 persons;

(7) The Board of Trustees of the University of the District of Columbia may appoint officers of the University, persons who report directly to the President, persons who head major units of the University, academic administrators, and persons in a confidential relationship to the foregoing, exclusive of those listed in the definition of the Educational Service; provided, that the total number of persons appointed by the University to the Excepted Service shall not exceed 20;

(8) The Criminal Justice Coordinating Council may appoint no more than 9 persons;

(9) The District of Columbia Sentencing and Criminal Code Revision Commission may appoint no more than 11 persons;

(10) The State Board of Education may appoint staff to serve an administrative role for the elected members of the Board; provided, that funding is available and that at least 3 full-time equivalent employees are appointed to the Office of Ombudsman for Public Education.

(11) Each other personnel authority not expressly designated in paragraphs (1) through (10) of this subsection may appoint 2 persons.

(b) The authority to appoint persons to the Excepted Service, which is vested in subsection (a) of this section, may be redelegated, in whole or in part.

(c) Within 45 days of actual appointment and within 45 days of any change in such appointment, the names, position titles, and agency placements of all persons appointed to Excepted Service positions under the authority of this section shall be:

(1) Published in the District of Columbia Register; and

(2) Posted online on a website accessible to the public.

(d) At the discretion of the personnel authority, an individual appointed to the Excepted Service at grade level DS-11 or above pursuant to this section:

(1) May be paid in accordance with the pay schedule for the Management Supervisory Service as provided in § 1-609.56; and

(2) May be placed in any step of the appropriate grade of that schedule.

(e) The personnel authority may authorize performance incentives for exceptional service for individuals appointed pursuant to this section not to exceed 10% of the rate of basic pay in any year. Such exceptional service incentives may be paid only when the Excepted Service employee is bound by a performance contract that clearly identifies measurable goals and outcomes and the employee has exceeded contractual expectations in the year for which the incentive is paid.

(f) An individual appointed to the Excepted Service pursuant to this section or § 1-609.08 may be paid severance pay upon separation for non-disciplinary reasons according to the length of the individual's employment with the District government as follows:

Length of Employment	Maximum Severance
Up to 6 months	2 weeks of the employee's basic pay
6 months to 1 year	4 weeks of the employee's basic pay
1 to 3 years	8 weeks of the employee's basic pay
More than 3 years	10 weeks of the employee's basic pay.

(g)(1) Pursuant to regulations as the Mayor may prescribe, the following expenses may be paid to an individual being interviewed for, or an appointee to, a hard-to-fill Excepted Service position at a DS-11 or above:

(A) Reasonable pre-employment travel expenses;

(B) Reasonable relocation expenses for the Excepted Service selectee or appointee and his or her immediate family if they relocate to the District of Columbia from outside the Greater Washington Metropolitan Area; and

(C) A reasonable temporary housing allowance, for a period not to exceed 60 days, for the Excepted Service selectee or appointee and his or her immediate family.

(2) In no event shall the sum of pre-employment travel expenses, relocation expenses, and temporary housing allowance exceed $10,000 or 10% of the appointee's salary, whichever is less.

(h) Within 90 days of September 10, 1999, and notwithstanding any other law or regulation, the Mayor shall submit to the Council for approval under the provisions of § 1-611.06, regulations establishing the Metropolitan Police Department Excepted Service Sworn Employees" Compensation System. Such regulations shall establish policies and procedures governing the compensation, promotion, transfer, and demotion of Metropolitan Police Department excepted service sworn employees appointed pursuant to section § 1-609.03(a)(2).

Title 2

Section 201

D.C. Official Code § 22A-101. Definitions.

[…]

(75) "Law enforcement officer" means:

(A) An officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia;

(B) An investigative officer or agent of the United States;

(C) An on-duty, civilian employee of the Metropolitan Police Department;

(D) An on-duty, licensed special police officer;

(E) An on-duty, licensed campus police officer;

(F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services; ~~or~~

(G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division~~.~~; or

(H) An employee of the District of Columbia Office of the Inspector General who, as part of their official duties, conducts investigations of alleged felony violations.

[…]

ATTACHMENT Z

Committee Print
B24-0320
Committee on the Judiciary and Public Safety
November 30, 2022

A BILL

24-0320

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

_____

To provide for comprehensive policing and justice reform for District residents and visitors, and for other purposes.

TABLE OF CONTENTS

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Comprehensive Policing and Justice Reform Amendment Act of 2022".

TITLE I. IMPROVING POLICE ACCOUNTABILITY AND TRANSPARENCY

SUBTITLE A. PROHIBITING THE USE OF ASPHYXIATING RESTRAINTS AND NECK RESTRAINTS

Sec. 101. The Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.01 *et seq.*), is amended as follows:

(a) Section 2 (D.C. Official Code § 5-125.01) is amended to read as follows:

"Sec. 2. (a) The Council of the District of Columbia finds that law enforcement officers' use of neck restraints, or any other technique that causes asphyxiation, presents an unnecessary danger to the public and constitutes excessive force.

"(b) On November 1, 2015, Alonzo Smith died after an altercation with 2 special police officers. During the incident, Smith was placed facedown with his hands cuffed behind his back

as one special police officer held Smith's head down and another kneeled on his back. The Office of the Chief Medical Examiner ruled Smith's death a homicide.

"(c) On May 25, 2020, Minneapolis Police Department officer Derek Chauvin murdered George Floyd by applying a neck restraint to Floyd with his knee for 8 minutes and 46 seconds. Hundreds of thousands, if not millions, of people across the world, including in the District, took to the streets to peacefully protest injustice, racism, white supremacy, and police brutality against Black people and other people of color. Chauvin was ultimately found guilty of second-degree unintentional murder, third-degree murder, and second-degree manslaughter.

"(d) Police brutality is abhorrent and antithetical to the District's values. It is the intent of the Council that this act unequivocally strengthen the 1985 ban on the use of neck restraints and other techniques that can cause asphyxiation by law enforcement officers.".

(b) Section 3 (D.C. Official Code § 5-125.02) is amended as follows:

(1) Paragraph (1) is repealed.

(2) Paragraph (2) is repealed.

(3) New paragraphs (3), (4), (5), and (6) are added to read as follows:

"(3) "Asphyxiating restraint" means:

"(A) The use of any body part or object by a law enforcement officer against a person with the purpose, intent, or effect of controlling or restricting the person's airway or severely restricting the person's breathing, except in cases where the law enforcement officer is acting in good faith to provide medical care or treatment, such as by providing cardiopulmonary resuscitation; or

"(B) The placement of a person by a law enforcement officer in a position in which that person's airway is restricted.

"(4) "Law enforcement officer" means:

"(A) An officer or member of the Metropolitan Police Department or of any other police force operating in the District;

"(B) An investigative officer or agent of the United States;

"(C) An on-duty, civilian employee of the Metropolitan Police Department;

"(D) An on-duty, licensed special police officer;

"(E) An on-duty, licensed campus police officer;

"(F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services;

"(G) An on-duty employee of the Court Services and Offender Supervision Agency, Pretrial Services Agency, or Family Court Social Services Division; and

"(H) An employee of the Office of the Inspector General who, as part of their official duties, conducts investigations of alleged felony violations.

"(5) "Neck restraint" means the use of any body part or object by a law enforcement officer to apply pressure against a person's neck, including the trachea, carotid artery, or jugular vein, with the purpose, intent, or effect of controlling or restricting the person's movement, blood flow, or breathing.

"(6) "Prohibited technique" means an:

"(A) Asphyxiating restraint; or

"(B) Neck restraint.".

(c) Section 4 (D.C. Official Code § 5-125.03) is amended to read as follows:

"Sec. 4. Use of prohibited techniques.

"(a) It shall be unlawful:

"(1) To use a prohibited technique; or

"(2) If a law enforcement officer observes another law enforcement officer's use of a prohibited technique, to fail to immediately, for the person on whom the prohibited technique was used:

"(A) Render, or cause to be rendered, first aid; or

"(B) Request emergency medical services.".

Sec. 102. Section 3 of the Federal Law Enforcement Officer Cooperation Act of 1999, effective May 9, 2000 (D.C. Law 13-100; D.C. Official Code § 5-302), is amended by striking the phrase "use of trachea and carotid artery holds under sections 3 and 4 of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.01 et seq.)," and inserting the phrase "use of prohibited techniques, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6))," in its place.

SUBTITLE B. IMPROVING ACCESS TO BODY-WORN CAMERA VIDEO RECORDINGS

Sec. 103. Section 3004 of the Body-Worn Camera Regulation and Reporting Requirements Act of 2015, effective October 22, 2015 (D.C. Law 21-36; D.C. Official Code § 5-116.33), is amended as follows:

(a) The section heading is amended by striking the phrase "reporting requirements." and inserting the phrase "reporting requirements; access." in its place.

(b) Subsection (a) is amended as follows:

(1) Paragraph (3) is amended by striking the phrase "interactions;" and inserting the phrase "interactions, and the results of those internal investigations, including any discipline imposed;" in its place.

(2) Paragraph (7) is amended to read as follows:

"(7) How many Freedom of Information Act requests the Metropolitan Police Department ("Department") received for body-worn camera recordings during the reporting period, the outcome of each request, including any reasons for denial, any costs invoiced to the requestor, the cost to the Department for complying with each request, including redaction, and the length of time between the initial request and the Department's final response; and

(c) New subsections (c), (d), (e), (f), and (g) are added to read as follows:

"(c) Notwithstanding any other law:

"(1) Within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Metropolitan Police Department, the Metropolitan Police Department shall provide unredacted copies of the requested body-worn camera recordings to the Chairperson and the Councilmember elected by the Ward in which the incident occurred. Such body-worn camera recordings shall not be publicly disclosed by the Chairperson or the Council; and

"(2) The Mayor:

"(A) Shall, except as provided in paragraph (2) of this subsection:

"(i) Within 5 business days after an officer-involved death or the serious use of force, publicly release:

"(I) The names and body-worn camera recordings of all officers directly involved in the officer-involved death or serious use of force; and

"(II) A description of the incident; and

"(ii) Maintain, on the website of the Metropolitan Police Department in a format readily accessible and searchable by the public, the names and body-worn camera recordings of all officers who were directly involved in an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

"(B) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the Office of the Attorney General, and the United States Attorney's Office for the District of Columbia, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request or subparagraph (A) of this paragraph.

"(3)(A) The Mayor shall not release a body-worn camera recording pursuant to paragraph (1)(A) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

"(i) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and

"(ii) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

"(B)(i) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (A) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

"(ii) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interests of justice.

"(d) Before publicly releasing a body-worn camera recording of an officer-involved death, the Metropolitan Police Department shall:

"(1) Consult with an organization with expertise in trauma and grief on best practices for providing the decedent's next of kin with a reasonable opportunity view the body-worn camera recording privately in a non-law enforcement setting prior to its release; and

"(2) In a manner that is informed by the consultation described in paragraph (1) of this subsection:

"(A) Provide actual notice to the decedent's next of kin at least 24 hours before the release, including the date on and the manner in which it will be released;

"(B) Offer the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting; and

"(C) If the next of kin accepts the offer in subparagraph (B) of this paragraph, provide the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting.

"(e)(1) Metropolitan Police Department officers shall not review their body-worn camera recordings or body-worn camera recordings that have been shared with them to assist in initial report writing.

"(2) Officers shall indicate, when writing any subsequent reports, whether the officer viewed body-worn camera footage prior to writing the subsequent report and specify what body-worn camera footage the officer viewed.

"(f) When releasing body-worn camera recordings, the likenesses of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, shall not be redacted or otherwise obscured.

"(g) For the purposes of this section, the term:

"(1) "FOIA" means Title II of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq.*).

"(2) "Next of kin" means the priority for next of kin as provided in Metropolitan Police Department General Order 401.08, or its successor directives.

"(3) "Serious use of force" means any:

"(A) Firearm discharges by a Metropolitan Police Department officer, with the exception of range and training incidents;

"(B) Head strikes by a Metropolitan Police Department officer with an impact weapon;

"(C) Uses of force by a Metropolitan Police Department officer:

"(i) Resulting in serious bodily injury;

"(ii) Resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ;

"(iii) Involving the use of a prohibited technique, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6)); and

"(iv) Resulting in a death; and

"(D) Incidents in which a Metropolitan Police Department canine bites a person.".

Sec. 104. Chapter 39 of Title 24 of the District of Columbia Municipal Regulations is amended as follows:

(a) Section 3900 is amended as follows:

(1) Subsection 3900.9 is amended to read as follows:

"3900.9. (a) Members shall not review their BWC recordings or BWC recordings that have been shared with them to assist in initial report writing.

"(b) Members shall indicate, when writing any subsequent reports, whether the member viewed BWC footage prior to writing the subsequent report and specify what BWC footage the member viewed.".

(2) Subsection 3900.10 is amended to read as follows:

"3900.10. (a) Notwithstanding any other law, the Mayor:

"(1) Shall, except as provided in paragraph (b) of this subsection:

"(A) Within 5 business days after an officer-involved death or the serious use of force, publicly release:

"(i) The names and body-worn camera recordings of all officers directly involved in the officer-involved death or serious use of force; and

"(ii) A description of the incident; and

"(B) Maintain, on the website of the Metropolitan Police Department in a format readily accessible and searchable by the public, the names and body-worn camera recordings of all officers who were directly involved in an officer-involved death since the Body-Worn Camera Program was launched on October 1, 2014; and

"(2) May, on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police, the Office of the Attorney General, and the United States Attorney's Office for the District of Columbia, publicly release any other body-worn camera recordings that may not otherwise be releasable pursuant to a FOIA request or paragraph (a)(1)(A) of this subsection.

"(b)(1) The Mayor shall not release a body-worn camera recording pursuant to paragraph (a)(1)(A) of this subsection if the following persons inform the Mayor, orally or in writing, that they do not consent to its release:

"(A) For a body-worn camera recording of an officer-involved death, the decedent's next of kin; and

"(B) For a body-worn camera recording of a serious use of force, the individual against whom the serious use of force was used, or if the individual is a minor or unable to consent, the individual's next of kin.

"(2)(A) In the event of a disagreement between the persons who must consent to the release of a body-worn camera recording pursuant to subparagraph (1) of this paragraph, the Mayor shall seek a resolution in the Superior Court of the District of Columbia.

"(B) The Superior Court of the District of Columbia shall order the release of the body-worn camera recording if it finds that the release is in the interests of justice.

"(c) Before publicly releasing a body-worn camera recording of an officer-involved death, the Metropolitan Police Department shall:

"(1) Consult with an organization with expertise in trauma and grief on best practices for providing the decedent's next of kin with a reasonable opportunity view the body-worn camera recording privately in a non-law enforcement setting prior to its release; and

"(2) In a manner that is informed by the consultation described in subparagraph (1) of this paragraph:

"(A) Provide actual notice to the decedent's next of kin at least 24 hours before the release, including the date on which it will be released;

"(B) Offer the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting; and

"(C) If the next of kin accepts the offer in sub-subparagraph (B) of this subparagraph, provide the decedent's next of kin a reasonable opportunity to view the body-worn camera recording privately in a non-law enforcement setting.".

(b) Section 3901.2 is amended by adding a new paragraph (a-1) to read as follows:

"(a-1) Recordings related to a request from or investigation by the Chairperson of the Council Committee with jurisdiction over the Department;".

(c) Section 3902 is amended as follows:

(1) Subsection 3902.3 is amended by striking the phrase "to MPD" and inserting the phrase "to the Department" in its place.

(2) Subsection 3902.4 is amended to read as follows:

"3902.4. Notwithstanding any other law, within 5 business days after a request from the Chairperson of the Council Committee with jurisdiction over the Department, the Department shall provide unredacted copies of the requested BWC recordings to the Chairperson. Such BWC recordings shall not be publicly disclosed by the Chairperson or the Council; except, that the Councilmember representing the Ward in which the incident occurred may jointly view the recordings.".

(3) Subsection 3902.5 is amended to read as follows:

"3902.5. (a) Pursuant to policy directives adopted under the authority of § 3900.3, the Department shall schedule a time for the following individuals to view a BWC recording:

"(1) Any subject of the BWC recording;

"(2) The subject's legal representative;

"(3) If the subject is a minor, the subject's parent or legal guardian; and

"(4) If the subject is deceased, the subject's parent, legal guardian, next of kin, and their respective legal representatives.

"(b) Notwithstanding paragraph (a) of this subsection:

"(1) None of the individuals listed in paragraph (a) of this subsection may make a copy of the BWC recording; and

"(2) The Department may not schedule a time to view the BWC recording if access to the unredacted BWC recording would violate a recognized privacy right of another subject.".

(4) A new subsection 3902.9 is added to read as follows:

"3902.9. When releasing body-worn camera recordings, the likenesses of any local, county, state, or federal government employees acting in their professional capacities, other than those acting undercover, shall not be redacted or otherwise obscured.".

(d) Section 3999.1 is amended by inserting definitions between the definitions of "metadata" and "subject" to read as follows:

""Next of kin" means the priority for next of kin as provided in MPD General Order 401.08, or its successor directive.

""Serious use of force" means any:

"(1) Firearm discharges by a Metropolitan Police Department officer, with the exception of range and training incidents;

"(2) Head strikes by a Metropolitan Police Department officer with an impact weapon;

"(3) Uses of force by a Metropolitan Police Department officer:

"(A) Resulting in serious physical injury;

"(B) Resulting in a loss of consciousness, or that create a substantial risk of death, serious disfigurement, disability or impairment of the functioning of any body part or organ;

"(C) Involving the use of a prohibited technique, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6)); and

"(D) Resulting in a death; and

"(4) Incidents in which a Metropolitan Police Department canine bites a person.".

SUBTITLE C. OFFICE OF POLICE COMPLAINTS REFORMS

Sec. 105. The Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1101 *et seq*.), is amended as follows:

(a) Section 2 (D.C. Official Code § 5-1101) is amended by adding new paragraphs (3A) and (3B) to read as follows:

"(3A) Members of the District of Columbia Housing Authority Police Department ("DCHAPD") are also authorized to make arrests, carry a firearm, and perform other functions normally reserved for members of the Metropolitan Police Department. Since the powers of DCHAPD officers closely resemble the powers of MPD officers, an effective system of police oversight must include a process for resolving allegations concerning DCHAPD officers.

"(3B) Similarly, employees of the Office of the Inspector General ("OIG") are authorized to carry a firearm, make warrantless arrests for felony violations of the law, and serve as affiants for search warrants. Again, since the powers of this specific class of OIG employees have powers that closely resemble the powers of MPD officers, an effective system of police oversight must include a process for resolving allegations concerning OIG employees conducting felony investigations.".

(b) The lead-in language of section 3 (D.C. Official Code § 5-1102) is amended by striking the phrase "citizen complaints against police officers" and inserting the phrase "complaints against law enforcement officers" in its place.

(c) Section 4 (D.C. Official Code § 5-1103) is amended as follows:

(1) New paragraphs (2A), (2B), and (2C) are added to read as follows:

"(2A) "DCHA" means the District of Columbia Housing Authority.

"(2B) "DCHAPD" means the District of Columbia Housing Authority Police Department.

"(2C) "Designated agency principal" means:

"(A) The Police Chief, for cases in which the subject police officer or employee is a member of the MPD;

"(B) The DCHA Director, for cases in which the subject police officer or employee is a member of the DCHAPD; or

"(C) The Inspector General, for cases in which the subject police officer or employee is a member of the OIG authorized to conduct felony investigations.".

(2) A new paragraph (3B) is added to read as follows:

"(3B) "MPD" means the Metropolitan Police Department.".

(3) A new paragraph (5) is added to read as follows:

"(5) "OIG" means the Office of the Inspector General.".

(d) Section 5 (D.C. Official Code § 5–1104) is amended as follows:

(1) Subsection (a) is amended to read as follows:

"(a)(1) There is established a Police Complaints Board ("Board"). The Board shall be composed of 9 members, which shall include one member from each Ward and one at-large member, none of whom shall have a current or prior affiliation with law enforcement, including being employed by a law enforcement agency or law enforcement union.

"(2) The Board members shall be District residents and represent the District's geographic, demographic, and cultural diversity.

"(3)(A) The members of the Board shall be appointed by the Mayor, subject to confirmation by the Council.

"(B) The Mayor shall submit a nomination to the Council for a 90-day period of review, excluding days of Council recess.

"(C) If the Council does not approve the nomination by resolution within this 90-day review period, the nomination shall be deemed disapproved.".

(2) Subsection (b) is amended by striking the phrase "The Mayor shall designate the chairperson of the Board, and may remove a member of the Board from office for cause." and inserting the phrase "The Board shall select a chairperson from among its members. The Mayor may remove a member of the Board from office for cause." in its place.

(3) Subsection (c) is amended by striking the number "3" and inserting the number "5" in its place.

(4) Subsection (d) is amended to read as follows:

"(d) The Board shall conduct periodic reviews of the complaint review process, and shall make recommendations, where appropriate, to the Mayor, the Council, and the designated agency principal concerning the status and the improvement of the complaint process and the management of the MPD and the DCHAPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers.".

(5) Subsection (d-2) is amended as follows:

(A) Paragraph (1) is amended to read as follows:

"(1) The Board shall review the following with respect to the MPD, the DCHAPD, or the OIG:

"(A) The number, type, and disposition of complaints received, investigated, sustained, or otherwise resolved;

"(B) The race, national origin, gender, and age of the complainant, if known, and the subject officer or officers;

"(C) The proposed discipline and the actual discipline imposed on a law enforcement officer as a result of any sustained complaint;

"(D) All use of force incidents, serious use of force incidents, and serious physical injury incidents; and

"(E) Any in-custody death.".

(B) Paragraph (3) is repealed.

(C) Paragraph (4) is amended by striking the phrase "the MPD to" both times it appears and inserting the phrase "the MPD, the DCHAPD, or the OIG to" in its place.

(D) Paragraph (5) is amended by striking the phrase "the MPD" and inserting the phrase "the MPD, the DCHAPD, or the OIG, respectively" in its place.

(E) A new paragraph (7) is added to read as follows:

"(7) In its review of in-custody deaths described in paragraph (1)(E) of this subsection, the Board shall issue findings related to, and recommendations in response to, each death.".

(6) Subsection (d-3)(2)(C) is amended by striking the phrase "citizen complaints" and inserting the word "complaints" in its place.

(7) A new subsection (d-4) is added to read as follows:

"(d-4)(1) The Police Chief shall, prior to issuing a new, or amending an existing, written directive, submit the new or amended written directive to the Board for feedback.

"(2) The Board shall, within 14 days of receipt of the new or amended written directive, provide the Police Chief written feedback, which shall include consideration of whether the proposed written directive:

"(A) Reduces the likelihood of confrontations between law enforcement officers and residents and visitors;

"(B) Increases transparency, accountability, and procedural justice in policing;

"(C) Promotes racial equity;

"(D) Increases public confidence in law enforcement agencies; and

"(E) Complies with local and federal law.

"(3) Notwithstanding paragraph (1) of this subsection, the Police Chief may issue a new, or amend an existing, written directive prior to receiving feedback from the Board if 14 days have expired since the MPD submitted the proposed directive to the Board or the Police Chief submits a written rationale to the Board explaining why an exigency exists.

"(4) For the purposes of this subsection, the term "written directives" means any rules or regulations issued by the Mayor or Police Chief applicable to MPD employees including general orders, special order, circulars, standard operating procedures, and bureau or division orders, that are not purely administrative.".

(e) Section 7 (D.C. Official Code § 5-1106) is amended as follows:

(1) Subsection (a) is amended to read as follows:

"(a)(1) The Executive Director shall employ qualified persons or utilize the services of qualified volunteers, as necessary, to perform the work of the Office, including the investigation of complaints.

"(2) The Executive Director may employ persons on a full-time or part-time basis, or retain the services of contractors for the purpose of resolving a particular case or cases, as may be determined by the Executive Director, except that complaint investigators may not be persons currently or formerly employed by the:

"(A) MPD;

"(B) DCHAPD; or

"(C) OIG, if the current or former employee was authorized to conduct felony investigations.

"(3) The District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*), shall apply to the Executive Director and other employees of the Office.".

(2) Subsection (c) is amended to read as follows:

"(c)(1) Subject to approval of the Board, the Executive Director shall establish a pool of qualified persons who shall be assigned by the Executive Director to carry out the mediation and complaint determination functions set forth in this act.

"(2) In selecting a person to be a member of this pool, the Executive Director shall take into consideration each person's education, work experience, competence to perform the functions required of a dispute mediator or complaint hearing examiner, and general reputation for competence, impartiality, and integrity in the discharge of his responsibilities.

"(3) No member of the pool shall be a current or former employee of the:

"(A) MPD;

"(B) DCHAPD; or

"(C) OIG, if the current or former employee was authorized to conduct felony investigations.".

"(4) For their services, the members of this pool shall be entitled to such compensation as the Executive Director, with the approval of the Board, shall determine; provided that the compensation shall be on a per-case basis, not a per-hour, basis.".

(e) Section 8 (D.C. Official Code § 5-1107) is amended as follows:

(1) Subsection (a) is amended as follows:

(A) The lead-in language is amended by striking the phrase "a citizen complaint" and inserting the phrase "a complaint" in its place.

(B) Paragraph (5) is amended by striking the phrase "; or" and inserting a semicolon in its place.

(C) Paragraph (6) is amended by striking the period and inserting the phrase "; or" in its place.

(D) A new paragraph (7) is added to read as follows:

"(7) Recklessly making false statements in applications for search warrants, arrest warrants, or in sworn testimony before a court of competent jurisdiction.".

(2) Subsection (a-1) is amended to read as follows:

"(a-1) If the MPD, the DCHAPD, or the OIG receives a complaint under subsection (a) of this section, the designated agency principal shall cause the complaint to be transmitted to the Office within 3 business days after receipt.".

(3) Subsection (b) is amended by striking the phrase "to the Police Chief for further processing by the MPD or the District of Columbia Housing Authority Police Department ("DCHAPD"), as appropriate" and inserting the phrase "to the designated agency principal" in its place.

(4) Subsection (b-1) is amended by striking the phrase "the MPD or the HAPD a citizen complaint received" and inserting the phrase "the MPD, the DCHAPD, or the OIG, a complaint received" in its place.

(5) Subsection (d) is amended by striking the phrase "within 90 days" and inserting the phrase "within 120 days" in its place.

(6) Subsection (e) is amended to read as follows:

"(e) Each complaint shall be submitted in writing to the Office and may be:

"(1) Signed by the complainant; or

"(2) Submitted anonymously.".

(7) Subsection (g) is amended as follow:

(A) The lead-in language is amended by striking the phrase "the complainant. Within" and inserting the phrase "the complainant, if known. Within" in its place.

(B) The paragraph (6) is amended by striking the phrase "the MPD or the HAPD" and inserting the phrase "the MPD, the DCHAPD, or the OIG" in its place.

(8) A new subsection (g-1) is added to read as follows:

"(g-1)(1) If the Executive Director discovers any evidence of abuse or misuse of police powers that was not alleged by the complainant in the complaint, the Executive Director may:

"(A) Initiate the Executive Director's own complaint against the subject police officer; and

"(B) Take any of the actions described in subsection (g)(2) through (6) of this section.

"(2) Evidence of abuse or misuse of police powers includes circumstances in which the subject police officer failed to:

"(A) Intervene in or subsequently report any use of force incident in which the subject police officer observed another law enforcement officer utilizing excessive force or engaging in any type of misconduct, pursuant to MPD General Order 901.07, its successor directive, or a similar local or federal directive; or

"(B) Immediately report to their supervisor any violations of the rules and regulations of the MPD committed by any other MPD officer, and each instance of their use of force or a use of force committed by another MPD officer, pursuant to MPD General Order 201.26, or any successor directive.".

(9) Subsection (h) is amended to read as follows:

"(h)(1) The Executive Director shall notify in writing the complainant, if known, and the subject police officer or officers of the action taken under subsection (g) or (g-1) of this section.

"(2) If the complaint is dismissed, the notice shall be accompanied by a brief statement of the reasons for the dismissal, and the Executive Director shall notify the complainant, if known, that the complaint may be brought to the attention of the designated agency principal, who may direct that the complaint be investigated and that appropriate action be taken.".

(10) Subsection (h-1) is amended by striking the phrase "The MPD and the HAPD shall" and inserting the phrase "The MPD, the DCHAPD, and the OIG shall" in its place.

(11) Subsection (h-2)(1) is amended to read as follows:

"(1) The Office shall have the authority to audit complaints referred to the MPD, the DCHAPD, or the OIG for further action.".

(12) Subsection (i) is repealed.

(13) Subsection (j) is amended to read as follows:

"(j) This act shall also apply to the DCHAPD, the OIG, and to any federal law enforcement agency that, pursuant to the Federal Law Enforcement Officer Cooperation Act of 1999, effective May 9, 2000 (D.C. Law 13-100; D.C. Official Code § 5-301 *et seq.*), has a cooperative agreement with the MPD that requires coverage by the Office; provided, that the Chief of the respective law enforcement department or agency or the designated agency principal, where applicable, shall perform the duties of the MPD Chief of Police for the members of their respective departments or agencies.".

(f) Section 9 (D.C. Official Code § 5–1108) is amended to read follows:

"Sec. 9. Dismissal of complaint.

"(a) A complaint may be dismissed on the following grounds:

"(1) The complaint is deemed to lack merit;

"(2) The complainant, if known, refuses to cooperate with the investigation; or

"(3) If, after the Executive Director refers a complaint for mediation, the complainant, willfully fails to participate in good faith in the mediation process.

"(b) A complainant shall not be deemed to have refused to cooperate with the investigation solely because the complainant submitted a complaint anonymously as described in section 8(e)(2).".

(g) Section 10(b) (D.C. Official Code § 5–1109(b)) is amended to read as follows:

"(b) The Executive Director shall give written notification of such referral to the:

"(1) Designated agency principal;

"(2) Complainant, if known; and

"(3) Subject officer or officers.".

(h) Section 11 (D.C. Official Code § 5–1110) is amended as follows:

(1) Subsection (f) is amended by striking the phrase "the MPD as" and inserting the phrase "the MPD, the DCHAPD, or the OIG as" in its place.

(2) Subsection (g) is amended by striking the phrase "Police Chief" both times it appears and inserting the phrase "designated agency principal" in its place.

(3) Subsection (k) is amended by striking the phrase "Police Chief" both times it appears and inserting the phrase "designated agency principal" in its place.

(i) Section 12 (D.C. Official Code § 5–1111) is amended as follows:

(1) Subsection (c) is amended to read as follows:

"(c)(1)(A) The Executive Director is authorized to cause the issuance of subpoenas under the seal of the Superior Court of the District of Columbia compelling the complainant, the subject officer or officers, witnesses, and other persons to respond to written or oral questions, or to produce relevant documents or other evidence as may be necessary for the proper investigation and determination of a complaint.

"(B) Notwithstanding subparagraph (A) of this paragraph, the Executive Director shall not seek subpoenas against a complainant who submitted an application anonymously as described in section 8(e)(2).

"(2)(A) The service of any such subpoena on a subject police officer or any other employee of the MPD, the DCHAPD, or the OIG may be effected by service on the designated

agency principal or their designee, who shall deliver the subpoena to the subject police officer or employee.

"(B) The designated agency principal or their designee shall transmit the return of service to the Office.

"(3) Statements made pursuant to a subpoena shall be given under oath or affirmation.".

(2) Subsection (d) is amended to read as follows:

"(d)(1)(A) Employees of the MPD, the DCHAPD, and the OIG shall cooperate fully with the Office in the investigation and adjudication of a complaint.

"(B) Upon notification by the Executive Director that an MPD, DCHAPD, or OIG employee has not cooperated as requested, the designated agency principal shall cause appropriate disciplinary action to be instituted against the employee, and shall notify the Executive Director of the outcome of such action.

"(2)(A) An employee of the MPD, the DCHAPD, or the OIG shall not retaliate, directly or indirectly, against a person who files a complaint under this act.

"(B) If a complaint of retaliation is sustained under this act, the subject police officer or employee shall be subject to appropriate penalty, including dismissal; provided, that such disciplinary action shall not be taken with respect to an employee's invocation of the Fifth Amendment privilege against self-incrimination.".

(3) Subsection (h) is amended to read as follows:

"(h)(1) Upon review of the investigative file and the evidence adduced at any evidentiary hearing, and in the absence of the resolution of the complaint by conciliation or mediation, the complaint examiner shall make written findings of fact regarding all material issues of fact, and shall determine whether the facts found sustain or do not sustain each allegation of misconduct.

"(2) In making that determination, the complaint examiner may consider any MPD, DCHAPD, or OIG regulation, policy, or order that prescribes standards of conduct for law enforcement officers.

"(3) For the purposes of this act, these written findings of fact and determinations by the complaint examiner (collectively, the "merits determination") may not be rejected unless they clearly misapprehend the record before the complaint examiner and are not supported by substantial, reliable, and probative evidence in that record.".

(4) Subsection (i) is amended to read as follows:

"(i)(1)(A) If the complaint examiner determines that one or more allegations in the complaint is sustained, the Executive Director shall transmit the entire complaint file, including the merits determination of the complaint examiner and the Executive Director's recommendation for the discipline to be imposed on the subject police officer, to the designated agency principal for appropriate action.

"(B) To assist the Executive Director in making an informed recommendation of the discipline to be imposed a subject police officer, the Executive Director shall have access to:

"(i) The most current Table of Offenses and Penalties Guide in General Order 120.21 (Disciplinary Procedures and Processes), or any successor document; and

"(ii) The subject police officer's complete personnel file, including any record of prior misconduct and adverse or corrective action.

"(2) If the complaint examiner determines that no allegation in the complaint is sustained, the Executive Director shall dismiss the complaint and notify the parties and the designated agency principal in writing of such dismissal with a copy of the merits determination.".

(f) Section 13 (D.C. Official Code § 5–1112) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "the Police Chief shall" and inserting the phrase "the designated agency principal shall" in its place.

(2) Subsection (b) is amended to read as follows:

"(b)(1) The review of the complaint file shall include a review of the personnel file of the subject officer or officers, including any record of prior misconduct by the subject police officer or officers and the Executive Director's recommendation for the discipline to be imposed on the subject police officer as described in section 12(i)(1)(A).

"(2)(A) Within 15 working days after receiving the complaint file from the designated agency principal, the reviewing officers shall make a written recommendation, with supporting reasons, to the designated agency principal regarding an appropriate penalty from the Table of Offenses and Penalties Guide in General Order 120.21 (Disciplinary Procedures and Processes), or any successor document.

"(B) This recommendation may include a proposal for any additional action by the designated agency principal not inconsistent with the intent and purpose of the complaint review process.".

(3) Subsection (c) is amended by striking the phrase "the Police Chief" and inserting the phrase "the designated agency principal" in its place.

(4) Subsection (d) is amended to read as follows:

"(d)(1) Within 5 working days after receiving the staff recommendation, the designated agency principal shall notify the complainant, if known, and the subject police officer or officers in writing of the staff recommendation and the Executive Director's recommendation, and shall afford the complainant and the subject police officer or officers reasonable time to file with the designated agency principal a written response to the staff recommendation.

"(2) The designated agency principal shall consider the written responses received from the complainant and the subject police officer or officers and the Executive Director's recommendation before taking final action with regard to the complaint.".

(5) Subsection (e) is amended to read as follows:

"(e)(1) Within 15 working days after receiving the written responses of the complainant and the subject officer or officers, or within 15 working days of the deadline set for receipt of such responses, whichever is earlier, the designated agency principal shall issue a decision as to the imposition of discipline upon the subject police officer or officers.

"(2) The designated agency principal's decision shall be in writing and shall set forth a concise statement of the reasons therefor, including the rationale for imposing or not imposing the discipline recommended by the Executive Director.

"(3) The designated agency principal may not reject the merits determination, in whole or in part.

"(4) The designated agency principal may not supplement the evidentiary record.".

(6) Subsection (f) is amended by striking the phrase "Police Chief" both times it appears and inserting the phrase "designated agency principal" in its place.

(7) Subsection (g) is amended as follows:

(A) The lead-in language is amended by striking the phrase "Police Chief" and inserting the phrase "designated agency principal" in its place.

(B) Paragraph (1) is amended by striking the phrase "Police Chief" and inserting the phrase "designated agency principal" in its place.

(C) Paragraph (2) is amended by striking the phrase "Police Chief" wherever it appears and inserting the phrase "designated agency principal" in its place.

(8) Subsection (h) is amended by striking the phrase "Police Chief" wherever it appears and inserting the phrase "designated agency principal" in its place.

SUBTITLE D. USE OF FORCE REVIEW BOARD MEMBERSHIP EXPANSION

Sec. 106. Use of Force Review Board; membership.

(a) There is established a Use of Force Review Board ("Board"), which shall review uses of force as set forth by the Metropolitan Police Department in its written directives.

(b) The Board shall consist of the following 13 voting members, and may include non-voting members at the Mayor's discretion:

(1) Seven MPD members appointed by the Chief of Police who hold the rank of Inspector or above, or the civilian equivalent;

(2) Three civilian members appointed by the Mayor, pursuant to section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01(e)), with the following qualifications and no current or prior affiliation with law enforcement, including being employed by a law enforcement agency or law enforcement union:

(A) One member who has personally experienced the use of force by a law enforcement officer;

(B) One member of the District of Columbia Bar in good standing; and

(C) One District resident community member;

(3) Two civilian members appointed by the Council with the following qualifications and no current or prior affiliation with law enforcement, including being employed by a law enforcement agency or law enforcement union:

(A) One member with subject matter expertise in criminal justice policy; and

(B) One member with subject matter expertise in law enforcement oversight and the use of force; and

(4) The Executive Director of the Office of Police Complaints.

Sec. 107. Section 2(e) of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01(e)), is amended as follows:

(a) Paragraph (38) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(b) Paragraph (39) is amended by striking the period and inserting the phrase "; and" in its place.

(c) A new paragraph (40) is added to read as follows:

"(40) Use of Force Review Board, established by section 106 of the Comprehensive Policing and Justice Reform Amendment Act of 2022, as approved by the Committee on the Judiciary and Public Safety on November 30, 2022 (Committee print of Bill 24-320).".

SUBTITLE E. ANTI-MASK LAW REPEAL

Sec. 108. The Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, effective March 10, 1983 (D.C. Law 4-203; D.C. Official Code § 22-3312 *et seq.*), is amended as follows:

(a) Section 4 (D.C. Official Code § 22-3312.03) is repealed.

(b) Section 5(b) (D.C. Official Code § 22-3312.04(b)) is amended by striking the phrase "or section 4 shall be" and inserting the phrase "shall be" in its place.

Sec. 109. Section 23-581(a-3) of the District of Columbia Official Code is amended by striking the phrase "sections 22-3112.1, 22-3112.2, and 22-3112.3" and inserting the phrase "§§ 22-3312.01 and 22-3312.02" in its place.

SUBTITLE F. LIMITATIONS ON CONSENT SEARCHES

Sec. 110. Subchapter II of Chapter 5 of Title 23 of the District of Columbia Official Code is amended by adding a new section 23-526 to read as follows:

"§ 23–526. Limitations on consent searches.

"(a) For the purposes of this section, the term "consent search" means a search of a person, vehicle, home, or property:

"(1) Based solely on the subject's consent to that search;

"(2) Not executed pursuant to a warrant; and

"(3) Not conducted pursuant to an applicable exception to the warrant requirement as described in United States or District of Columbia case law, excluding the exception for consent searches.

"(b) When seeking to perform a consent search, sworn members of District Government law enforcement agencies shall:

"(1) Prior to the search of a person, vehicle, home, or property:

"(A) Explain, using plain and simple language delivered in a calm demeanor, that the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to a search;

"(B) Advise the subject that:

"(i) A search will not be conducted if the subject refuses to provide consent to the search; and

"(ii) The subject has a legal right to decline to consent to the search;

"(C) Obtain consent to search without threats or promises of any kind being made to the subject;

"(D) Confirm that the subject understands the information communicated by the officer; and

"(E) Use interpretation services when seeking consent to conduct a search of a person who:

"(i) Cannot adequately understand or express themselves in spoken or written English; or

"(ii) Is deaf or hard of hearing; and

"(2) If the sworn member is unable to obtain consent from the subject, refrain from conducting the search.

"(c) The requirements of subsection (b) of this section shall not apply to searches executed pursuant to a warrant or conducted pursuant to an applicable exception to the warrant requirement.

"(d)(1) If a defendant or juvenile respondent moves to suppress any evidence obtained in the course of the search for an offense prosecuted in the Superior Court of the District of Columbia, the court shall consider an officer's failure to comply with the requirements of this section as a factor in determining the voluntariness of the consent.

"(2) There shall be a presumption that a search was nonconsensual if the evidence of consent, including the warnings required in subsection (b) of this section, is not captured on body-worn camera or provided in writing.

"(e) Nothing in this section shall be construed to create a private right of action.".

SUBTITLE G. MANDATORY CONTINUING EDUCATION EXPANSION; RECONSTITUTING THE POLICE OFFICERS STANDARDS AND TRAINING BOARD

Sec. 111. Title II of the Metropolitan Police Department Application, Appointment, and Training Requirements of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01 *et seq.*), is amended as follows:

(a) Section 203(b) (D.C. Official Code § 5-107.02(b)) is amended as follows:

(1) Paragraph (2) is amended by striking the phrase "biased-based policing" and inserting the phrase "biased-based policing, racism, and white supremacy" in its place.

(2) Paragraph (3) is amended to read as follows:

"(3) Limiting the use of force and employing de-escalation tactics;".

(3) Paragraph (4) is amended to read as follows:

"(4) Prohibited techniques, as that term is defined in section 3(6) of the Limitation on the Use of the Chokehold Act of 1985, effective January 25, 1986 (D.C. Law 6-77; D.C. Official Code § 5-125.02(6));".

(4) Paragraph (5) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(5) Paragraph (6) is amended by striking the period and inserting a semicolon in its place.

(6) New paragraphs (7) and (8) are added to read as follows:

"(7) The limitations on the use of consent searches, as described in D.C. Official Code § 23-526; and

"(8) The duty of a sworn officer to report, and the method for reporting, suspected misconduct or excessive use of force by a law enforcement officer that a sworn member observes or that comes to the sworn member's attention, as well as any governing District laws and regulations and Department written directives.".

(b) Section 204 (D.C. Official Code § 5-107.03) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "the District of Columbia Police" and inserting the phrase "the Police" in its place.

(2) Subsection (b) is amended as follows:

(A) The lead-in language is amended by striking the phrase "11 persons" and inserting the phrase "15 persons" in its place.

(B) A new paragraph (2A) is added to read as follows:

"(2A) Executive Director of the Office of Police Complaints or the Executive Director's designee;".

(C) Paragraph (3) is amended to read as follows:

"(3) The Attorney General for the District of Columbia or the Attorney General's designee;".

(D) Paragraph (8) is amended by striking the period and inserting the phrase "; and" in its place.

(E) Paragraph (9) is amended to read as follows:

"(9) Five community representatives appointed by the Mayor, one each with expertise in the following areas:

"(A) Oversight of law enforcement;

"(B) Juvenile justice reform;

"(C) Criminal defense;

"(D) Gender-based violence or LGBTQ social services, policy, or advocacy; and

"(E) Violence prevention or intervention.".

(3) Subsection (i) is amended by striking the phrase "promptly after the appointment and qualification of its members" and inserting the phrase "by September 1, 2020" in its place.

(c) Section 205(a) (D.C. Official Code § 5-107.04(a)) is amended as follows:

(1) Paragraph (1) is amended by striking the phrase "a citizen of the United States" and inserting the phrase "a citizen or national of, or person lawfully admitted for permanent residence in, the United States" in its place.

(2) Paragraph (10) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(3) Paragraph (11) is amended by striking the period and inserting the phrase "; and" in its place.

(4) A new paragraph (12) is added to read as follows:

"(12) If the applicant has prior service with another law enforcement or public safety agency in the District or another jurisdiction, information on any alleged or sustained misconduct or discipline imposed by that law enforcement or public safety agency.".

SUBTITLE H. IDENTIFICATION OF MPD OFFICERS DURING FIRST AMENDMENT ASSEMBLIES AS LOCAL LAW ENFORCEMENT

Sec. 112. Section 109 of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.09), is amended to read as follows:

"(a) MPD shall:

"(1) Implement a method for enhancing the visibility to the public of the name and badge number of District law enforcement officers policing a First Amendment assembly by modifying the manner in which those officers' names and badge numbers are affixed to the officers' uniforms or helmets; and

"(2) Ensure that all uniformed District law enforcement officers assigned to police First Amendment assemblies are equipped with the enhanced identification and may be identified even if wearing riot gear.

"(b) During a First Amendment assembly, the uniforms and helmets of District law enforcement officers policing the assembly shall prominently identify the officers' affiliation with a District law enforcement agency.".

SUBTITLE I. PRESERVING THE RIGHT TO JURY TRIAL

Sec. 113. Section 16-705(b)(1) of the District of Columbia Official Code is amended as follows:

(a) Subparagraph (A) is amended by striking the phrase "; or" and inserting a semicolon in its place.

(b) Subparagraph (B) is amended by striking the phrase "; and" and inserting the phrase "; or" in its place.

(c) A new subparagraph (C) is added to read as follows:

"(C)(i) The defendant is charged with an offense under:

"(I) Section 806(a)(1) of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1322; D.C. Official Code § 22–404(a)(1));

"(II) Section 432a of the Revised Statutes of the District of Columbia (D.C. Official Code § 22–405.01); or

"(III) Section 2 of An Act To confer concurrent jurisdiction on the police court of the District of Columbia in certain cases, approved July 16, 1912 (37 Stat. 193; D.C. Official Code § 22–407); and

"(ii) The person who is alleged to have been the victim of the offense is a law enforcement officer, as that term is defined in section 432(a) of the Revised Statutes of the District of Columbia (D.C. Official Code § 22-405(a)); and".

SUBTITLE J. REPEAL OF FAILURE TO ARREST CRIME

Sec. 114. Section 400 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-115.03), is repealed.

SUBTITLE K. AMENDING MINIMUM STANDARDS FOR POLICE OFFICERS

Sec. 115. Section 202 of the Omnibus Police Reform Amendment Act of 2000, effective October 4, 2000 (D.C. Law 13-160; D.C. Official Code § 5-107.01), is amended by adding a new subsection (f) to read as follows:

"(f) An applicant shall be ineligible for appointment as a sworn member of the Metropolitan Police Department if the applicant:

"(1) Was previously determined by a law enforcement agency to have committed serious misconduct, as determined by the Chief by General Order;

"(2) Was previously terminated or forced to resign for disciplinary reasons from any commissioned, recruit, or probationary position with a law enforcement agency; or

"(3) Previously resigned from a law enforcement agency to avoid potential, proposed, or pending adverse disciplinary action or termination.".

SUBTITLE L. POLICE ACCOUNTABILITY AND COLLECTIVE BARGAINING AGREEMENTS

Sec. 116. The District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*), is amended as follows:

(a) Section 801(d) (D.C. Official Code 1-608.01(d)) is amended to read as follows:

"(d) The Mayor may issue separate rules and regulations concerning the personnel system affecting members of the uniform services of the Fire and Emergency Medical Services Department ("FEMS") which may provide for a probationary period of at least one year. Other such separate rules and regulations may only be issued to carry out provisions of this act which accord such member of the uniform services of FEMS separate treatment under this act. Such separate rules and regulations are not a bar to collective bargaining during the negotiation process between the Mayor and the recognized labor organizations for FEMS, but shall be within the parameters of section 708.".

(b) Section 1708 (D.C. Official Code § 1-617.08) is amended by adding a new subsection (c) to read as follows:

"(c)(1) All matters pertaining to the discipline of sworn law enforcement personnel shall be retained by management and not be negotiable through bargaining, including substantive or impacts-and-effects bargaining.

"(2)(A) This subsection shall apply to any collective bargaining agreements entered into with the Fraternal Order of Police/Metropolitan Police Department Labor Committee after September 30, 2020, and to any collective bargaining agreements automatically renewed on or after September 30, 2020.

"(B) The negotiated grievance process shall only be applied to the discipline of sworn law enforcement personnel for matters in which the Metropolitan Police Department has issued a final agency decision.".

SUBTITLE M. OFFICER DISCIPLINE REFORMS

Sec. 117. Section 502 of the Omnibus Public Safety Agency Reform Amendment Act of 2004, effective September 30, 2004 (D.C. Law 15-194; D.C. Official Code § 5-1031), is amended as follows:

(a) Subsection (a-1) is repealed.

(b) Subsection (b) is amended to read as follows:

"(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement or prosecuting agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General or the Office of the District of Columbia Auditor, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

Sec. 118. Section 6-A1001.5 of Chapter 10 of Title 6 of the District of Columbia Municipal Regulations is amended by striking the phrase "reduce the penalty" and inserting the phrase "reduce or increase the penalty" in its place.

SUBTITLE N. USE OF FORCE REFORMS

Sec. 119. Use of deadly force.

(a) For the purposes of this section, the term:

(1) "Deadly force" means any force that is likely or intended to cause serious bodily injury or death.

(2) "Deadly weapon" means any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use, is likely to cause serious bodily injury or death.

(3) "Serious bodily injury" means extreme physical pain, illness, or impairment of physical condition, including physical injury, that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

(b) A law enforcement officer shall not use deadly force against a person unless:

(1) The law enforcement officer actually and reasonably believes that deadly force is immediately necessary to protect the law enforcement officer or another person, other than the subject of the use of deadly force, from the threat of serious bodily injury or death;

(2) The law enforcement officer's actions are reasonable, given the totality of the circumstances; and

(3) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(c) In any grand jury, criminal, delinquency, or civil proceeding where an officer's use of deadly force is a material issue, the trier of fact shall consider:

(1) The reasonableness of the law enforcement officer's belief and actions from the perspective of a reasonable law enforcement officer; and

(2) The totality of the circumstances, which shall include:

(A) Whether the subject of the use of deadly force:

(i) Possessed or appeared to possess a deadly weapon; and

(ii) Refused to comply with the law enforcement officer's lawful order to surrender an object believed to be a deadly weapon prior to the law enforcement officer using deadly force;

(B) Whether the law enforcement officer, or another law enforcement officer in close proximity, engaged in de-escalation measures prior to the use of deadly force, including taking cover, requesting support from available mental health, behavioral health, or social workers, waiting for back-up, trying to calm the subject of the use of force, or, if feasible, using non-deadly force prior to the use of deadly force; and

(C) Whether any conduct by the law enforcement officer prior to the use of deadly force increased the risk of a confrontation resulting in deadly force being used.

SUBTITLE O. RESTRICTIONS ON THE PURCHASE AND USE OF MILITARY WEAPONRY

Sec. 120. Limitations on military weaponry acquired by District law enforcement agencies.

(a) Beginning in Fiscal Year 2021, District law enforcement agencies shall not acquire the following property through any program operated by the federal government:

(1) Ammunition of .50 caliber or higher;

(2) Armed or armored vehicles, including aircraft and watercraft;

(3) Bayonets;

(4) Explosives or pyrotechnics, including grenades;

(5) Firearm silencers;

(6) Firearms of .50 caliber or higher;

(7) Objects designed or capable of launching explosives or pyrotechnics, including grenade launchers, firearms, and firearms accessories; and

(8) Remotely piloted, powered aircraft without a crew aboard, including drones.

(b) If a District law enforcement agency:

(1) Requests property through a program operated by the federal government, the District law enforcement agency shall publish notice of the request on a publicly accessible website within 14 days after the date of the request; or

(2) Acquires property through a program operated by the federal government, the District law enforcement agency shall publish notice of the acquisition on a publicly accessible website within 14 days after the date of the acquisition.

(c) Within 180 days after the effective date of the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, effective July 22, 2020 (D.C. Act 23-336; 67 DCR 9148), District law enforcement agencies shall:

(1) Return or dispose of any property described in subsection (a) of this section that the agencies currently possess; and

(2) Publish an inventory of the property returned or disposed of as described in paragraph (1) of this subsection on a publicly accessible website.

SUBTITLE P. LIMITATIONS ON THE USE OF INTERNATIONALLY BANNED CHEMICAL WEAPONS, RIOT GEAR, AND LESS-LETHAL PROJECTILES

Sec. 121. The First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.01 *et seq*.), is amended as follows:

(a) Section 102 (D.C. Official Code § 5-331.02) is amended as follows:

(1) Paragraphs (1) and (2) are redesignated as paragraphs (2) and (5), respectively.

(2) A new paragraph (1) is added to read as follows:

"(1) "Chemical irritant" means any:

"(A) Chemical that can rapidly produce sensory irritation or disabling physical effects in humans, which disappear within a short time following termination of exposure, including tear gas; or

"(B) Substance prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, effective April 29, 1997, for law enforcement purposes or as a method of warfare.".

(3) New paragraphs (3) and (4) are added to read as follows:

"(3) "Less-lethal projectile" means any munition that can cause bodily injury or death through the transfer of kinetic energy and blunt force trauma, including rubber or foam-covered bullets and stun grenades.

"(4) "Less-lethal weapons" means:

"(A) Chemical irritants; and

"(B) Less-lethal projectiles.".

(b) Section 103 (D.C. Official Code § 5–331.03) is amended to read as follows:

"Sec. 103. Policy on First Amendment assemblies.

"It is the declared public policy of the District of Columbia that:

"(1) Persons and groups have a right to organize and participate in peaceful First Amendment assemblies on the streets, sidewalks, and other public ways, and in the parks of the District of Columbia, and to engage in First Amendment assembly near the object of their protest so they may be seen and heard, subject to reasonable restrictions designed to protect public safety, persons, and property, and to accommodate the interest of persons not participating in the assemblies to use the streets, sidewalks, and other public ways to travel to their intended destinations, and use the parks for recreational purposes; and

"(2) MPD shall not engage in mass arrests of groups that include First Amendment assemblies or that began as a First Amendment assembly unless MPD:

"(A) Determines that the assembly has transformed, in substantial part or in whole, into an activity subject to dispersal or arrest; and

"(B) Has issued an order to disperse as described in section 107(e) and (e-1).".

(c) Section 107 (D.C. Official Code § 5–331.07) is amended as follows:

(1) Subsection (b)(2) is amended by striking the phrase "or property." and inserting the phrase "or property; provided, that there is individualized probable cause for arrest." in its place.

(2) Subsection (c) is amended by striking the phrase "by dispersing, controlling, or arresting the persons engaging in such conduct" and inserting the phrase "by identifying and dispersing, controlling, or arresting the particular persons engaging in such conduct" in its place.

(3) Subsection (e) is amended to read as follows:

"(e) If the MPD determines that a lawful First Amendment assembly, riot, or part thereof, should be dispersed, the MPD shall:

"(1) Where there:

"(A) Is not an imminent danger of bodily injury or significant damage to property, issue at least three clearly audible and understandable orders to disperse using an

amplification system or device, waiting at least 2 minutes between the issuance of each warning; or

"(B) Is imminent danger of bodily injury or significant damage to property, issue at least one clearly audible and understandable order to disperse using an amplification system or device;

"(2) Provide the participants a reasonable and adequate time to disperse and a clear and safe route for dispersal; and

"(3) Capture on body-worn camera each component of the order to disperse described in subsection (e-1) of this section.".

(4) New subsections (e-1) and (e-2) are added to read as follows:

"(e-1) An order to disperse shall:

"(1) Be authorized by an official at the rank of Lieutenant or above;

"(2) Inform the persons to be dispersed of the law, regulation, or policy that they have violated that serves as the basis for the order to disperse:

"(3) Warn the persons to be dispersed that they may be arrested if they do not obey the dispersal order or abandon their illegal activity; and

"(4) Identify reasonable exit paths for participants to use to leave the area that will be dispersed.

"(e-2) When dispersing a First Amendment assembly, MPD shall, to the extent possible:

"(1) Position all arresting officers at the rear of the crowd so they can hear the order to disperse; and

"(2) Have the arresting officers positioned at the rear of the crowd provide verbal confirmation or a physical indication that the warnings were audible.".

(c) Section 116 (D.C. Official Code § 5-331.16) is amended to read as follows:

"Sec. 116. Use of riot gear, chemical irritants, or less-lethal projectiles; reporting requirements.

"(a) For the purposes of this section:

"(1) "Bodily injury" means physical pain, physical injury, illness, or impairment of physical condition.

"(2) "Significant bodily injury" means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer, and, in addition, the following injuries constitute at least a significant bodily injury: a fracture of a bone; a laceration that is at least one inch in length and at least one quarter of an inch in depth; a burn of at least second degree severity; a brief loss of consciousness; a traumatic brain injury; and a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation.

"(b) Law enforcement officers shall not be deployed in riot gear unless:

"(1) The on-scene Incident Commander believes there is an impending risk to law enforcement officers of significant bodily injury;

"(2) The deployment is not being used to disperse a First Amendment assembly and is consistent with the District's policy on First Amendment assemblies;

"(3) The deployment of officers in riot gear is reasonable, given the totality of the circumstances; and

"(4) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

"(c) Law enforcement officers shall not deploy less-lethal weapons at a First Amendment Assembly or riot unless:

"(1) The law enforcement officer actually and reasonably believes that the deployment of less-lethal weapons is immediately necessary to protect the law enforcement officer or another person from the threat of bodily injury or damage to property;

"(2) The deployment of less-lethal weapons is not being used to disperse a lawful First Amendment assembly and is consistent with the District's policy on First Amendment assemblies;

"(3) The law enforcement officer has received training on the proper use of less-lethal weapons in the context of crowds;

"(4) The law enforcement officer's actions are reasonable, given the totality of the circumstances; and

"(5) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

"(d) In any grand jury, criminal, delinquency, or civil proceeding where an officer's use of riot gear or less-lethal weapons is a material issue, the trier of fact shall consider:

"(1) The reasonableness of the law enforcement officer's belief and actions from the perspective of a reasonable law enforcement officer; and

"(2) The totality of circumstances, which shall include whether:

"(A) The law enforcement officer, or another law enforcement officer in close proximity, engaged in de-escalation measures prior to the deployment of less-lethal weapons or riot gear, including issuing an order to disperse and providing individuals a reasonable opportunity to disperse, as described in section 107(e) and (e-1);

"(B) Any conduct by the law enforcement officer prior to the deployment of less-lethal weapons or riot gear increased the risk of a confrontation resulting in less-lethal weapons being deployed;

"(C) The use of less-lethal weapons was limited to the people for whom MPD had individualized probable cause for arrest; and

"(D) The less-lethal weapon was deployed in a frequency, manner, and intensity that is objectively reasonable.

"(e) Following any deployment of officers in riot gear as described in subsection (b) of this section, the deployment of less-lethal weapons as described in subsection (c) of this section, or upon request by the Chairperson of the Council Committee with jurisdiction over the Metropolitan Police Department:

"(1) The highest ranking official at the scene of the deployment shall make a written report to the Chief of Police, within five business days after the deployment, that describes the deployment of riot gear or less-lethal weapons, including, where applicable and if known:

"(A) The number of officers deployed in riot gear;

"(B) The number of officers who deployed less-lethal weapons;

"(C) The type, quantity, and amount of less-lethal weapons deployed;

"(D) The number of people against whom any other use of force was deployed;

"(E) The justification for the deployment of officers in riot gear, the deployment of less-lethal weapons, or any other uses of force; and

"(F) Whether the deployment of officers in riot gear, or the deployment of less-lethal weapons or any other uses of force, met the requirements of this act; and

"(2) MPD shall publish the report on a publicly accessible website within ten business days after the deployment.

"(3) If MPD cannot post a report in compliance with section 116(e)(2), MPD will post an explanation of the delay within ten (10) business days.

"(f) The Mayor shall request that any federal law enforcement agency operating in the District follow the requirements of this section.".

Sec. 122. Section 901 of An Act relating to crime and criminal procedure in the District of Columbia, effective December 27, 1967 (81 Stat. 742; D.C. Official Code § 22-1322), is amended by adding a new section (e) to read as follows:

"(e) A law enforcement officer's failure to comply with the requirements of section 107 of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.07), shall be a defense in prosecutions for violations of subsection (b) or (c) of this section.".

Sec. 123. Limitations on less-lethal weapons acquired by District law enforcement agencies; reporting requirements.

(a) If a District law enforcement agency seeks to purchase or acquire less-lethal weapons, as that term as defined in section 102(4) of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.02(4)), the District law enforcement agency shall maintain the following information regarding its use of less-lethal weapons on a publicly accessible website:

(1) A description of the less-lethal weapons in its inventory sought, including:

(A) How the less-lethal weapon is used or deployed;

(B) The physiological and psychological effect the less-lethal weapon has on people; and

(C) Whether the less-lethal weapon is indiscriminate in nature or if it can be targeted at specific individuals in a crowd;

(2) Any technical documentation issued or published by the manufacturer or distributor of the less-lethal weapon;

(3) An explanation for the law enforcement agency's expected need for the less-lethal weapon;

(4) A description of the personnel who will use, be equipped with, or have access to less-lethal weapons sought;

(5) A description of the training those personnel will receive on how to use or deploy the less-lethal weapon, including how the training addresses the requirements of the First Amendment Assemblies Act of 2004, effective April 13, 2005 (D.C. Law 15-352; D.C. Official Code § 5-331.01 *et seq*.);

(6) The number, quantity, or amount of less-lethal weapons sought; and

(7) The unit price and total price of the less-lethal weapons sought.

(b) Before acquiring a new type of less-lethal weapon, MPD will post the information in subsection(a) at least 28 days prior to the acquiring or purchasing the new type of less-lethal weapon.

SUBTITLE Q. EVALUATING BIAS IN THREAT ASSESSMENTS.

Sec. 124. Section 5 of the Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1104), is amended by adding a new subsection (d-5) to read as follows:

"(d-5)(1) The Executive Director, or an entity selected by the Executive Director, shall conduct a study to determine whether the Metropolitan Police Department ("MPD") engaged in biased policing when it conducted threat assessments before or during assemblies within the District.

"(2) At a minimum, the study shall:

"(A) Examine MPD's use of threat assessments before or during assemblies in the District from January 2017 through January 2021;

"(B) Determine whether MPD engaged in biased policing when they conducted threat assessments before or during assemblies in the District from January 2017 through January 2021;

"(C) Provide a detailed analysis of MPD's response to each assembly in the District between January 2017 through January 2021, including:

"(i) Number of arrests made;

"(ii) Number of civilian and officer injuries;

"(iii) Type of injuries;

"(iv) Number of fatalities;

"(v) Number of officers deployed;

"(vi) What type of weaponry and crowd control tactics were used;

"(vii) Whether riot gear was used; and

"(viii) Whether any of the individuals involved in the assembly were on the Federal Bureau of Investigation's terrorist watchlist;

"(D) If there is a finding that biased policing has occurred, determine whether MPD's response varied based on the race, color, religion, sex, national origin, or gender of those engaged in the assembly; and

"(E) Provide recommendations based on the findings in the study, including:

"(i) If biased policing occurred, how to prevent bias from impacting whether MPD conducts a threat assessment and how to ensure bias does not impact a threat assessment going forward;

"(ii) If biased policing has not been found to have occurred, how to ensure that there is not a disparity in MPD's response to all assemblies across all groups, of proportionate size and characteristics, in the District in the future; or

"(iii) If the study is inconclusive on the occurrence of biased policing, what additional steps must be taken to reach a conclusion.

"(3) Any collaborating outside partners shall meet the following criteria:

"(A) Be nonpartisan;

"(B) Have expertise and knowledge of law enforcement practices in the District, bias in policing, homegrown domestic terrorism in the United States, and intelligence data sharing practices;

"(C) Have a history of conducting studies and evaluations of law enforcement procedures, regulations, and practices; and

"(D) Have experience developing solutions to policy or legal challenges.

"(4) The Executive Director shall submit a report on the study to the Council no later than 12 months after the effective date of the Comprehensive Policing and Justice Reform Amendment Act of 2022, as approved by the Committee on the Judiciary and Public Safety on November 30, 2022 (Committee print of Bill 24-320).".

SUBTITLE R. PREVENTING WHITE SUPREMACY IN POLICING.

Sec. 125. Definitions.

For the purposes of this subtitle, the term:

(1) "Hate group" means an organization or group of individuals whose goals, activities, and advocacy are primarily or substantially based on a shared antipathy, hatred, hostility, or violence towards people of one or more other different races, ethnicities, religions, nationalities, genders, or sexual or gender identities.

(2) "MPD" means the Metropolitan Police Department.

(3) "ODCA" means the Office of the District of Columbia Auditor.

(4) "White supremacy" means a hate group whose shared antipathy, hatred, hostility, or violence is based on the belief that white people are innately superior to other races.

Sec. 126. White supremacy in policing assessment and recommendations.

(a) ODCA and any entities selected by the District of Columbia Auditor ("D.C. Auditor") shall cause to be conducted a comprehensive assessment of whether MPD officers have ties to white supremacist or other hate groups that may affect the officers' ability to carry out their duties properly and fairly or may undermine public trust in MPD.

(b) In conducting the assessment, the ODCA or the entities selected by the D.C. Auditor shall:

(1) Investigate MPD officers':

(A) Organizational affiliations and memberships;

(B) Social media engagement, including any published statements, photographs, or video footage; and

(C) Sustained allegations of misconduct against the officers, as determined by the Metropolitan Police Department or the Office of Police Complaints; and

(2) Conduct interviews with officers, witnesses, or other relevant stakeholders.

(c)(1) Any entity selected by the ODCA shall be nonpartisan and have expertise in:

(A) Civil rights and racial equity;

(B) The threat of white supremacist and other hate groups, movements, and organizing efforts; or

(C) Law enforcement and intelligence oversight and reform or in conducting investigations and evaluations of law enforcement procedures, policies, and practices.

(2) At least one entity shall have additional expertise in local, federal, and constitutional law, as it relates to freedoms of speech and association.

(d) If, during the course of the assessment, the ODCA determines that criminal activity or other wrongdoing has occurred or is occurring, they shall, as soon as practicable, report the facts that support such information to the appropriate prosecuting authority and MPD.

(e)(1) ODCA shall submit a report describing the comprehensive assessment, relevant findings, and recommendations to the Mayor and Council no later than 18 months after the effective date of this act.

(2) The report shall include recommendations to reform or improve MPD's hiring and training practices, policies, practice, and disciplinary system to better prevent, detect, and respond to white supremacist or other hate group ties among Department officers and staff that suggest they are not able to enforce the law fairly, and to better investigate and discipline officers for such behavior.

SUBTITLE S. LIMITATIONS ON THE USE OF VEHICULAR PURSUITS BY LAW ENFORCEMENT OFFICERS.

Sec. 127. Definitions.

(a) For the purposes of this subtitle, the term:

(1) "Boxing in" means any practice or tactic in which law enforcement officers intentionally surround a suspect motor vehicle with pursuit vehicles and then reduce the traveling speed of the pursuit vehicles with the intent to stop or slow the suspect motor vehicle.

(2) "Caravanning" means any practice or tactic in which a law enforcement officer operates a pursuit vehicle without maintaining a reasonable distance between another pursuit vehicle.

(3) "Crime of violence" shall have the same meaning as provided in D.C. Official Code § 23-1331(4).

(4) "Deploying a roadblock" means any tactic or practice in which a law enforcement officer intentionally places a vehicle or object in the path of the suspect vehicle with the intent to stop the suspect motor vehicle.

(5)(A) "Deploying a tire deflation device" means any tactic or practice in which a law enforcement officer intentionally places or activates a device that extends across the roadway with the intent to slow or stop a suspect vehicle.

(B) The term "deploying a tire deflation device" does not include raising bollards or other barricades when:

(i) The bollard or barricade is clearly visible to the operator of the suspect motor vehicle; and

(ii) The bollard or barricade is raised in a manner that provides the operator of the suspect motor vehicle adequate time to safely avoid the bollard or barricade.

(6) "Law enforcement officer" shall have the same meaning as provided in D.C. Official Code § 23-501(2).

(7) "Motor vehicle" means any automobile, all-terrain vehicle, motorcycle, moped, or other vehicle designed to be propelled only by an internal-combustion engine or electricity.

(8) "Paralleling" means any practice or tactic in which a law enforcement officer operates a pursuit vehicle in the same direction, and at approximately the same speed, as the suspect motor vehicle using another street or highway parallel to the direction or route of the suspect motor vehicle.

(9) "Pursuit vehicle" means any motor vehicle operated by a law enforcement officer during a vehicular pursuit of a fleeing suspect.

(10) "Ramming" means any tactic in which a law enforcement officer intentionally causes a pursuit vehicle to come into physical contact with a suspect motor vehicle with the intent to damage, slow, or stop the suspect motor vehicle, regardless of the speed of the pursuit vehicle.

(11) "Serious bodily injury" means a bodily injury or significant bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement;

(C) Protracted loss or impairment of the function of a bodily member or organ; or

(D) Protracted loss of consciousness.

Sec. 128. Law enforcement vehicular pursuit reform.

(a) A law enforcement officer shall not use a motor vehicle to engage in a vehicular pursuit of a suspect motor vehicle, unless the law enforcement officer actually and reasonably believes:

(1) The fleeing suspect:

(A) Has committed or attempted to commit a crime of violence; or

(B) Poses an immediate threat of death or serious bodily injury to another person;

(2) The vehicular pursuit is:

(A) Immediately necessary to protect another person, other than the fleeing suspect, from the threat of serious bodily injury or death; and

(B) Not likely to cause death or serious bodily injury to any person; and

(3) All other options have been exhausted or do not reasonably lend themselves to the circumstances.

(b) In any grand jury, criminal, delinquency, or civil proceeding where an officer's use of a vehicular pursuit is a material issue, the trier of fact shall consider:

(1) The reasonableness of the law enforcement officer's belief and actions from the perspective of a reasonable law enforcement officer; and

(2) The totality of the circumstances, which shall include:

(A) Whether the identity of the suspect was known;

(B) Whether the suspect could have been apprehended at a later time;

(C) The likelihood of a person, including the suspect motor vehicle's occupants, being endangered by the vehicular pursuit, including the type of area, the time of day, the amount of vehicular and pedestrian traffic, and the speed of the vehicular pursuit;

(D) The availability of other means to apprehend or track the fleeing suspect, such as helicopters;

(E) Whether circumstances arose during the vehicular pursuit that rendered the pursuit futile or would have required the vehicular pursuit to continue for an unreasonable time or distance, including:

(i) The distance between the pursuing law enforcement officers and the fleeing motor vehicle; and

(ii) Whether visual contact with the suspect motor vehicle was lost, or the suspect motor vehicle's location was no longer known;

(F) Whether the law enforcement officer's pursuit vehicle sustained damage or a mechanical failure that rendered it unsafe to operate;

(G) Whether the law enforcement officer was directed to terminate the pursuit by the pursuit supervisor or a higher-ranking supervisor;

(H) The law enforcement officer's training and experience;

(I) Whether anyone in the suspect motor vehicle:

(i) Appeared to possess, either on their person or in a location where it is readily available, a dangerous weapon; and

(ii) Was afforded an opportunity to comply with an order to surrender any suspected dangerous weapons;

(J) Whether the law enforcement officer, or another law enforcement officer in close proximity, engaged in de-escalation measures;

(K) Whether any conduct by the law enforcement officer prior to the vehicular pursuit increased the risk of a confrontation resulting in a vehicular pursuit; and

(L) Whether the law enforcement officer made all reasonable efforts to prevent harm, including abandoning efforts to apprehend the suspect.

(c)(1) The following practices or tactics employed by a law enforcement officer shall constitute a serious use of force:

(A) Boxing in;
(B) Caravanning;
(C) Deploying a roadblock;
(D) Deploying a tire deflation device; and
(E) Paralleling.
(2) Ramming shall constitute a deadly use of force.

SUBTITLE T. SCHOOL POLICE INCIDENT OVERSIGHT AND ACCOUNTABILITY.

Sec. 129. The Attendance Accountability Amendment Act of 2013, effective September 19, 2013 (D.C. Law 20-17; D.C. Official Code § 38-236.01 *et seq.*), is amended as follows:

(a) Section 201 (D.C. Official Code § 38-236.01) is amended as follows:

(1) A new paragraph (10A) is added to read as follows:

"(10A) "Law enforcement officer" means:

"(A) An officer or member of the Metropolitan Police Department or any other police force operating in the District;

"(B) An on-duty, civilian employee of the Metropolitan Police Department;

"(C) An investigative officer or agent of the United States;

"(D) An on-duty, licensed special police officer or security guard;

"(E) An on-duty, licensed campus police officer;

"(F) An on-duty employee of the Department of Corrections or Department of Youth Rehabilitation Services;

"(G) An on-duty employee of the Pretrial Services Agency, Court Services and Offender Supervision Agency, or Superior Court Family Court Social Services Division; or

"(H) An employee of the Office of the Inspector General who, as part of their official duties, conducts investigations of alleged felony violations.".

(2) Paragraph (17) is amended to read as follows:

"(17) "School-related arrest" means an arrest of a student that occurred, or was based on conduct that occurred, at a District of Columbia Public School or public charter school, on its grounds, within a school vehicle or other form of transportation, or at a school-sponsored activity.".

(b) Section 209(a)(2) (D.C. Official Code § 38-236.09(a)(2)) is amended as follows:

(1) Subparagraph (G) is amended by striking the phrase "arrest; and" and inserting the phrase "arrest and the reason for involving law enforcement officers;" in its place.

(2) A new subparagraph (G-i) is added to read as follows:

"(G-i) The type and count of weapons or controlled substances recovered during a school-related arrest; and".

(3) Subparagraph (H) is amended to read as follows:

"(H) A description of the conduct that led to or reasoning behind each suspension, involuntary dismissal, emergency removal, disciplinary unenrollment, voluntary withdrawal or transfer, referral to law enforcement, school-related arrest, recovery of weapons, recovery of controlled dangerous substances, and, for students with disabilities, change in placement; and".

Sec. 130. Section 386 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-113.01), is amended as follows:

(a) Subsection (a) is amended as follows:

(1) Paragraph (4B)(K) is amended by striking the period and inserting a semicolon in its place.

(2) Paragraph (4C)(G) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(3) Paragraph (4D) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(4) A new paragraph (4E) is added to read as follows:

"(4E) Disaggregated by school:

"(A) The number of times a law enforcement officer was dispatched to, or requested by, a school;

"(B) The reason for dispatching or requesting the officer;

"(C) The number of school-related arrests, as that term is defined in section 201(17) of the Attendance Accountability Amendment Act of 2013, effective August 25, 2018 (D.C. Law 22-157; D.C. Official Code § 38-236.01(17)), involving an officer;

"(D) The type and count of weapons or controlled substances recovered from any school-related event, whether or not an arrest occurred;

"(E) Demographic data for any student and law enforcement officer involved in a stop or school-based arrest, including:

"(i) Race and ethnicity;

"(ii) Gender;

"(iii) Age; and

"(iv) Disability status; and".

(b) Subsection (c) is amended by adding a new paragraph (1A) to read as follows:

"(1A) Biannually, aggregated data collected in accordance with subsection (a)(4E) of this section;".

SUBTITLE U. OPIOID OVERDOSE PREVENTION.

Sec. 131. Section 4(b) of the Drug Paraphernalia Act of 1982, effective September 17, 1982 (D.C. Law 4-149; D.C. Official Code § 48-1103(b)), is amended by adding a new paragraph (1B) to read as follows:

"(1B) Notwithstanding paragraph (1) of this subsection, it shall not be unlawful for District government employees, contractors, and grantees, acting within the scope of their employment, contract, or grant, to deliver, or possess with intent to deliver, drug paraphernalia for the personal use of a controlled substance.".

SUBTITLE V. METROPOLITAN POLICE DEPARTMENT OVERTIME SPENDING TRANSPARENCY.

Sec. 132. Section 386 of the Revised Statutes of the District of Columbia (D.C. Official Code § 5-113.01), is amended as follows:

(a) Subsection (c)(1) is amended as follows:

(1) Subparagraph (A) is amended by striking the phrase "; and" and inserting a semicolon in its place.

(2) Subparagraph (B)(ii) is amended by striking the semicolon and inserting the phrase "; and" in its place.

(3) A new subparagraph (c) is added to read as follows:

"(C) Copies of the overtime pay spending reports submitted to the Council as described in subsection (d) of this section.".

(b) A new subsection (d) is added to read as follows:

"(d) MPD shall provide a written report every 2 pay periods on MPD's overtime pay spending to the Council that describes the amount spent year-to-date on overtime pay and the staffing plan and conditions justifying the overtime pay.".

SUBTITLE W. METROPOLITAN POLICE DEPARTMENT CADET PROGRAM EXPANSION.

Sec. 133. Section 2 of the Police Officer and Firefighter Cadet Programs Funding Authorization and Human Rights Act of 1977 Amendment Act of 1982, effective March 9, 1983 (D.C. Law 4-172; D.C. Official Code § 5-109.01), is amended as follows:

(a) Subsection (a) is amended to read as follows:

"(a)(1) The Chief of the Metropolitan Police Department ("MPD") shall establish a police officer cadet program for the purpose of instructing, training, and exposing cadets to:

"(A) MPD's operations; and

"(B) The duties and responsibilities of serving as an MPD police officer.

"(2) The police officer cadet program established in paragraph (1) of this subsection shall be composed of the following persons residing in the District, who shall have substantial ties to the District, such as currently or formerly residing, attending school, or working in the District for a significant period of time:

"(A) Senior-year high school students; and

"(B) High school graduates under 25 years of age.".

(b) Subsection (b) is amended by striking the phrase "the Metropolitan Police Department" and inserting the acronym "MPD" in its place.

SUBTITLE X. PUBLIC RELEASE OF RECORDS RELATED TO MISCONDUCT AND DISCIPLINE.

Sec. 134. Section 204 of the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-534), is amended by adding a new subsection (d-1) to read as follows:

"(d-1)(1) Notwithstanding any provision of this act, a request under this act for disciplinary records shall not be categorically denied or redacted on the basis that it constitutes an unwarranted invasion of a personal privacy for officers within the Metropolitan Police Department ("MPD"), the District of Columbia Housing Authority Police Department ("HAPD"), or the Office of the Inspector General ("OIG"), except as described in paragraph (3).

"(2) For the purposes of this subsection, the term "disciplinary records" means any record created in furtherance of a disciplinary proceeding for, or an Office of Police Complaints ("OPC") investigation of, an MPD, HAPD, or OIG officer, regardless of whether the matter was fully adjudicated or resulted in policy training, including:

"(A) The name of the officer complained of, investigated, or charged;

"(B) The complaints, allegations, and charges against the officer;

"(C) The transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing;

"(D) The disposition of any disciplinary proceeding;

"(E) The final written opinion or memorandum supporting the disposition and any discipline imposed, including the MPD's, HAPD's, or OIG's complete factual findings and its analysis of the conduct and appropriate discipline of the officer; and

"(F) Any other record or document created by OPC, MPD, HAPD, or OIG in anticipation of, or in preparation for, any disciplinary proceeding.

"(3) When providing records or information related to disciplinary records, the responding public body may redact:

"(A) With respect to the officer or the complainant, records or information related to:

"(i) Technical infractions, solely pertaining to the enforcement of administrative departmental rules that do not involve interactions with members of the public and are not otherwise connected to the officer's investigative, enforcement, training, supervision, or reporting responsibilities;

"(ii) Their medical history, except in cases where the medical history is a material issue in the basis of the complaint; and

"(iii) Their use of an employee assistance program, including mental health treatment, substance abuse treatment service, counseling, or therapy, unless such use is mandated by a disciplinary proceeding that may be otherwise disclosed pursuant to this subsection; and

"(B) With respect to any person:

"(i) Personal contact information, including home addresses, telephone numbers, and email addresses;

"(ii) Any social security numbers;

"(iii) Any records or information that preserves the anonymity of whistleblowers, complainants, victims, and witnesses; and

"(iv) Any other records or information otherwise exempt from disclosure under this section other than subsection (a)(2).".

Sec. 135. The Office of Citizen Complaint Review Establishment Act of 1998, effective March 26, 1999 (D.C. Law 12-208; D.C. Official Code § 5-1101 *et seq*.), is amended by adding new sections 16 and 17 to read as follows:

"Sec. 17. Officer disciplinary records database.

"(a) Notwithstanding section 3105 of the District of Columbia Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-631.05), by December 31, 2024, the Office shall maintain a publicly accessible database that contains the following information related to sustained allegations of misconduct pertaining to an officer's commission of a crime, the officer's interactions with members of the public, or the officer's integrity in criminal investigations, as determined by the Office, the MPD, the DCHAPD, or the OIG for incidents that occurred on the effective date of the Comprehensive Policing and Justice Reform Amendment Act of 2022, as approved by the Committee on the Judiciary and Public Safety on November 30, 2022 (Committee print of Bill 24-320), or thereafter:

"(1) The name, badge number, rank, length of service, and current duty status of an officer against whom an allegation of misconduct has been sustained;

"(2) A description of:

"(A) The complaint that is the basis of the sustained allegation of misconduct, if initiated by a complaint; or

"(B) The conduct that is the basis of the sustained allegation of misconduct, if initiated by another means;

"(3) Whether the allegation of misconduct was initiated by:

"(A) The MPD;

"(B) The DCHAPD;

"(C) The OIG;

"(D) A complaint submitted to the Office pursuant to section 8(a);

"(E) The Executive Director as described in section 8(g-1); or

"(F) Any other entity;

"(4) A description of the final disposition and a copy of the final order or written determination;

"(5) The discipline imposed on the officer in response to the sustained allegation of misconduct and the date on which it was imposed;

"(6) If applicable, the discipline recommended by the Office, as described in section 12(i)(1)(A); and

"(7) Whether the officer or another entity has requested an appeal regarding the sustained allegation of misconduct.

"(b) In the event a sustained allegation is successfully appealed, overturned, vacated, or otherwise invalidated, the Office shall remove database entries related to the initial sustained allegation of misconduct.

"(c) The MPD shall maintain records necessary to update the database as needed and furnish that information to the Office as requested.

Sec. 18. Advisory group on public disclosure of disciplinary records.

"(a) The Office shall establish and consult with an advisory group to provide recommendations regarding the public disclosure of disciplinary records through the database described in section 17 or available under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.) on the following topics:

"(1) Records retention policies for District law enforcement agencies;

"(2) Processes for sending data to the Office for timely inclusion in the officer disciplinary database;

"(3) The accessibility and usability of the officer disciplinary database;

"(4) Methods to improve the timeliness of responses to requests for records under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.);

"(5) Standards for determining whether a record is exempt from disclosure under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.);

"(6) Standards for determining when and how to redact records;

"(7) Policies for protecting the privacy of witnesses, victims, and juveniles; and

"(8) Whether a need exists to modify the provisions related to the contents of the disciplinary database described in section 17 or the disciplinary records available under the Freedom of Information Act of 1976, effective March 29, 1977 (D.C. Law 1-96; D.C. Official Code § 2-531 *et seq*.);

"(b) The advisory group shall consist of:

"(1) One representative from each of the following agencies:

"(A) The D.C. Housing Authority Police Department

"(B) The Metropolitan Police Department;

"(C) The Office of the Attorney General;

"(D) The Office of the Inspector General; and

"(E) The Public Defender Service; and

"(2) One representative from each of the following organizations:

"(A) American Civil Liberties Union;

"(B) DC Open Government Coalition;
"(C) Electronic Privacy Information Center;
"(D) Fraternal Order of Police;
"(E) Reporters Committee for Freedom of the Press; and
"(F) The Network for Victim Recovery of DC.".

SUBTITLE Y. LIMITING APPLICATION OF DUNCAN ORDINANCE AND OTHER LIMITATIONS ON DATA-SHARING.

Sec. 136. Section 1004 of Title 1 of the District of Columbia Municipal Regulations (1 DCMR § 1004), is amended by adding a new subsection 1004.10 to read as follows:

"1004.10. Nothing in this section shall prohibit the Metropolitan Police Department from providing unexpurgated adult arrest records to employees or contractors working to reduce gun violence, or serve individuals at high risk of being involved in gun violence, within the following District agencies:

"(a) The Criminal Justice Coordinating Council;
"(b) The Office of Gun Violence Prevention;
"(c) The Office of Neighborhood Safety and Engagement;
"(d) The Office of the Attorney General; and
"(e) The Office of Victim Services and Justice Grants.".

Sec. 137. The Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010, effective May 27, 2010 (D.C. Law 18-160; D.C. Official Code § 1-301.81 *et seq.*), is amended by adding a new section 122 to read as follows:

"Sec. 122. Publication of arrest data.

"(a) To facilitate the Office of the Attorney General's ("OAG") ability to publish data about its prosecution practices, including data about how its prosecution decisions break down by race and other demographic factors, OAG shall be permitted to analyze and publish all arrest data that the Metropolitan Police Department ("MPD") transfers to OAG, regardless of whether it transfers that data via electronic or other means.

"(b) MPD shall cooperate with OAG's reasonable requests for information about the arrest data that it transfers to OAG, including requests for information about how MPD cleans and publishes its arrest data on its own website.".

SUBTITLE Z. DEPUTY AUDITOR FOR PUBLIC SAFETY

Sec. 138. The District of Columbia Auditor Subpoena and Oath Authority Act of 2004, effective April 22, 2004 (D.C. Law 15-146; D.C. Official Code § 1-301.171 *et seq.*), is amended by adding new sections 4b and 4c to read as follows:

"Sec. 4b. Deputy Auditor for Public Safety.

"(a) There is established within the Office of the District of Columbia Auditor the position of Deputy Auditor for Public Safety.

"(b) The Deputy Auditor for Public Safety shall be appointed by the Auditor.

"(c) In addition to other qualifications the Auditor deems necessary, the Deputy Auditor for Public Safety shall, at a minimum, have knowledge of law enforcement and corrections policies and practices, particularly regarding internal investigations for officer misconduct and uses of force.

"Sec. 4c. Duties of the Deputy Auditor for Public Safety.

"The Deputy Auditor for Public Safety shall, in addition to any other responsibilities assigned by the Auditor or by law:

"(1) Conduct periodic reviews of the complaint review process and make recommendations, where appropriate, to the Mayor, the Council, and the designated agency principal concerning the status and the improvement of the complaint process and the management of the MPD and the DCHAPD affecting the incidence of police misconduct, such as the recruitment, training, evaluation, discipline, and supervision of police officers; and

"(2) Periodically review the following with respect to the MPD, the DCHAPD, or the OIG:

"(A) The number, type, and disposition of complaints received, investigated, sustained, or otherwise resolved;

"(B) The race, national origin, gender, and age of the complainant, if known, and the subject officer or officers;

"(C) The proposed discipline and the actual discipline imposed on a police officer as a result of any sustained complaint;

"(D) All use of force incidents, serious use of force incidents, and serious physical injury incidents; and

"(E) Any in-custody death.".

Sec. 139. Section 903(a)(4) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1–609.03(a)(4) *et seq*.), is amended by striking the phrase "than 4 persons" and inserting the phrase "than 5 persons" in its place.

TITLE II. CONFORMING AMENDMENT.

Sec. 201. The amendatory § 22A-101(75) within section 101 (page 31) of the Revised Criminal Code Act, passed on 2nd reading on November 15, 2022 (Enrolled version of Bill 24-416), is amended as follows:

(a) Subparagraph (F) is amended by striking the phrase "; or" and inserting a semicolon in its place.

(b) Subparagraph (G) is amended by striking the semicolon and inserting the phrase "; or" in its place.

(c) A new subparagraph (H) is added to read as follows:

"(H) An employee of the District of Columbia Office of the Inspector General who, as part of their official duties, conducts investigations of alleged felony violations.".

TITLE III. APPLICABILITY; FISCAL IMPACT STATEMENT; EFFECTIVE DATE.

Sec. 301. Applicability.

(a)(1) Except as provided in subsection (b) of this section, sections 101, 102, 103, 104, 105, 121, 125, 128, 129, 135, 138, and 139 shall apply upon the date of inclusion of their fiscal effect in an approved budget and financial plan.

(2) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification.

(3)(A) The Budget Director shall cause the notice of the certification to be published in the District of Columbia Register.

(B) The date of publication of the notice of the certification shall not affect the applicability of the provisions identified in paragraph (1) of this subsection.

(b) Section 117 and 118 shall apply retroactively to any matter pending, before any court or adjudicatory body, as of the applicability date of this act under a negotiated grievance process

or under Title XVI-A of the District of Columbia Government Comprehensive Merit Personnel Act, effective June 10, 1998 (D.C. Law 12-124; D.C. Official Code § 1-616.51 *et seq.*), or any related regulations.

Sec. 302. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 303. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 60-day period of congressional review as provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(2)), and publication in the District of Columbia Register.